VICTORIAN OCCUPATIONAL HEALTH AND SAFETY -

AN ASSESSMENT OF LAW IN TRANSITION

The La Trobe/Melbourne Occupational
Health and Safety Project

PREFACE

The production of a research report of this kind obviously involves a lot of indebtedness to a number of people and institutions. In the present instance the Victorian Law Foundation, the Department of Labour and the Criminology Council provided the essential funding without which the research would not have been possible in the first place. For that they are to be thanked as they are for their forebearance with what became an unaviodably protracted process of completion.

Individuals too numerous to be thanked by name also gave freely of their time in order to provide the vital information upon which the Report is based. Many of these were obviously from the Department of Labour, but others, like those Health and Safety Representatives who would give up an evening in order to be interviewed, also played an invaluable role. Not least, immense gratitude is owed to the team of administrative staff in the Department of Legal Studies who toiled indefatiguably to produce and proof-read the Report. Kelly Pyers, Denise Lumsden, Nola Andrew and Mary Reilly all played a vital part in this respect. It is to be hoped that their efforts, and those of everyone else who has helped, will be amply rewarded by the implementation of the Report's recommendations (p.325 ff) which we believe would considerably improve the standard of occupational health and safety in Victoria. Substantial changes have already been set in train by the Department of Labour since this research was carried out, and we can only hope finally that this Report will help in maintaining the momentum of this process.

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CONTENTS

CHAPTER 1

Context, Objectives and Methods

1.1 The Background

1.1.1 In 1985, the State of Victoria enacted a new Occupational Health and Safety Act (referred to in this report as the OHSA or the 1985 Act). This enactment was underpinned by a number of different factors which combined to generate the impetus for legislative change. These included growing concern over what was considered to be a poor Occupational Health and Safety record and a feeling, shared by many strategically placed individuals and groups, that the way to remedy this situation was substantially to follow the path taken by the United Kingdom in the wake of the Robens Report just over a decade earlier (Robens: 1972). Not least, a crucial part of the backdrop to the enactment involved a desire to reduce the costs associated with the workers' compensation system as part of an attempt to restructure the Victorian economy (Carson and Henenberg: 1988, see Appendix 1).

1.1.2 The OHSA radically overhauled and reorganised the State's Occupational Health and Safety system. Among other things it established a tripartite Occupational Health and Safety Commission (s.7), provided for the election of Health and Safety representatives at the workplace (s.30), and gave trade unions, where present, the key role in the nomination and electoral processes involved (s.30). The elected representatives were given a wide range of powers including those of inspecting the workplace, accompanying inspectors and accessing information held by the employer about actual or potential hazards (s.31). Crucial and most contentious was the decision to give them the additional power to issue Provisional Improvement Notices (s.33) and, where faced with immediate threat to the health and safety of any person, to order cessation of work (s.26). For their part, employers were subjected to a general duty of care (s.21), and were required to establish Health and

Safety Committees at the request of the representatives (s.37). Inspectors were empowered to issue Improvement and Prohibition Notices (s.43 and s.44), and were required to perform various adjudicative roles, particularly in relation to disputes over Provisional Improvement Notices and Work Cessations (s. 35 and s.26).

1.1.3 The present project began in late 1985, shortly after the new enactment came into effect. Funded by the Victoria Law Foundation, the Government of Victoria (Department of Labour) and the Australian Criminology Council, the original project team consisted of Professor W.G. Carson, Dr. W.B. Creighton, Ms. C. Henenberg and Mr. R. Johnstone. Both of the latter worked full-time on the project until Mr. Johnstone was appointed to a post in the Law School at Monash University in 1988, moving to the University of Melbourne in 1989. He has, however, maintained close contact with and interest in the project, and is responsible for our analysis of legal proceedings in Chapter 6. Dr. Creighton's participation in the project was restricted by his secondment from the University of Melbourne to become Legal Officer of the ACTU in 1986, and more recently by his appointment to a senior post with the ILO in Geneva in mid-1988. Once again, however, he has maintained as much contact as possible with the project, and has contributed Chapter 7 of the Report, dealing with the operation of the Industrial Relations Commission vis a vis the 1985 Act. Ms Henenberg continued to work stoically on the project up to its conclusion and took responsibility for writing up the results presented in Chapter 5.

1.2 Objectives

1.2.1 In broadest outline, the aim of the research was to observe and assess the operation of the OHSA, and to compare it with the occupational health and safety system (the Labour and Industry Act 1958 and the Industrial Safety, Health and Welfare Act 1981) which had preceded it - hence the project's sub-title 'An Assessment of Law in Transition'. These terms were carefully chosen because, in fairness to the legislation, to those charged

with its implementation and to the project team itself, it was recognised that any pretensions to hard quantitative evaluation of effect or impact would be quite premature so soon after the 1985 Act's passage. At the same time, however, it was felt that even in this essentially transitional phase, general trends could be mapped, problems identified and progress assessed. One practical objective of such an exercise carried out so early in the life of the new system, was therefore that the project should prove to be of value in the context of facilitating and assisting successful implementation of the 1985 Act.

1.2.2 In more theoretical vein, not to be addressed at any inordinate length in this report, the project also adopted the broad aim of making a significant contribution to occupational health and safety analysis. Generally, it is conceded that the whole field is grossly under-theorised in social scientific terms, and one of the team's aspirations was and remains that of doing something to remedy this defect. Thus, based on the empirical research undertaken during the project, Carson hopes to produce a book which will go some way towards formulating a politicial economy of occupational health and safety regimes, while Carson and Johnstone are carrying out further work on theoretical dimensions of the debate about appropriate sanctions in this area of law. As part of a PhD thesis, Johnstone is also undertaking a broader study of legal proceedings under the occupational health and safety legislation with a view to locating their analysis within the extensive, but largely ignored, theoretical literature on courtroom processes. In all three instances, while the primary objective is the reconnection of occupational health and safety debates with central theoretical issues, it should be stressed that this process is viewed as one which can produce very important practical policy implications, however far removed from such concerns the undertaking may at first sight appear to be. Thus, a further general and longer term objective of the project is to demonstrate that the view so often articulated by

policy makers and 'purist' academics to the effect that their different enterprises are and should remain mutually exclusive, is misguided and damaging to both parties.

1.2.3 Within the framework of the broad objectives outlined at 1.2, above, the project incorporated a series of more specific objectives, the components from which, as it were, the general account could be constructed. These included:

> Mapping the enforcement profile and inspection strategies pertaining under the old and new systems respectively;
>
> Examining the nature of enforcement decisions under the two systems and attempting to penetrate the routine reasoning processes or 'logic-in-use' underlying them;
>
> Investigating patterns of contact between employers and the relevant enforcement agency under the two regimes;
>
> Investigating the impact of organisational changes within the Department of Labour upon the implementation of the 1985 Act;
>
> Collecting information about the operation of participative arrangements for occupational health and safety at the workplace in the period following 1985, and obtaining data about the experience of participants;
>
> Obtaining the views of employers, their representatives, trade unions, Health and Safety Representatives, magistrates and departmental personnel about the changes effected by the new legislation;
>
> Investigation of court and tribunal proceedings initiated under the 1985 Act.

1.2.4 Except in so far as its activities were alluded to in the course of investigations designed to meet the above objectives, the tripartite Occupational Health and Safety Commission of Victoria was not included in our enquiries. Nor were those of its Commonwealth counterpart.

1.2.5 Although the 1985 Act and consequential reorganisation of the relevant Department mean that Inspectorates dealing with lifts and cranes, boilers and pressure vessels, and dangerous goods now operate, at least in theory, under this legislation, the project restricted its objectives in the main to assessing the law in transition with regard to the Inspectorate formerly known as the Workplace Inspection Branch.

1.3 Methods

1.3.1 As is appropriate in research of this kind, the project utilised both quantitative and qualitative methods. With reference to the former, it must be stressed right at the outset that the system of information retention (organisation of filing etc.) inherited by the relevant Department from the past created immense problems in connection with the collection of quantitative data. In particular, a system which had neither any single reference point showing all dealings with any particular set of premises, nor any single file or even file location for each set of premises, created enormous difficulties.

As might be expected, attempts have subsequently been made to rectify this problem through computerised recording systems, initially called Employer Inspection Record (EIR) and subsequently, through the possibly more than a trifle optimistically dubbed Inspection Information Recording System (INSPIRE). Once again, however, as a means of retrieving hard data pertaining to the operation of the new occupational health and safety regime in Victoria, these systems have taken a long time to be put in place. As late as April, 1989, for example, we were advised that INSPIRE data pertaining to several crucial aspects of the 1985 Act's operation were so unreliable as to be only usable for purposes of this research with the most extreme caution, if at all (see Chapter 2, 2.3, below).

1.3.2 The qualitative methods used during the project yielded an immense amount of useful information. As befits a report of this kind, however, we will restrict its use to the role of brief exemplification, more protracted analysis of its content being left for the subsequent publications referred to at 1.2.2, above.

1.3.3 Registered Files - Pre Reform

The first step in mapping the profile of enforcement practice before the 1985 Act came into effect was to examine the files generated by a random sample of factory premises during an appropriate period. Since not all premises would be likely to generate

such a file, it was necessary to obtain a sample sufficiently large to produce enough 'file contacts' for purposes of analysis. On departmental advice, a sampling fraction of 1 in 20 of the approximately 22,500 premises on the 1985 register of Victorian factory premises was initially adopted as being likely to produce around 200 file contacts between January 1980 and September 1985, the period chosen for analysis of the pre-reform era. As it turned out, however, this sampling process only produced less than half that number, and a further sample of 1 in 10 of the remaining premises was drawn. These two samples totalled 3,290 premises and in the end, allowing for some cases in which multiple blocs of issues were dealt with in one file, 562 files were generated in the pre-Act period.

The registered files generated by our sample between 1980 and 1985 fell into eight different 'departmental' categories. Although these categories do not appear always to have been mutually exclusive and unambiguous, they do nonetheless represent the classification system by which the enforcement agency in question routinely organised information pertaining to its more significant contacts with employers. The following list indicates the categories employed:

Registered File Classification 1980-85

Accident
Safety
Survey
Factory Standards
Spray Painting
RSI
Foundries
Asbestos

Several features of the above list should be underlined. First, it should be noted that we have not included 'registration files', those files which were generated when, as the term suggests, premises were going through the process of registration. While it may be claimed that registration is an integral part of an efficient occupational health and safety system, and we would not dispute this, it was felt, nonetheless, that the shortcomings found

and the requirements imposed at this stage in the career of a company or one of its constituent premises were qualitatively distinct vis à vis law-enforcement processes. This apart, analysis of the many registration files in the sample, whether arising from new premises or changes in ownership, would have required resources far beyond those available to the project. It should also be noted that some of the categories in the classification system may reflect particular departmental preoccupations or programs specific to the period in question. Spray-painting, RSI and Foundries, for example, are all subject to this qualification.

All of the accident files generated by our sample between 1980 and 1985 were analysed and coded to provide data on:

Basic demographic data about the premises;
The nature of the process or machine involved;
The type and severity of injury;
Details of how the accident came to the attention of the authorities;
Selected information pertaining to the injured person;
Time elapsing between first report, first investigative visit and conclusion of the investigation;
Use of witnesses, interpreters etc;
Details of any contravention/s involved;
Action taken by the Department;
Where known, the outcome in terms of the matter being put right;
Details of any court proceedings.

The results of this analysis can be found in Chapters 2 and 3, though in some instances the requisite information was so sporadically recorded on files, that systematic analysis proved impossible.

Out of the total accident files generated by our sample in this period, 100 were further selected at random for particularly detailed analysis. This included sequential analysis of changes in proposed enforcement response as well as of the reasoning used throughout the decision-making process. Accident files were chosen for this purpose because, of all the files available, they provided the most consistent data on proposed

action and the reasons advanced in connection therewith. The results of this analysis are, once again, reported in Chapter 2, below.

The remaining registered files from the pre-reform era were analysed and the following data extracted:

How the matter was initiated;
The nature of the issue;
The number of visits made by the inspectorate;
The enforcement strategy used;
Details of legal proceedings, if any.

Details of this analysis are included in Chapters 2 and 3.

It should be remembered, of course, that in the case of both pre-reform accident files and pre-reform non-accident files, a number fell into a somewhat ambiguous category which involved initiation during the pre-reform era and completion in the period after 1985. Files falling in this category have been identified, and we are satisfied that no undue distortion of the project's results ensues therefrom.

1.3.4 Registered Files - Post-Reform

1.3.4.1 Registered files generated by our sample of 3,290 factory premises between October 1985 and September 1988 were analysed in order to provide a basic profile of the enforcement system in transition. The number of such files was 130. It should be noted that, in the post-reform area the file classification system was expanded to include new categories such as Health and Risk Management. Some registered files pertaining to disputed Provisional Improvement Notices (PINS) and Work Cessations were also generated, although the vast majority of instances in which such issues arose were recorded on a sporadic and unsystematic regional basis rather than in the form of registered files, pending introduction of the computerised systems referred to above.

1.3.4.2 All post-reform registered files generated by our sample were analysed, and the basic data listed above extracted. Since it was anticipated that the number of accident

files generated by the sample in the post-reform era would be relatively small, all were subjected to the detailed analysis described earlier. The results of these analyses can be found in Chapters 2 and 3, below.

1.3.4.3 Since the 1985 Act brought a wide range of non-factory premises within the ambit of the law, an additional random sample of 1,000 non-factory workplaces was drawn from the Accident Compensation Commission (ACC) data base. This sample generated only the staggeringly low total of 22 registered files, and these were analysed in accordance with the procedures followed for pre- and post-reform registered files as described above.

1.3.5 Non-Registered File Quantitative Data

Much of the routine work carried out by the Inspectorate in the pre-reform era, as in the post 1985 period, would not result in the generation of a registered file. Routine visits, hazard control visits involving accidents or other matters not deemed sufficiently serious to warrant opening a file, and complaints sustained but not again held to warrant the opening of a file, might all eventuate in what were known as 'requirements'. Since data on these activities were not retained on any uniform time basis across the state, it was not possible to chart the pattern of these kinds of contacts for our sample. In order to obtain at least some view of these activities, however, it was possible to sample the requirement sheets retained in the four regions of Preston, Dandenong, Footscray and Ballarat. Depending on the number of requirement sheets retained and the period of time involved, variable sampling fractions were used. In all, 434 sets of requirement sheets were examined, 119 from the pre-reform period and 315 from the period after 1985.

With reference to the post-reform era, it had been hoped that the use of data from EIR and INSPIRE would enable us to obtain an overview of inspectorial activity, including non-registered file activity and, crucially, activities undertaken in relation to disputes over

Provisional Improvement Notices and Work Cessations. As suggested at 1.3.1, however, we were advised in April 1989 that the data from INSPIRE were still extremely unreliable for these purposes. In order to augment what turned out to be the meagre amount of information thrown up by our sample on these last two matters, it was therefore decided to attempt retrieval of direct documentary evidence from four regions: Preston, Metropolitan Central, Dandenong and Footscray. In all, details of 64 PIN disputes and 30 Work Cessations were examined.

In order to elicit employer reaction to and experience of the new legislation as compared with the old system, questionnaires were sent to employers at 900 randomly selected sets of premises, 300 to factory premises which had generated a registered file, 300 to factory premises which had not, and 300 to non-factory premises coming under the Act for the first time in 1985. The response rates of 18%, 10% and 19%, respectively, were extremely disappointing. This was probably due to a questionnaire design which was, in retrospect, unduly complex and possibly confusing, though lack of interest in occupational health and safety matters also cannot be ruled out as a contributing factor. Whatever the cause, such low response rates have led us, properly, to extreme caution about making any generalisations from these results. For this reason, Chapter 5, Self-Regulation - The View from the Workplace - is heavily dependent on the other and more reliable sources of information pertaining to employees rather than employers.

Health and Safety Representatives were also surveyed by questionnaire. During 1987, 250 representatives undergoing initial training by the Victorian Trades Hall Council (VTHC) were asked to complete a questionnaire, as were 24 representatives undergoing second stage training. In addition, all 43 'non-union' representatives (ie representatives not appointed under union auspices as specified in ss.30(1)-30(3) of the 1985 Act) who attended four of the training courses provided by the Department of Labour during 1986-

7 were surveyed by post. In 1988, 50 randomly selected respondents to the questionnaire administered during initial training received a further and more open-ended questionnaire by post, and 19 participants from another VTHC second stage training course were surveyed in similar fashion. This was done in order to increase the amount of information from representatives with greater experience, though it should be noted that the average period in office of respondents from the initial training programme was in fact eight months. The more open-ended questionnaires are drawn upon to augment the basic data utilised in Chapter 5. Table 1.1 shows the respective response rates.

Table 1.1

HEALTH AND SAFETY REPRESENTATIVE QUESTIONNAIRE

	Administered	Returned	Percent
1987 VTHC Initial Training Courses	250	205	82
1987 VTHC Second Stage Training Course	24	24	100
1986-7 Dept. of Labour Training Courses	43	10	23
	317	239	

1.3.6 Qualitative Data

An extensive program of semi-structured interviewing formed an integral part of the project, interviews being tape-recorded with the consent of interviewers. Tapes were subsequently typed up and the transcripts stored for reference. In only two cases was permission for tape-recording refused.

All regions of the Department of Labour, except for Bendigo, were visited for interview purposes, and interviews were also conducted with senior departmental personnel in Melbourne. In all, 55 members of the Department of Labour were formally interviewed,

although informal discussion took place with many more as part of the process described below. We also interviewed 12 union officials, 30 Health and Safety Representatives, 22 employers or employer representatives, and 13 Magistrates. Interviews were also recorded with the Chairperson of the Victorian Occupational Health and Safety Commission, the Opposition spokesperson on occupational health and safety, and the Director General of the Department of Labour. In all, 125 formal interviews lasting from half-an-hour to an hour were carried out.

In addition to a period of approximately two years during which the two research workers were employed almost continuously at Nauru House and were therefore in constant contact with departmental personnel, a considerable amount of time was also spent in participant observation. Apart from visits to regions for purposes of formal interviewing, some 56 days were spent in the regions, either in the field with inspectors/advisers or in regional offices. Around 90 hours were spent at health and safety representative training sessions, and 90 court cases were attended.

The methodology used for the study of prosecutions in the courts is discussed further in Chapter 6.

1.4 Problems with Quantitative Data

This project encountered major methodological problems with regard to the systematic collection of quantitative data pertaining to the activities of the enforcement agency in question. In part these were probably inevitable inasmuch as the agency was obviously in a state of considerable flux during the research period. In considerable measure too, such difficulties were a product of the fact that the system undergoing transformation in the period after 1985 had not formerly been a model of organisational and informational efficiency. This said, however, it must also be reported that some of the strategies adopted by the reformed agency itself, were themselves not conducive to the

rapid development of an efficient information feed-back system for its own purposes, much less for those of researchers. These strategies and their adverse effect upon the implementation process as well as upon the project will be discussed at later points in this Report.

1.5 Summary

This Report is obviously a lengthy one. For this reason, and recognising that many people will not have the time to read it in full, Chapter 8 includes a summary of our findings, as a prelude to a concise statement of major conclusions and recommendations. Those particularly interested in analysis of the Inspectorate in transition are referred to chapter 4. It should also be emphasised here that since the data of this project were collected, many changes have already been implemented by the Department of Labour. The extent to which such changes have overcome the problems alluded to in the Report is not, of course, something upon which we can comment with any authority.

REFERENCES

Carson, W.G., and Henenberg, C., (1988) 'The Political Economy of Legislative Change: *Making* Sense of Victoria's New Occupational Health and Safety Legislation', 6 Law in Context, 1-19.

Robens (1972) Report of the Committee on Safety and Health at Work 1970-1972 (HMSO, London).

CHAPTER 2

Patterns of Contact

As indicated in Chapter I, above, the most reliable and systematic quantitative data pertaining to agency/occupier contacts available to the project team stemmed from situations in which registered files had been opened. It should be remembered, however, that a considerable amount of agency activity and even, in the post-reform period, utilisation of some of the 1985 Act's most crucial enforcement strategies did not produce registered files. Moreover, records of these non-registered file contacts were not maintained in a way which permitted systematic collection of data relating to our samples of premises, and alternative strategies therefore had to be devised in order to gain an adequate picture of this side of the Department's work. The results of these investigations will be reported at a later point (see 2.3 below).

2.1 Patterns of File Contact: Factory Premises

Of our sample of 3,290 factory premises, 366 or some 11% had registered file contact with the agency during the period covered by the research. As indicated earlier, this figure does not include file contacts for purposes of registration of premises. Moreover, the relatively small number of registered file contacts, other than registration contact, once again underlines the importance of the work undertaken by the Inspectorate which does not result in file creation. Since some premises generated more than one registered file, the number of files examined in the course of the project considerably exceeded the 366 premises involved. In all, 674 files were generated by sampled factory premises during the period researched. Table 2.1 shows the distribution of these 674 files between the 366 premises in question.

TABLE 2.1

DISTRIBUTION OF CONTACT FILES AMONG FACTORY PREMISES

No of Contact Files	No. of Premises	Total Files
1	250	250
2	50	100
3	31	93
4	9	36
5	7	35
6	4	24
7	4	28
8	6	48
9	1	9
10	1	10
11	1	11
12	1	12
18	1	18
	366	674

In a few instances involving non-accident files, a single file contained blocs of transactions concerning identifiably different matters. For purposes of analysis, each of these small number of transactional blocs was treated as a separate file. When adjustment is made for these additions, the total number of 'files' generated becomes 692. However, there were 12 premises with a single file contact during the period whose files were unavailable; a further 32 files pertaining to one of several contacts with particular premises were missing, although the premises themselves featured in the analysis because of their other accessible file contacts. A total of 44 out of the 692 files were therefore unavailable for analysis.

In Table 2.2, the distribution of these contact files according to their departmental classification and point of initiation (i.e. pre or post 1985 Act) is shown. Since the nature, though not of course the content, of the 44 missing files is known, they are included in this table.

TABLE 2.2

DISTRIBUTION OF REGISTERED FACTORY CONTACT FILES

BY TYPE AND POINT OF INITIATION

Type	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988		Total
	No.	%	No.	%	
Accident	302	53.7	53	40.8	355
Surveys	54	9.6	6	4.6	60
Safety	94	16.7	19	14.6	113
Spray Painting	76	13.5	4	3.1	80
Asbestos	10	1.8	12	9.2	22
Foundry	7	1.2	9	6.9	16
Factory Standards	3	0.5	0	-	3
R.S.I.	11	2.0	0	-	11
Risk Management	N/A	-	18	13.8	18
Health	5	0.9	9	6.9	14
	562	99.9*	130	99.9*	692

* Figures rounded to one decimal place.

Since the pre-and post-Act periods covered by the above table are not commensurate, one comprising 5 3/4 years and the other 3 years, a straight horizontal comparison on the basis of raw numbers is not appropriate. By allowing for the differing time-spans involved, however, it is possible to calculate a rate per 1000 per annum for the generation of contact files for this sample of factory premises. When this is done, it emerges that the overall rate of factory file generation drops from around 30 per 1000 per annum before the 1985 Act, to around 13 per 1000 per annum in the three years following its enactment. Calculations for the two broad categories of accident and non-accident files follow the same general pattern although the reduction in the rate of accident file generation

was somewhat more acute. It dropped from around 16 per 1000 per annum before the 1985 Act to around 5 per 1000 per annum thereafter, while the rate for non-accident files generated per 1000 per annum dropped from around 14 to 8.

Other patterns to emerge from this broad profile of file contact with factory premises show that, despite its relative though not insignificant decline in frequency, accident investigation remained the largest single generating source of registered files in both periods. In addition, the emergence of risk management as a significant activity is quite apparent, as is the growing concern over asbestos and the much neglected question of health at the workplace. The changing pattern of the agency's approach through targetted enforcement strategies is also apparent. Spray painting investigations, for example, appear to have declined in relative importance quite markedly, while programs involving foundries substantially increased. Indeed, in the post-reform era, the special programs aspect of the Department's operations is under-represented by registered file contacts, since a number of such programs mounted under the auspices of a newly regionalised organisational structure apparently did not become the subject of registered files. In itself, this is perhaps a reflection of the chronic deficiencies in the Department's system of central information retrieval, retention and collection which will be a recurrent theme in this report.

In Table 2.2, the 44 'missing' files for which no detailed analysis was possible were included, 14 of them, it should be noted, pertaining to risk management. So too were a further 4 risk management files which, as explained in Chapter I, might justifiably be placed in the same ambiguous category as registration files with regard to law-enforcement. When the missing files and those related to risk management are excluded, the distribution of available file contacts between accidents and non-accidents according to point of initiation is as shown in Table 2.3, leaving 347 accident files and 297 non-accident files for analysis.

TABLE 2.3

DISTRIBUTION OF FACTORY FILES FOR ANALYSIS BY POINT OF INITIATION AND ACCIDENT/NON-ACCIDENT

Type	Jan 1980 to Sept 1985		Oct 1985 to Sep 1988		Total
	No	%	No	%	
Accident	302	55.2	45	46.4	347
Non-Accident 245	44.8	52	53.6	297	
Total	547	100.0	97	100.0	644

2.1.1 File Contact by Size: Factory Premises

One crucial question about agency/occupier contact over the period of transition is whether or not the 1985 Act has indeed led to substantial self-regulation in larger, unionised premises, thereby freeing up agency time for smaller, less labour-organised workplaces. Using commonly accepted, though it should be noted not regular intervals of size measurement according to employee numbers, the following results were obtained for the 347 accident and 297 non-accident files respectively.

TABLE 2.4

ACCIDENT FILES BY NO OF EMPLOYEES AND PERIOD OF INITIATION

	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988		
No. of Employees	No	%	No	%	Total
1-9	34	11.3	6	13.3	40
10-19	41	13.6	10	22.2	51
20-49	34	11.3	7	15.6	41
50-99	26	8.6	4	8.9	30
100-199	56	18.5	12	26.7	68
200-499	74	24.5	4	8.9	78
500 +	23	7.6	1	2.2	24
Size not known	14	4.6	1	2.2	15
TOTAL	302	100.0	45	100.0	347

TABLE 2.5

NON-ACCIDENT FILES BY NO. OF EMPLOYEES AND PERIOD OF INITIATION

	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988	
No. of Employees	No	%	No	%
1-9	100	40.8	9	17.3
10-19	39	15.9	13	25.0
20-49	26	10.6	8	15.4
50-99	20	8.2	6	11.5
100-199	16	6.5	2	3.8
200-499	19	7.8	11	21.2
500 +	5	2.0	1	1.9
Size not known	20	8.2	2	3.8
Total	245	100.0	52	99.9*

* Figures rounded to one decimal place

Although Table 2.4 shows a fairly pronounced increase in the proportion of accident files generated by contact with premises where less than 50 people are employed (from about 36% to over 50%) this should not be too readily ascribed to the process, outlined above, whereby self-regulation would permit the deployment of more resources towards smaller premises. In the post 1985 Act period, accident investigations became increasingly data-driven on the basis of ACC claims data pointing Inspectors in the direction of premises or industries generating more or more serious claims, and it is almost certainly this change rather than self-regulation, as such, which accounts for the shift. This said, and despite quite a few doubts about the accuracy of the ACC claims data, the change in the pattern of accident-file contacts suggests that a policy which does redeploy resources more substantially towards smaller premises may well be justified. It should also be noted, moreover, that this trend has occurred against the background of a substantial overall drop in the rate of factory accident file generation, as already seen.

Against this background it is perhaps surprising that a similar trend is not apparent in the pattern of non-accident file contacts in the post reform era. Here, the percentage of registered file contacts with premises employing less than 50 persons actually decreased, from around 67% before the 1985 Act to about 58% during the three years following. Moreover, the smallest category of premises with less than 10 employees only accounted for just over 17% of these file contacts in the post reform era as opposed to just under 41% in the earlier period, a decline of some 24%. As already suggested at 2.1 above, however, part of the explanation for this trend may lie in the Department's use of targetted programs before and after the 1985 Act. In the former period, for example, spray painting programs accounted for 30% of the non-accident file contacts, whereas in the past reform era this figure drops to 8%, the significance of this decrease lying in the fact that spray painting

contacts were heavily concentrated in the smaller premises. Of 70 contacts of this kind with premises for which the size is known, no fewer than 63 involved workplaces employing less than 20 workers. Similarly, though less marked, is the fact that surveys, which dropped from around 10% to 5% of total non-accident file contacts across the two periods, were weighted in favour of sawmills; again out of a total of 52 surveys of premises for which the size is known, 30 involved programmed visits to sawmills employing less than 20 people. It should also be noted that, interestingly enough, special programs or 'blitzes' on both the motor vehicle industry and on the retail butchery trade generated no contact files within our sample, though it might reasonably be anticipated that they would roughly balance each other out in terms of size if they had. Finally, in this context, we should underline the fact that an unconfirmed number of other programs were conducted on a regional basis in the period after the enactment of the 1985 Act, but these did not generate centralised, registered files which would be picked up in our sample. As late as May 1989, a senior departmental official told us that the central authorities had no data on these programs and had not heard the results of them. Once again, the deficiency and difficulties in centralised data collection and collation should not be overlooked.

2.1.2 File Contact by Process: Factory Premises

In Table 2.6 the Factory and Shop Trades Classification System is used to show the distribution of our 347 accident factory file contacts according to the type of premises involved. Immediately apparent is the domination of these file contacts by the Industrial Metals, Machines and Conveyances category, accounting for nearly a third, followed at some distance by Sawmilling/Joinery and the Food, Drink and Tobacco categories. As shown in Table 2.7, the same pattern broadly applies in both periods, with the qualification that Food, Drink and Tobacco industry files drop away dramatically after the 1985 Act, while

Paper Printing comes to the fore to join Sawmilling/Joinery. Industrial Metals etc., also dominate the non-accident files generated in both periods with Sawmilling/Joinery maintaining its second position, though in the post 1985 Act period it has to share this dubious honour with Chemical Dyes etc., (Table 2.8).

TABLE 2.6

FACTORY ACCIDENT FILES BY TYPE OF FACTORY PREMISES INVOLVED

Industry	No	%
Non-Metalliferous Mine and Quarry Products	6	1.7
Bricks, Pottery, Glass	5	1.4
Chemicals, Dyes, Explosives, Paints, etc	7	2.0
Industrial Metals, Machines, Conveyances	104	30.0
Textiles	25	7.2
Skins and Leather	1	0.3
Clothing	17	4.9
Bread Bakeries	2	0.6
Food, Drink and Tobacco	44	12.7
Sawmills, Joinery etc	49	14.1
Furniture, Bedding etc	19	5.5
Paper Printing	27	7.8
Rubber	19	5.5
Miscellaneous Products	22	6.3
Total	347	100.0

TABLE 2.7

ACCIDENT FILES BY TYPE OF FACTORY PREMISES AND PERIOD OF INITIATION

	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988	
Industry	No	%	No	%
Non-Metalliferous Mine and Quarry Products	3	1.0	3	6.7
Bricks, Pottery, Glass	4	1.3	1	2.2
Chemicals, Dyes, Explosives, Paints, etc	6	2.0	1	2.2
Industrial metals, Machines, Conveyances	89	29.5	15	33.3
Textiles	25	8.3	0	0.0
Skins and Leather	1	0.3	0	0.0
Clothing	17	5.6	0	0.0
Bread Bakeries	2	0.7	0	0.0
Food, Drink and Tobacco	43	14.2	1	2.2
Sawmills, Joinery etc	41	13.6	8	17.8
Furniture, Bedding etc	16	5.3	3	6.7
Paper Printing	20	6.6	7	15.6
Rubber	18	6.0	1	2.2
Miscellaneous Products	17	5.6	5	11.1
Total	302	100.0	45	100.0

TABLE 2.8

NON-ACCIDENT FACTORY FILES BY TYPE OF PREMISES AND PERIOD OF INITIATION

	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988	
Industry	No	%	No	%
Non-Metalliferous Mine and Quarry Products	1	0.4	0	0.0
Bricks, Pottery, Glass	0	0.0	1	1.9
Chemicals, Dyes, Explosives, Paints, etc	3	1.2	8	15.4
Industrial metals, Machines, Conveyances	135	55.1	19	36.5
Precious Metals	2	0.8	0	0.0
Textiles	2	0.8	0	0.0
Skins and Leather	2	0.8	0	0.0
Clothing	6	2.4	2	3.8
Bread Bakeries	4	1.6	0	0.0
Food, Drink and Tobacco	10	4.1	5	9.6
Sawmills, Joinery etc	50	20.4	8	15.4
Furniture, Bedding etc	9	3.7	2	3.8
Paper Printing	9	3.7	1	1.9
Rubber	5	2.0	2	3.8
Miscellaneous Products	7	2.9	4	7.7
Total	245	99.9*	52	99.8*

* Figures rounded to one decimal place.

2.2 Patterns of File Contact: Non-Factory Premises

As indicated at 1.7.3, above, a random sample of 1000 non-factory premises revealed that only 17 or 2% had file contact with the agency during the period covered by the research in this case from January 1984 to September 1988. As in the case of factory premises with such contacts, some premises had more than one contact, and the

distribution of the total number of contacts between the 17 premises is therefore as shown in Table 2.9 below.

TABLE 2.9

DISTRIBUTION OF NON-FACTORY CONTACT FILES BETWEEN PREMISES

No of Contact Files	No of Premises	Total Files
1	11	11
2	3	6
3	2	6
4	1	4
	17	27

Although no fewer than 13 of these 27 files were unavailable for inspection in the course of the research, largely because many of them were post 1985 Act and therefore still 'live', it was possible to classify all of the non-factory contact files by the type of issue involved and their point of initiation. The resulting distribution is shown in Table 2.10.

TABLE 2.10

DISTRIBUTION OF NON-FACTORY CONTACT FILES BY TYPE AND PERIOD OF INITIATION

	Jan 1984 to Sept 1985		Oct 1985 to Sept 1988		
Type	No	%	No	%	Total
Accidents	3		8	36.4	11
Surveys	1		0	0.0	1
Safety	1	N/A	1	4.5	2
Asbestos	0		8	36.4	8
Risk Management	0		4	18.2	4
Health	0		1	4.5	1
Total	5		22	100.0	27

Despite the paucity of numbers in the above table, several things still stand out. To begin with, it is clear that some of the same patterns which were noted in connection with factory contact files are also apparent here. Once again, for example, accidents figure very significantly, while concerns about asbestos and risk management feature even more prominently than they did among the factory contact sample. In this context, it is also interesting to note how the 22 file contacts in the three years after October 1985 were distributed between different types of workplaces. This distribution is shown in Table 2.11 (pre-1985 file contacts are shown in parentheses).

TABLE 2.11

DISTRIBUTION OF POST-REFORM NON-FACTORY FILE CONTACT BY NATURE OF WORKPLACE

CONTACT TYPE

Nature of Workplace	Accident	Survey	Safety	Asbestos	Risk Management	Health	Total
Prisons	2 (1)						2 (1)
Hospital	2		(1)	5		1	8 (1)
State Instrumentalities				1	1		2
Private Offices	1				1		2
Local Government					1		1
Banks					1		1
Schools/Colleges	3 (1)	(1)	1	2			6 (2)
RESTAURANTS	(1)						- (1)
	8 (3)	0 (1)	1 (1)	8	4	1	22 (5)

Subject always to the qualifications of smallness of numbers, there are also, however, some interesting differences between the file contact patterns for non-factory premises as compared with those for factories. If, in particular, the data in Table 2.10 are used to calculate rates of file generation per 1000 sampled non-factory premises each year, these differences become quite pronounced. Thus, the overall rate of file generation per 1000 non-factory premises per annum comes to around 7.3 in the wake of the 1985 Act, a figure which contrasts fairly sharply with that of 13 per 1000 recorded for sampled factory premises. Similarly, the rate of accident file generation for non-factory premises comes to around 2.7 per 1000 per annum after the 1985 Act, while that for non-accident files is around 4.7. In contrast, the rate for accident file generation in relation to factories, while dropping, came to around 5 per 1000 per annum after the passage of the 1985 Act, while the rate for non-accident files was about 8 per 1000 per annum.

All of this signals change in a direction which is unsurprising. Given the political and bureaucratic impetus behind the 1985 Act, it might be expected to result in greater attention to non-factory premises, even if the range of premises covered was not very different from that which, in theory at least, had been embraced by its predecessor, the Industrial Safety, Health and Welfare Act 1981 (the 1981 Act). All of this said, however, it should be noted that, even at 7.3 per 1000 per annum after the 1985 Act, the overall rate of file generation for non-factory premises stands at little more than half of that for factories. The same is roughly true in relation to both accident and non-accident files as well. While things are indeed changing, the pace is not particularly rapid, despite the fact that the number of non-factory workplaces in Victoria far exceeds the number of factory premises. According to the Accident Compensation Commission's annual report for 1986-7, for example, manufacturing accounted for only about 12% of registered work locations; wholesale and retail trades, community services and finance, property and business services accounted for around 53% of the locations (ACC, 1988:20).

While discussion of the reasons for the apparent slowness of change in this respect, as in many others, will be left to a later point, one or two possibilities warrant brief mention at this point. First and foremost, perhaps, it seems that the Inspectors involved in this study were generally uneasy with situations which were not covered by specific regulations and, under the 1985 Act, by codes of practice. Concomitantly, in such situations they were reluctant to invoke general duty of care provisions such as those contained in ss.11 and 21 of the 1981 and 1985 Acts respectively. Given the slow emergence of regulations and codes of practice pertaining to non-factory premises, this would therefore be the area of maximum unease and even indecisiveness. For the same reason, a strong attachment to issues involving machine guarding would be understandable. To this should be added what can only be described as a pronounced element of confusion and even perhaps

timidity with regard to the Inspectorate's role vis à vis the public sector, a factor which would once again slow the pace of transition towards greater formal attention to non-factory premises. This said, it should be noted that, once again, what at times was reduced almost to a process of research by rumour revealed that at least several regions carried out programs involving non-factory premises without any central registered files being generated. Parenthetically, it should also be emphasised that we are dealing here with files generated by what was formerly known as the Workplace Inspection Branch of the Factories and Shops Inspectorate, and files generated by other Inspectorate branches such as those concerned with lifts and cranes or boilers and pressure vessels are not therefore included.

2.3 Patterns of Non-File Contact

Throughout this project, we have been acutely conscious of the fact that the full range of enforcement activities carried out by the agency under study is not fully reflected in the pattern of file contacts alone. As explained earlier, routine visits, 'hazard control' visits involving accidents not deemed sufficiently serious to warrant opening a file, and complaints again not held to justify a file, might all result in what were known as 'requirements'. Drawing its title from the outcome of contact rather than its cause, this system of written or verbal instructions thus covered a wide variety of agency/employer interaction where either departmental guidelines or Inspectors' own assessments of situations led to no generation of a registered file. Instead, the matters in question would be dealt with on a running, follow-up basis whereby a file would only eventuate if the issue had not been satisfactorily resolved after three visits. This system was described in a 1984 policy document as '[occurring] during an inspection when a non-compliance, breach or unsafe situation is observed and is usually corrected on the spot or the employer

undertakes to rectify it' (84/4421/22). In the same year, the system's institutionalisation was further reflected in a memorandum which emphasised that 'instructions ... require that where after 3 visits requirements have not been completed, consideration is given to Breach Reports', a step which would necessitate the opening of a file (Memo, 17/9/84).

With passage of the 1985 Act, there emerged several other types of contact which could fall into the non-file contact category. Some of these could be quite crucial to the implementation of the new legislation as, for example, when inspectors might visit workplaces in connection with disputed Provisional Improvement Notices (PINS), Work Cessations, or determination of designated work groups, under ss.35, 26 and 29 of the 1985 Act respectively.

Originally, it had been our intention to map out the pattern of such non-file contacts, as well as the broader profile of the Inspectorate's post-reform activities, by drawing upon a computerised information system which was introduced by the Department of Labour some time after passage of the 1985 Act. Initially dubbed EIR (Establishment Inspection Record), and subsequently given the possibly unduly optimistic acronym INSPIRE (Inspection Information Record), this system unfortunately was extremely slow to achieve a level of operational efficiency adequate to these purposes. Indeed, as late as April 1989 we were advised that data included on a long awaited print out covering activities between the beginning of January 1988 and the end of March 1989, fifteen months in all, were so inaccurate that they should only be used with great caution.

Some of the reasons for the slow development of an adequate system of computerised information will be discussed later (see Chapter 4, below). In the meantime, however, we took what steps we could to access data pertaining to non-file contacts by other methods. In two separate operations we therefore set out to retrieve at least some documentary evidence about routine requirements, hazard control and complaint contacts,

on the one hand, and about the crucial question of attendance at PIN disputes and Work Cessations in the post-reform era on the other. In both cases, it should be stressed, the way in which the documentary evidence was retained or provided was such that systematic random sampling was not possible, though we have no particular reason to believe that the documents recovered were in any way atypical. For the same reason, it was not possible to separate factory and non-factory premises for selection purposes.

2.3.1 Requirements

In the first of the above exercises we visited four regional offices - Preston, Dandenong, Footscray and Ballarat. Depending on the number of documents available and the time-scale covered by them, we selected at random intervals what were hoped would be sufficient numbers to provide a reasonably representative picture of these types of non-file contact. Table 2.12 shows the resultant distribution of selected documents according to contact type and region.

TABLE 2.12

NON-FILE CONTACT BY TYPE AND REGION

CONTACT TYPE

Region	Routine Requirements	Complaints	Hazard Control	Total
Preston	67	26	44	137
Dandenong	66	34	45	145
Footscray	49	13	49	111
Ballarat	30	1	10	41
	212	74	148	434

Because of the sampling qualifications already alluded to, it would be unwise even to try draw any conclusions about these patterns of non-file contact from the above table, save to underline, yet again, just how chronic the informational deficiencies in the Department of Labour have been, at least until very recently. Such data will, however, have some value as a basis from which to operate when we turn, in the next chapter, to the question of enforcement. While they may tell us little about patterns of contact, within particular categories of contact such as complaints, for example, they may offer a starting point from which to construct the broad framework of enforcement response in this nebulous area of agency/employer interaction which does not involve the generation of registered files. Similarly, at that point it will be useful to have had these non-file contacts broken down according to their point of initiation - before or after the 1985 Act - and according to the types of premises involved. Table 2.13 shows the overall breakdown of retrieved non-file contacts, other than those pertaining to PIN disputes, Work Cessations or determination of designated work groups, according to their initiation before or after the

1985 Act, while the three succeeding tables give the same breakdown for each category of contact, as well as that for type of premises.

TABLE 2.13

NON-FILE CONTACT BY POINT OF INITIATION

Type of Contact	Pre Sept. 1985	Post Sept. 1985	Total
Routine Requirement	47	165	212
Hazard Control	54	94	148
Complaints	18	56	74
	119	315	434

TABLE 2.14

NON-FILE ROUTINE REQUIREMENTS CONTACTS BY TYPE OF PREMISES AND POINT OF INITIATION

Type of Premises	Pre Sept. 1985	Post Sept. 1985	Total
Factory	43	135	178
Non-Factory	4	30	34
Total	47	165	212

TABLE 2.15

NON-FILE COMPLAINT CONTACTS BY TYPE OF PREMISES AND POINT OF INITIATION

Type of Premises	Pre Sept. 1985	Post Sept. 1985	Total
Factory	15	48	63
Other	3	8	11
	18	56	74

TABLE 2.16

NON-FILE HAZARD CONTROL CONTACTS BY TYPE OF PREMISES AND POINT OF INITIATION

	Point of Initiation		
Type of Premises	Pre Sept. 1985	Post Sept. 1985	Total
Factory	45	90	135
Non Factory	9	4	13
	54	94	148

2.3.2 Provisional Improvement Notices and Work Cessations

Anticipating that our sample, large as it was, might not produce very many examples of PIN disputes and Work Cessations, and conscious of the difficulties being experienced successively with EIR and INSPIRE, we also set out to retrieve, where possible, documentary aspects on these important aspects of the 1985 Act's implementation. Contacts in connection with the determination of designated work groups were also included. Once again, systematic and random sampling was precluded, and once more,

too, the data obtained may therefore prove more useful as a basis for discussion of enforcement than of contact patterns. For the record, however, it is appropriate to record the non-file contacts falling in these categories for which documentary evidence was retrieved.

Four regions were visited and all available documents pertaining to the requisite types of contact were examined. Their distribution by region and type is shown in Table 2.17.

TABLE 2.17

RETRIEVED PIN DISPUTE, WORK CESSATION ETC. DOCUMENTS BY REGION AND TYPE

Region	Type of Dispute				
	PIN Dispute	Work Cessation	Designated Work Group	Unclear	Total
Footscray	10	21		1	32
Preston	14	5	1		20
Dandenong	5	4	1	2	12
Central	35			1	36
	64	30	2	4	100

Table 2.18 examines the distribution of retrieved PIN dispute documents in more detail, giving the breakdown by region and nature of the premises involved, where Table 2.19 provides similar information for the 30 recovered cases of disputed Work Cessations.

TABLE 2.18

RETRIEVED PIN DISPUTE DOCUMENTS BY REGION

AND NATURE OF PREMISES

REGION	NATURE OF PREMISES								
	Factory	Educational Institution	Govt. Department	Hospital	Hotel	Local Govt.	State Instrumentality	Other Non-Factory	Total
Footscray	5			1	1	2	1		10
Preston	4	1		3		4		2	14
Dandenong	5								5
Central	4	3	5	9		4	6	4	35
TOTAL	18	4	5	13	1	10	7	6	64

TABLE 2.19

RETRIEVES WORK CESSATION DOCUMENTS BY REGION AND NATURE OF PREMISES

Region	Nature of Premises				
	Factory	Government Department	State Instrumentality	Other Non-Factory	Total
Footscray	15		4	2	21
Preston	3	1		1	5
Dandenong	4				4
Central					
	22	1	4	3	30

Yet again it must be stressed that because of the possible non-representativeness of the retrieved documents (though we have no reasons to regard them as atypical) it would be extremely dangerous to attempt to draw too firm conclusions from the above tables. Apart from emphasising that this difficulty underlines once more the Department's informational problems, all that can be said is that some of the figures are highly suggestive. Thus, for example, it is notable that four of Victoria's major regional offices should only have produced documentary evidence of 30 cases of Work Cessation involving attendance by inspectors since the 1985 Act's inception, though variation in documentary retention time and system should, of course, be taken into account. For all its faults, moreover, INSPIRE would seem to support the impression of extreme scrupulousness in the use of this power by Health and Safety Representatives, only 64 attendances at Work Cessations being recorded across the entire state between January 1988 and March 1989.

If these impressions are correct, then, it would seem that, contrary to some of its critics, the 1985 Act has not brought Victorian industry to a halt as a consequence of groundless Work Cessations. Nor, persisting with the same carefully impressionistic approach, would it seem that there has been promiscuous resort to Provisional Improvement Notices: we only recovered details of disputes relating to 64 such notices since the passage of the 1985 Act from our four regions, while INSPIRE recorded only 142 PIN dispute attendances throughout the state during the 15 month period between January 1988 and March 1989. Interestingly, though, within our data the distribution of Work Cessations and disputed PINS between factory and non-factory premises was markedly different. Whereas 73% of Work Cessation documents recovered related to factories, only 28% of documents pertaining to disputed PINS involved premises of this kind. If anything more than an artefact of the unusual circumstances under which we had to obtain this data, such a difference may have a bearing on differing approaches to industrial relations on the part of management and employees in the manufacturing and non-manufacturing sectors of the economy.

Finally, it is worth noting in this context, that data can often say as much through their silences as through the frequently over-played 'findings' to which they lend credence. Thus, for example, nothing in the data discussed here reveals the extent to which inspectors may be called in prior to a Provisional Improvement Notice or a Work Cessation being imposed. Nor, above all, are we told anything about all of those Provisional Improvement Notices which are concurred in, or ignored, by employers. Where no dispute occurs, there was not, during the period of this research, any systematic process of data collection by the Department. According to our INSPIRE data, moreover, the entire Victorian inspectorate only visited 4 premises in 15 months where the issue was failure to comply with a Notice issued under s.33 of the 1985 Act. If anywhere even close to accurate, such

a figure suggests either massive compliance or equally massive employer intransigence going unnoticed or undealt with.

REFERENCES

Accident Compensation Commission (1988) Annual Report.

CHAPTER 3

The Enforcement Process

In the previous chapter we examined patterns of contact before and after the Occupational Health and Safety Act of 1985 (OHSA). Further details of these patterns will be provided in Chapter 4 where analysis of our qualitative data is provided. Remaining with the quantitative side of the research, however, we now turn to the crucial question of enforcement processes. In so doing, we will follow the same broad sequence of presentation as that utilised in Chapter 2.

3.1 Factory Accidents

As indicated in Chapter 2, our sample of 3,290 factory premises produced 347 accident files which were available for analysis, 302 from the five year period before the 1985 Act came into effect and 45 from the three year period following. By far the vast majority of these came to the attention of the relevant agency as a result of employer notification, 88% and 86% respectively, though there was some suggestion in the qualitative data that some employers in the post 1985 Act era were confused as to whether reporting to the Department of Labour was necessary in addition to dealing with the matter under WorkCare.

3.1.1 Causes and Types of Injury: Factory Accidents

In Table 3.1 the nature of the incident, process or circumstances involved in our 347 injury accidents are shown according to the point of their occurrence before or after the 1985 Act.

TABLE 3.1

NATURE OF FACTORY INJURY ACCIDENTS BY POINT OF OCCURRENCE

Nature of Incident etc	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988		
	No	%	No	%	Total
Power Presses	38	12.6	4	8.9	42
Woodworking Machinery	59	19.5	14	31.1	73
Other Machinery	169	56.0	24	53.3	193
Falling/Flying Objects	11	3.6	1	2.2	12
Falls	6	2.0	0	0.0	6
Manual Handling	3	1.0	0	0.0	3
Chemicals	3	1.0	1	2.2	4
Miscellaneous	13	4.3	1	2.2	14
	302	100.0	45	99.9*	347

* Figures rounded to one decimal place.

What is immediately apparent from this table is the extent to which the investigated accidents thrown up by our sample are dominated by machinery accidents of one kind or another. If, for example, we combine the first three rows comprising accidents involving power presses, woodworking or other machinery, we find that no less than 82% and 93% of the pre and post 1985 Act accidents, respectively, involved machinery of one kind or another. Indeed, and even though allowance must be made for the effects of an increasingly targetted approach to accident investigation, it is interesting to note that the percentage of investigated accidents involving machinery rose by around 10% in the wake of the 1985 Act.

Out of the 347 investigated accidents produced by the factory sample, 12 resulted in death. Only one of these fatalities occurred in the post 1985 Act period covered by the research, the result of an incident in which the victim was crushed by a steel tank. Of the

remaining 11 deaths from the period before the 1985 Act's passage, falls and falling objects accounted for three apiece, while there were two fatalities in circumstances where the deceased persons simply collapsed - one appears to have involved a straightforward heart attack, and the other a somewhat more confused sequence of events in the course of which a brewery worker died from asphyxiation following inhalation of vomit. The other three fatalities resulted from carbon monoxide poisoning, a cerebral haemorrhage occasioned by the worker striking his head whilst engaged in descaling a boiler unit, and from one final instance where the injured party struck his head on a metal bar.

With the 12 fatalities excluded, the remaining 335 accidents, several of them involving more than one injury, produced the pattern of injuries shown in Table 3.2. In keeping with the high incidence of machinery related accidents shown in Table 3.1, above, it comes as no surprise that injuries to fingers, hands and arms predominate. Indeed, such injuries constitute some 86% of those occurring in the pre 1985 Act period and around 78% of those which were generated by the sampled factory premises in the three years following the Act. Perhaps most surprising is the low incidence of investigated accidents involving strains and sprains given the amount of publicity which has been given to this area of occupational health and safety, particularly in the years following the 1985 Act.

TABLE 3.2

NON-FATAL FACTORY ACCIDENTS BY INJURIES INVOLVED

Type of Injury	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988		
	No	%	No	%	Total
Laceration/Crushing, Bruising of fingers, hands or arms	190	53.5	23	41.8	213
Amputation of finger tips	82	23.1	17	30.9	99
Fractured fingers or hands	29	8.2	2	3.6	31
Burns to fingers	5	1.4	1	1.8	6
Laceration - other parts of body	5	1.4	1	1.8	6
Bruising or crushing other parts of body	6	1.7	4	7.3	10
Fractures - other parts of body	8	2.3	2	3.6	10
Burns - other parts of body	9	2.5	0	0.0	9
Major amputations	4	1.1	1	1.8	5
Strains/Sprains	5	1.4	0	0.0	5
Other	12	3.4	4	7.3	16
	355	100.0	55	99.9*	410

* Figures rounded to one decimal place.

3.1.2 Accidents, Issues and Contraventions: Factory Premises

Just as a single accident might involve more than one injury, as we have seen, so too the issues and/or contraventions uncovered in the course of subsequent investigations could often be multiple. In total, the issues which surfaced in connection with the 347 factory accidents covered by the research came to 450, their distribution according to the

accident's date of occurrence and the nature of the issues involved being as shown in Table 3.3.

TABLE 3.3

FACTORY ACCIDENT ISSUES BY TYPE AND DATE OF OCCURRENCE

Type of Issue	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988		
	No	%	No	%	Total
Machine Guarding	244	61.9	37	66.1	281
Machine Cleaning/ Setting Up	30	7.6	3	5.4	33
Machinery Other	16	4.1	2	3.6	18
Accident Reporting	38	9.6	4	7.1	42
Manual Handling	10	2.5	0	0.0	10
Work Practices	13	3.3	3	5.4	16
Instruction/Supervision	10	2.5	2	3.6	12
Protective Equipment	9	2.3	0	0.0	9
Other	24	6.1	5	8.9	29
	394	99.9*	56	100.1*	450

* Figures rounded to one decimal place

Once again, the pattern which emerges here is one very much in conformity with what we have already seen in this chapter, namely, a very heavy emphasis on machinery and its guarding. Conversely, the relatively low incidence of issues pertaining to manual handling is again somewhat surprising, though some explanation for this will emerge in the course of analysing our qualitative data. Overall, perhaps, the most striking feature of the picture is just how little change has taken place in the nature of the issues picked up by the Inspectors in the course of factory accident investigation since the 1985 Act came into effect.

Out of the 347 accidents covered in the course of the research, no fewer than 237 or 68% involved one or more detected contraventions of the law. As can be seen from Table 3.4, moreover, accidents investigated after passage of the 1985 Act were somewhat more likely to involve such contravention.

TABLE 3.4

INVESTIGATED FACTORY ACCIDENTS AND LEGAL CONTRAVENTIONS

	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988		
	No	%	No	%	Total
Contravention	204	67.5	33	73.3	237
No Contravention	98	32.5	12	26.7	110
	302	100.0	45	100.0	347

To complete the picture on contravention it was possible to determine, first of all, what kinds of issues were involved in the 237 cases where violation was implicated in an accident. In Table 3.5 the relevant distribution of the 316 issues uncovered in this context during the two periods is shown, though the range of categories has been reduced on account of the exceedingly small numbers falling in some of them as a consequence of the overwhelming domination of issues related to machinery.

TABLE 3.5

NATURE OF ISSUES INVOLVED IN CONTRAVENTION RELATED FACTORY ACCIDENTS

Nature of Issue	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988		
	No	%	No	%	Total
Machinery Guarding	180	65.7	29	69.0	209
Machinery Other	28	10.2	4	9.5	32
Accident Reporting	36	13.1	4	9.5	40
Miscellaneous	30	10.9	5	11.9	35
	274	99.9*	42	99.9*	316

* Figures rounded to one decimal place.

As already indicated machinery related issues clearly predominate, accounting for over three-quarters of the contravention issues in both periods. Of interest also is the fact that by far the next largest category, although a long way behind machinery issues, is accident reporting which is the sine qua non of any effective enforcement system. It may also be added that, out of the 12 fatalities covered in this study, only two were deemed to have involved issues where there was a clear contravention of relevant legislation - one an incident concerning inadequate ventilation for carbon monoxide fumes, and the other a roof fall in which neither guards nor warning signs had been provided. Both of these fatalities occurred in the pre 1985 Act period.

Finally in this context, it is relevant to address the slightly different question of what kinds of accidents produced the above pattern of contravention. Table 3.6 shows the nature of the incidents, machines or circumstances involved in the 237 accidents in question, and again confirms the picture which has already emerged. In both periods incidents involving machinery dominate almost to the exclusion of all else, accounting for

over 90% of investigated accidents involving contravention both before and after reform. Whatever the cause, the picture is a very traditional one of an Inspectorate overwhelmingly caught up in the safety of machinery.

TABLE 3.6

NATURE OF INCIDENT, PROCESS ETC, INVOLVED IN FACTORY ACCIDENTS INVOLVING CONTRAVENTION

Proximate Cause or Circumstance	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988		
	No	%	No	%	Total
Power Presses	35	17.2	3	9.1	38
Woodworking Machinery	32	15.7	7	21.2	39
Other Machinery	122	59.8	22	66.7	144
Falling or Flying Objects	5	2.5	1	3.0	6
Falls	2	1.0	-		2
Manual Handling	2	1.0	-		2
Miscellaneous	6	2.9	-		6
	204	100.1*	33	100.0	237

* Figures rounded to one decimal place

3.1.3 Enforcement Responses: Factory Accidents

What action did the relevant agency take in relation to the breaches of the law outlined above in connection with factory accidents? In Table 3.7 the final outcome is shown for the 204 pre-1985 Act and 33 post-Act accidents involving one or more contraventions. Since more than one action might be taken in relation to a single accident, this table shows outcomes according to the most severe enforcement response adopted. The additional responses are shown later in this section of this chapter (see Table 3.11).

TABLE 3.7

ENFORCEMENT OUTCOME FOR FACTORY ACCIDENTS INVOLVING CONTRAVENTION

Enforcement Outcome	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988		
	No	%	No	%	Total
No Further Action	31	15.2	7	21.2	38
Verbal Requirements	58	28.4	6	18.2	64
Written Requirements or Directions	3	1.5	-	-	3
Warnings	63	30.9	6	18.2	69
Improvement Notice	N/A	-	5	15.2	5
Prohibition Notice	N/A	-	3	9.1	3
Breach Report but no Prosecution	2	1.0	-	-	2
Prosecution	43@	21.1	4	12.1	47@
Passed to another Agency	2	1.0	-	-	2
No Recommendation	1	0.5	1	3.0	2
Outcome Unknown	1	0.5	1	3.0	2
	204	100.1*	33	100.0	237

@ Two of these accidents were dealt with in one prosecution, the number of prosecutions thus being 46.

* Figures rounded to one decimal place

The enforcement pattern revealed by the above table is one that is very typical of the occupational health and safety and other regulatory fields. Despite a high rate of contravention, as already indicated, prosecution is comparatively rare. Enforcement strategies such as warnings, verbal requirements and, perhaps most worrying of all, no further action tend to predominate. Indeed, if the three latter approaches to enforcement are added together, they account for no less than about 74% of enforcement responses from the pre-1985 Act period and around 58% of these from the three year period after the Act. Interestingly enough, however, the reduction in the use of warnings and verbal

requirements in the post-Act period (together amounting to a diminution of around 23%) is offset by the approximately 24% of enforcement responses involving Improvement or Prohibition Notices which were, of course unavailable in the period before the 1985 Act. Clearly, and despite the reluctance of many Inspectors to use these strategies (see Chapter 4, below), the 1985 Act did have a considerable effect in terms of new enforcement strategies. This said, however, it should also be noted that the percentage of sampled accidents involving contraventions which were prosecuted also dropped dramatically between the two periods (from around 21% to 12%), although this may reflect what was a fairly protracted period of confusion over prosecution procedures in the years immediately after passage of the 1985 Act.

This low and apparently dropping rate of prosecution in relation to accidents is nonetheless doubly surprising in view of formal departmental policies covering the two periods covered by the research. Thus, up to early 1983 'severity of injury' was one of the principal criteria for preparation of a Breach Report - the first formal step towards prosecution - and 'generally accidents on regulated machines or guards (also) resulted in Breach Reports' (ADG Memo 22/11/1984). Thereafter, until the promulgation of new prosecution guidelines under the auspices of the 1985 Act, the formal policy on the circumstances in which such reports would be submitted also placed heavy emphasis on accident investigations (ADG Memo 17/9/84). With passage of the Act, Ministerial Guidelines on prosecution were gazetted in October 1985 and, once again, the first criterion for the institution of legal proceedings - after failure to comply with Improvement or Prohibition Notices - was an alleged breach of the 1985 Act or regulations which resulted in a fatality or serious accident.

Against this background, it is instructive to look at how some of the more serious injuries incurred in accidents involving contravention were dealt with. Thus, for example,

of the two fatalities in which a violation was implicated, both of them falling in the pre-1985 Act period, one was passed over to another agency when it became apparent that the substantive issue concerned scaffolding. The other - the case involving inadequate ventilation for carbon monoxide fumes - was apparently dealt with by resort to verbal requirements. According to the coronial inquest, the ventilation in the area where the death took place had been rendered ineffective by the stuffing of rags into a fixed wall vent and by hanging a plastic sheet across the doorway. The company, the report somewhat laconically concluded, 'did not take adequate steps to overcome the problem', but it is not clear from the file whether the company could have been prosecuted under what was then the agency's own Act (Labour and Industry Act, 1958) or the case passed on to another agency under whose legislation it could. In the event, neither step was taken.

Once one moves beyond fatalities, and while agencies may of necessity have to adopt arbitrary criteria for organisational purposes, what constitutes a serious injury becomes a matter of somewhat subjective judgment. Nor, it should be added, did the project explicitly set out to devise measures of seriousness, however arbitrary, to use in connection with an analysis of enforcement processes. Table 3.8 therefore shows the distribution of enforcement responses covering a subjectively chosen series of injuries which might be deemed serious by many people.

Apart from the obvious, and by now fully predictable predominance of injuries to fingers and hands, the principal feature of interest in the above table is how, depending upon one's personal assessment of seriousness, such injuries involving contravention have been dealt with by the relevant enforcement agency. If the injuries specified in the table come anywhere close to reflecting a realistic definition of what constitutes serious injury, then the adherence of enforcement processes to successive policy guidelines would seem to be somewhat dubious. While something over a quarter of the injuries involving violation

TABLE 3.8

ENFORCEMENT RESPONSES COVERING SELECTED NON-FATAL INJURIES WHERE CONTRAVENTION WAS INVOLVED

Nature of Injury	ENFORCEMENT RESPONSE												
	PROSECUTION		WARNING		PROHIBITION NOTICE		IMPROVEMENT NOTICE		VERBAL REQTS.		N.F. ACTION		TOTAL
	PRE	POST	PRE	POST	PRE	POST	PRE	POST	PRE	POST	PRE	POST	
Amputation of Finger Tips	21	2	20	4	N/A	1	N/A	3	11	-	7	2	71
Fractures - Fingers & Hands	3		5						10	2	5		25
Fractures - Ribs					N/A	1			2				3
Internal Injuries	1								1				2
Crushed Leg/Foot			1						1				2
Major Amputation	1	1	2										4
Head Injuries			1						2		1		4
Severed Tendons									1		1		2
	26	3	29	4	N/A	2	N/A	3	28	2	14	2	113
%	25.7		29.2		1.8		2.7		26.5		14.2		100.1*

* Figures rounded to one decimal place.

of the law indeed led to prosecution, the other side of the story is that approximately three quarters did not. More than 40% of them rated an enforcement response amounting to nothing more than verbal instruction or no further action, while a further 29% were dealt with by way of warnings. To be sure, some measure of discretion in enforcement is to be expected in any agency, but the question here is whether that discretion has been unduly exercised in favour of those who have committed violation of the law. As far as that question is concerned, however, from the vantage point of this research it must remain just that - a question.

In keeping with the approach adopted in earlier sections of this chapter, it is also possible to analyse enforcement responses according to the type of issue involved and the causes/circumstances of the accident. In the first of these contexts, Table 3.9 shows the distribution of enforcement responses in relation to the 316 issues involved in contravention accidents during the two periods, data from the post-reform era appearing in italics.

In order to avoid undue clutter in an already crowded table, and because of the small numbers in several columns, percentages have not been included here. However, some very simple calculations reveal a not unexpected pattern. Thus, in the pre-reform era around 73% of the issues which became the subject of prosecution involved machinery, while some 74% of those which elicited warnings from the agency were of this kind. Accident reporting issues came a long way behind but were nonetheless significant at 17% of prosecuted issues and 19% of those leading to a warning. At the other end of the enforcement scale, it should be noted, nearly 43% of enforcement responses to issues involved in contravention accidents took the form of no further action or the imposition of verbal requirements only. While small numbers in the post-reform period covered by the research render percentaging problematic in most instances, the emerging pattern seems to be similar. Five out of 7 prosecuted issues involved machinery, as did all of the

TABLE 3.9

ENFORCEMENT RESPONSES ACCORDING TO ISSUE TYPE AND ACT

Nature of Issue	PROSECUTION	WARNING	PROHIBITION NOTICE	IMPROVEMENT NOTICE	WRITTEN DIRECTIONS	VERBAL REQTS.	NO FURTHER ACTION	OTHER	TOTAL
Machine Guarding	42 (4)	57 (5)	N/A (3)	N/A (5)	3 (-)	52 (4)	23 (6)	3 (2)	180 (29)
Machinery Other	4 (1)	5 (1)	N/A (-)	N/A (-)	1 (-)	10 (2)	7 (-)	1 (-)	28 (4)
Accident Reporting	11 (-)	16 (-)	N/A (1)	N/A (1)	- (-)	5 (1)	4 (1)		36 (4)
Miscellaneous	6 (1)	6 (1)	N/A (-)	N/A (-)	- (-)	11 (1)	5 (2)	2 (-)	30 (5)
TOTAL	63 (6)	84 (7)	N/A (4)	N/A (6)	4 (-)	78 (8)	39 (9)	6 (2)	274 (42)

(1) Includes two issues which went as far as preparation of a breach report

(2) Includes one case transferred to another agency

warnings; 3 out of 4 of the issues subjected to Prohibition Notices and 5 out of the 6 attracting Improvement Notices also fell in this category. Again, 17 or around 40% of all post-reform issues raised in connection with accidents involving contravention elicited no action or verbal requirements only. In relation to accidents involving violation of the law, it would be hard to claim any really marked change in enforcement emphasis. Indeed, analysis by issues may even underestimate the extent to which occupational health and safety law enforcement pertaining to factory accidents has remained focused on machinery questions throughout the 1980's in Victoria. Since an issue such as, for example, failure to report on accident could arise out of a machinery accident which has gone unreported, the degree of emphasis on or pressure from this area could be understated in analysis based on issues alone. That this is indeed the case is apparent from Table 3.10, which looks at enforcement responses according to the main factors or circumstances involved in accidents where contraventions were detected. Once again, cases from the post-reform period covered by the research are in italics.

The picture now becomes even more stark. In the period before passage of the 1985 Act, all of the prosecutions generated by the contraventions involved in factory accidents arose out of incidents involving machinery, as did over 90% of the warnings. Nearly 44% of the accidents involving contravention were dealt with by verbal requirements or no further action. As far as the post-Act period covered by the research is concerned, again all of the prosecutions and warnings arose out of incidents involving machinery. The three Prohibition Notices and five Improvement Notices also fell in the machinery category. Out of the 33 accidents involving contravention, 13 or 39% were responded to by no further action or verbal requirements. As indicated earlier, however, it should be noted that one accident could provoke more than one enforcement response. Whilst analysis thus far has been based on the most severe response, these additional enforcement strategies should

TABLE 3.10

ENFORCEMENT RESPONSES ACCORDING TO CAUSE/CIRCUMSTANCES AND ACT

Cause/Circs of Accident	PROSECUTION	WARNING	PROHIBITION NOTICES	IMPROVEMENT NOTICES	WRITTEN DIRECTIONS	VERBAL REQTS.	NO FURTHER ACTION	OTHER	TOTAL
Power Presses	12 (-)	11 (1)	N/A (1)	N/A (-)	1 (-)	7 (1)	4 (-)	- (-)	35 (3)
Woodworking Machinery	10 (1)	10 (-)	N/A (-)	N/A (1)	- (-)	5 (2)	6 (3)	1 (-)	32 (7)
Other Machinery	21 (3)	39 (5)	N/A (2)	N/A (4)	1 (-)	40 (2)	19 (4)	2 (2)	122 (22)
Falling or Flying objects		1 (-)	N/A (-)	N/A (-)	(-)	2 (1)	2 (-)	- (-)	5 (1)
Falls		- (-)	N/A (-)	N/A (-)	(-)	1 (-)	- (-)	1 (-)	2 (-)
Manual Handling		1 (-)	N/A (-)	N/A (-)	(-)	1 (-)	- (-)	- (-)	2 (-)
Miscellaneous		3 (-)	N/A (-)	N/A (-)	1 (-)	2 (-)	- (-)	- (-)	6 (-)
TOTAL	43 (4)	65 (6)	N/A (3)	N/A (5)	3 (-)	58 (6)	31 (7)	4 (2)	204 (33)

not be overlooked. Accordingly, Table 3.11 shows the distribution of additional enforcement responses to factory accidents involving contravention according to the Act under which they were adopted.

TABLE 3.11

ADDITIONAL ENFORCEMENT RESPONSES: FACTORY ACCIDENTS

	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988	
Additional Enforcement Response	No	%	No	%
Written Directions	8	3.9	-	-
Verbal Requirements	160	78.4	12	36.4
Improvement Notice	1@	0.5	5	15.2
Prohibition Notice	N/A	-	5	15.2
None	33	16.2	11	33.3
Not Known	2	1.0	-	-
	204	100.0	33	100.1*

@ In one case, an accident occurring before the Act came into effect was subsequently dealt with by an Improvement Notice under the Act.

* Figures rounded to one decimal place.

Finally, it is germane to ask whether or not this pattern of enforcement response to factory accidents involving violation of the law led to the matters in question ultimately being satisfactory resolved, albeit after the initial contravention/s and their associated accidents had taken place. Table 3.12 offers a fairly optimistic picture in this report, though it cannot of course be allowed to obscure the broader picture of violation and relatively mild response which has already emerged in this chapter. Interestingly, the files examined

produced not a single example of outright failure in this context, a remarkable performance by any standard!

TABLE 3.12

COMPLIANCE: FACTORY ACCIDENTS INVOLVING CONTRAVENTION

Compliance Outcome	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988	
	No	%	No	%
Yes	159	77.9	25	75.8
Not Applicable	7	3.4	3	9.1
Matter in Progress	3	1.5	-	-
Not Known	35	17.2	5	15.2
	204	100.0	33	100.1*

* Figures rounded to one decimal place.

3.2 Non-Accident Factory Files

As was seen in Table 2.3, above, 297 registered factory files were generated by matters other than accidents during the two periods covered by the research. Of these 245, or around 83% came from the pre-1985 Act period and 52, or 17.5%, from the three year period after the Act came into effect. The distribution of these files according to the mode of their initiation and the Act under which they were generated or 'raised' is shown in Table 3.13.

TABLE 3.13

NON-ACCIDENT FACTORY FILES BY MODE OF INITIATION AND ACT

Mode of Initiation	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988	
	No	%	No	%
Special Program (Pre OHSA)	131	53.5	N/A	N/A
Special OHSA Program	N/A	N/A	9	17.3
Inspection After Accident	14	5.7	1	1.9
Complaint	27	11.0	5	9.6
Routine Follow-Up	36	14.7	12	23.1
Provisional Improvement Notice	N/A	N/A	1	1.9
Occupier Request	32	13.1	17	32.7
Not Known	5	2.0	7	13.5
	245	100.0	52	100.0

Of special note in the above table is the way in which special programs appear to have dropped off in the post OHSA period (from 53% to 17% of file generation). Too much should not be made of this as a long term trend however, since the decline apparent here may have been caused by a temporary faltering in this kind of approach once two special programs carried out fairly shortly after the advent of the Act had been completed (one on foundries and the other on butchers). In interviews, there were also some suggestions that this faltering may have been due to the obvious exigencies surrounding the reorganisation occasioned by regionalisation. Conversely, the marked jump in the percentage of files arising out of occupiers' requests can be accounted for by an increase in employer requests in relation to asbestos, no less than 10 of the 17 requests made in the period falling in this category. In the period before 1985, by contrast, photo-electric guarding was

the main source of employer requests, 23 out of 32 such requests being to do with this issue.

Given the importance of self-regulation in the new system, and of Provisional Improvement Notices within the machinery for achieving that objective, it is also interesting to note that only one non-accident factory file was initiated explicitly under this heading. In the case in question, the Health and Safety Representative called in the Inspectorate after a Provisional Improvement Notice concerning the safe storage of steel bars had not been complied with. To this single instance must be added a further two instances where initiation classified under the heading of complaints involved representatives calling in the Inspectorate. The fact remains, however, that as far as factory non-accident files are concerned, failure to comply with a Provisional Improvement Notice appears to have been a pretty insignificant source of factory non-accident file generation, despite the fact that allegation of such failure is specified as one of the normal criteria for the institution of legal proceedings (Ministerial Guidelines, October, 1985). Once again, the 1985 Act is either working superbly in as much as Provisional Improvement Notices are being almost uniformly complied with, or there is a drastic breakdown in the system which allows failure to comply to go undealt with.

Parenthetically here, it should be noted just how much agency time and work is expanded on these non-accident factory file matters, on top of accident investigations and contacts which generate no file. Table 3.14 shows that over 14% of pre-1985 Act matters and some 6% of post-Act matters involved 10 or more visits to the premises in question. Moreover, the much higher percentages in the 1-9 visit category should not, as many might expect, be taken to mean that one visit normally sufficed. In fact, only 22 of the 297 files involved just one visit, while those involving 2-9 visits (231 files) chalked up a massive 1,028 visits across the two periods covered by the research. Concomitantly, however, it

must also be pointed out that processing matters involved to a conclusion, satisfactory or otherwise, could take some time. While some 40% of the files could be closed within six months, and a further 24% within a year, others took much longer. Some 22% took from one to two years to complete, 9% took from two to three years, while 3% dragged on for between three and four years.

TABLE 3.14

NO. OF VISITS: NON-ACCIDENT FACTORY FILES BY ACT

No. of Visits	Jan 1980 to Sept 1985 No. of Files		Oct 1985 to Sept 1988 No. of Files	
	No	%	No	%
0	-		5	9.6
1-9	210	85.7	43	82.7
10-19	35	14.3	3	5.8
Not Known	-	-	1	1.9
	245	100.0	52	100.0

3.2.1 Non-Accident Factory Files: Issues

Any single factory non-accident file might involve a number of blocs of issues, each of which might, in turn, entail multiple individual issues. Thus, for example, a single survey might pick up a number of unguarded machines, or a series of issues pertaining to flammable substances. In Table 3.15, where the nature of these blocs of issues is shown, the total therefore exceeds the 297 non-accident factory files alluded to in 3.2, above.

TABLE 3.15

DISTRIBUTION OF BLOCS OF FACTORY NON-ACCIDENT ISSUES BY NATURE AND ACT

Nature of Issue Bloc	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988		
	No	%	No	%	TOTAL
Machinery Guarding	163	43.1	31	36.9	194
Flammable Substances/ Spray Painting etc.	88	23.3	4	4.8	92
Fumes, Ventilation etc.	14	3.7	9	10.7	23
Amenities, Housekeeping etc.	29	7.7	6	7.1	35
Asbestos	10	2.6	12	14.3	22
Floors/Stairs	13	3.4	1	1.2	14
Foundry Regulations	8	2.1	6	7.1	14
Access/Egress	15	4.0	3	3.6	18
Ergonomics	7	1.9	1	1.2	8
Chemicals	5	1.6	2	2.4	10
Protective Equipment	8	2.1	2	2.4	7
Manual Handling	6	1.3	1	1.2	7
Other	12	3.2	6	7.1	18
	378	100.0	84	100.0	462

Once again, the data contained in this table play a familiar refrain. In both periods, by far the most numerous blocs of issues have to do with machinery guarding (43% and 37%), while the effects of targetted programs can be seen in the variations which take place with regard to spray painting matters, on the one hand, and to blocs of foundry regulation matters on the other. Increased concern over asbestos is also apparent in the post OHSA period. Given the changing character of the concerns which are coming to the fore in the Occupational Health and Safety field, it is surprising once again to see how few files were generated by issues such as ergonomics or manual handling, particularly in the post OHSA period.

In 27 instances (10 in the pre OHSA 17 in the post OHSA period), it was not possible to ascertain the precise number of issues involved in a particular bloc. In order to give some impression of the scale and spread of the enforcement exercise in relation to the non-accident files generated by our factory sample, however, Table 3.16 shows the number of issues of different types involved in the remaining 435 blocs. Again machinery guarding dominates, amounting to some two-thirds of all issues dealt with in both periods, while the effects of targetting on areas such as foundries and spray painting is also apparent. Manual handling and ergonomics scarcely feature in either period, and overall the impression, yet again, is of an agency which is preoccupied or overwhelmed by the single issue of machinery guarding.

TABLE 3.16

DISTRIBUTION OF ALL FACTORY NON-ACCIDENT ISSUES BY ACT AND TYPE

Nature of Issue	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988		
	No	%	No	%	TOTAL
Machinery Guarding	2766	66.6	332	66.1	
Spray Painting, Flammable Substances etc.	1059	25.5	48	9.6	
Fumes/Ventilation	27	0.7	17	3.4	
Amenities/Housekeeping	51	1.2	34	6.8	
Asbestos	96	2.3	26	5.2	
Floors/Stairs	30	0.7	2	0.4	
Foundry Regulations	32	0.8	15	3.0	
Access/Egress	45	1.1	3	0.6	
Ergonomics	7	0.2	1	0.2	
Chemicals	4	0.1	2	0.4	
Protective Equipment	8	0.2	5	1.0	
Manual Handling	14	0.3	1	0.2	
OTHER	14	0.3	16	3.2	
	4153	100.0	502	100.1*	

* Figures rounded to one decimal place

3.2.2 Enforcement Responses: Non-Accident Factory Files

Just as one file might embrace multiple issues and blocs of issues, as we have seen, so too a single file could involve more than one enforcement response. Verbal or even written requirements, for example, might be followed by some other enforcement response such as a formal written direction in the pre-reform period, while an improvement notice might follow some less severe response in the post-OHSA era. Equally, of course, several different enforcement reactions could be provoked at the same time in response to different issues or progress thereon. For these reasons, the number of enforcement responses shown in Table 3.17 exceeds the 297 files under discussion.

TABLE 3.17

ENFORCEMENT OUTCOMES: FACTORY NON-ACCIDENT ISSUES

Enforcement Response	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988		
	No	%	No	%	TOTAL
Verbal Requirements	114	38.4	6	8.3	120
Written Notification of Requirements	123	41.4	19	26.4	142
Written Directions Threatened	6	2.0	N/A	-	6
Written Directions Issued	27	9.1	N/A	-	27
S.40(2)	N/A	-	8	11.1	8
Improvement Notice Threatened	N/A	-	10	13.9	10
Improvement Notice Issued	N/A	-	19	26.4	19
Stop Work Order Threatened	3	1.0	N/A	-	3
Stop Work Order Issued	3	1.0	N/A	-	3
Prohibition Notice Threatened	N/A	-	4	5.6	4
Prohibition Notice Issued	N/A	-	2	2.8	2
Breach/Prosecution Threatened	11	3.7	3	4.2	14
Formal Warning	3	1.0	1	1.4	4
Prosecution	6	2.0	0	0	6
Unclear	1	0.3	0	0	1
	297	99.9*	72@	100.1*	369

* Figures rounded to one decimal place

@ There were also 17 instances of no action being taken, 8 from the pre OHSA period and 9 from the post reform period.

As with the enforcement response to accidents involving contraventions, this table once again evidences a pattern heavily weighted towards the non-penal end of the response scale. During the period of nearly five years prior to the 1985 Act's commencement, for example, nearly 80% of enforcement responses comprised nothing more salutory than verbal requirements or written notification of requirements, almost an administrative process of listing. At the other end of the scale, warnings, prosecutions and threats of prosecution only totalled some 7% of the total enforcement responses, and even then more than two thirds of the responses in question did not amount to the real thing.

When we turn to the post OHSA period, a perceptible change in the overall enforcement pattern begins to become apparent, although the shift is not perhaps quite so dramatic as might be expected. Thus, the use of verbal requirements and written notification of requirements comes down dramatically but still accounts for some 35% of the agency's enforcement response. Concomitantly, Improvement Notices make their enforcement dèbut at around 26%, with another 14% of responses involving a threat of such a Notice. Moving up the scale of severity, the Department was obviously somewhat economical in its use of Prohibition Notices at around 3% of all responses, while it was even more sparing in its use of prosecution, an outcome which did not eventuate in any of the post OHSA non-accident cases covered by the research. Threats and warnings were, however, used in a small number of instances. A strong thread of continuity with the past - or slowness to change depending upon one's point of view - is also evidenced by

the fact that 14 out of the 19 Improvement Notices issued concerned machine guarding, as did both of the Prohibition Notices.

The preceding table dealt with the overall, multiple pattern of departmental responses in reaction to the issues raised in factory non-accident files. In doing so, it gives some idea but no firm indication of how tough the enforcement agency was prepared to be in particular instances. Some further light will be thrown on this question when prosecution is discussed as a separate matter at a later point (see Chapter 6, below). In the meantime, and although technical difficulties precluded the attachment of specific enforcement outcomes to either individual types or blocs of issues, in most cases it was possible to identify the most severe enforcement action taken in relation to the matters contained in each file. The resulting picture is shown in Table 3.18.

TABLE 3.18

STRONGEST ENFORCEMENT OUTCOME: FACTORY NON-ACCIDENT FILES

Enforcement Response	Jan 1980 to Sept 1985		Oct 1985 to Sept 1988		
	No	%	No	%	TOTAL
Verbal Requirements	84	36.5	7	10.4	91
Written Notification of Requirements	95	41.3	18	26.9	113
Written Directions Threatened	1	0.4	N/A	-	1
Written Directions Issued	21	9.1	N/A	-	21
S. 40(2) Issued	N/A	-	7	10.4	7
Improvement Notice Threatened	N/A	-	3	4.5	3
Improvement Notice Issued	N/A	-	16	23.9	16
Stopwork Order Threatened	0	0	N/A	-	0
Stopwork Order Issued	3	1.3	N/A	-	3
Prohibition Notice Threatened	N/A	-	2	3.0	2
Prohibition Notice Issued	N/A	-	1	1.5	1
Breach/Prosecution Threatened	8	3.5	3	4.5	11
Formal Warning	3	1.3	1	1.5	4
Prosecution	6	2.6	0	0.0	6
No Action	8	3.5	9	13.4	17
Outcome Unclear	1	0.4	0	0.0	1
	230	99.9*	67	100.0	297

* Figures rounded to one decimal place

The distribution of strongest responses between the two periods here differs from that shown in Table 2.3 where the criterion for allocation was the file's point of initiation. Since some files carried over from one period to the next, the strongest enforcement response in relation to 12 files initiated before the 1985 Act actually took place after its passage. Careful analysis of the 52 files initiated after the 1985 Act shows, however, that

the 'carried over' cases have not unduly distorted the enforcement picture in favour of the older and less forceful strategies of enforcement. Thus of 18 written notification of requirements issued after the 1985 Act, 16 were initiated in the post-Act period, while the same applied to 6 of the 7 instances in which verbal requirements were used.

In many respects the pattern shown in Table 3.18 is very much the one that might have been predicted on the basis of what has gone before, the pre OHSA enforcement response being grossly weighted towards the non-penal end of the response continuum and the post-Act outcomes just beginning to exhibit the effects of the policies and strategies embodied in the 1985 Act. In this latter respect, however, some further comment is warranted, particularly in view of the fact that 27% of the Department's sternest responses still comprised nothing more than verbal requirements or written notification thereof, while Improvement Notices only came to 24% of the total and Prohibition Notices to less than 2%. Setting aside the absence of prosecution, this pattern is somewhat strange when considered in the context of the Ministerial Guidelines referred to earlier (see 3.1.3 above), which indicated 'inter alia' that Improvement and Prohibition Notices would 'generally speaking (be) the principal instruments to be used by the Department for securing compliance with the legal standards set out in the Act' (Ministerial Guidelines, 1985).

Even when the threat of issuing such Notices is added to the picture, themselves somewhat strange enforcement concoctions, particularly where, in the case of Prohibition Notices, under s.44 (1) of the 1985 Act actual or potential immediate risk to health and safety presumably either does or does not exist, the use of Notices could not by any stretch of the imagination be said 'generally speaking' to have constituted the principal instruments used to secure compliance with regard to the non-accident factory files covered by this research. And thereby hangs a tale which will be recounted at greater length when our qualitative data is examined. Suffice it to say here that the prefatory statistical data

seems to hint at an Inspectorate slow to abandon established practices of minimal severity and to adopt the new strategies not only provided by the 1985 Act but positively enjoined under the Ministerial Guidelines. Of particular interest, moreover, is the fact that the strongest enforcement response in around 10% of the files was resort to s.40(2) of the 1985 Act, which requires Inspectors to give information to employers and Health and Safety Representatives or committees about observations made in the course of visits and about actions they propose to take. Never intended as an enforcement mechanism rather than an informational device, this section seems to have been adopted by at least some Inspectors as a kind of latter day, OHSA version of written requirements. We shall return to this question at a later point (see Chapter 4, below).

Against all of this, however, it may be argued that three years is not a very long time in which to effect a really substantial turnaround in a system which had been operating along its originally established lines for nigh on a century. Moreover, and despite the caveats entered earlier about numbers of visits and the length of time taken to secure compliance, as far as contacts involving registered non-accident factory files are concerned, a substantial degree of success can be claimed, at least on paper, on the basis of the figures generated in the course of this research. As shown in Table 3.19, there was remarkable continuity across the two periods in satisfactory resolution of the matters at stake.

TABLE 3.19

COMPLIANCE: FACTORY NON-ACCIDENT FILES

Compliance Outcome	Jan 1980 Sept 1985		Oct 1985 Sept 1988		
	No	%	No	%	TOTAL
Matter Satisfied in Full	288	76.2	63	75.0	351
Matter Satisfied in Part	28	7.4	9	10.7	37
Premises Closed/Moved or Machine etc No Longer In Use	26	6.9	1	1.2	27
Transferred to Another File	5	1.3	0	0.0	5
HSR to Follow Up	2	0.5	0	0.0	2
Not Known	29	7.7	11	13.1	40
	378	100.0	84	100.0	462

3.3 Enforcement Processes: Non-Factory Premises Files

As noted at 2.2 above, very few files were generated by our sample of 1000 non-factory premises either before or after the 1985 Act, though the overall rate of file generation in the post OHSA period did jump to just over half of the rate for factories. Moreover, no fewer than 13 out of the 27 files in question were unavailable for analysis, largely because many of them were post OHSA and still 'live'. In consequence, and although we are dealing with quantitative data, they will be presented in discursive rather than tabular form.

In all, there were five accident files available for inspection, two from the pre- and three from the post OHSA period. A further six accident files were unavailable, one from before and five from after the 1985 Act. All of the five available accident files dealt with injuries associated with machinery, and not surprisingly, the injuries reflected this, injuries to fingers and hands predominating to the exclusion of all else. The premises involved were one educational institution, a prison, a state-run home, a major hospital and a food-

chain. Inevitably the main issues to arise in connection with these accidents were machine guarding (an issue in all five), while questions about accident reporting and the adequacy of supervision arose as ancillary issues in two of the cases. Four of the 5 accidents were deemed to have involved contraventions of the law. Two of these, violations of guarding regulations in a hospital workshop and a college theatre workshop respectively, were dealt with by way of verbal requirement. In an unusual display of forcefulness vis à vis the public sector, a Prohibition Notice was imposed upon a prison in relation to a power press, while the restaurant - part of a large chain - was prosecuted after an inadequately guarded garbage compactor resulted in the amputation of a worker's finger tip. A written direction under the old Industrial Safety, Health and Welfare Act of 1981 was also issued to the company, while the prosecution was launched under ss.16 and 20 of the same Act (machinery guarding and accident reporting provisions). The company was convicted and fined on both counts, fines of $750 and $250 being imposed.

Turning to the remaining nine available non-factory files generated by matters other than accidents, two of these were generated in the period before the OHSA and seven in the three year period following. Both of the earlier files arose out of requests from employers. In all they produced 133 issues of concern, around half of them having to do with machine guarding, and nearly another quarter involving issues of access or egress. Fire-fighting and ventilation matters accounted for the vast majority of the remainder. In one of the two cases, the issues arising were dealt with by verbal requirements and the file recorded the whole matter as satisfactorily resolved. In the other case, that of an educational institution, the outcome is unclear since the 110 issues dealt with by way of written notification were left to the safety officer to follow-up.

The seven post OHSA files falling in this category arose out of notification from occupiers or asbestos removalists in relation to asbestos issues. In two instances an

inspector merely observed or approved removal of the material; in another four instances written notification of requirements under the Asbestos Regulations was resorted to, while the final case was dealt with by use of s.40(2). In four of the cases involving issues of concern, satisfactory resolution was recorded, while the outcome in the remaining case was unclear.

3.4 Enforcement Processes: Non-File Contact

As reported in Chapter 2 of this report, the project team went to considerable lengths to map out the profile of the non-file enforcement activities undertaken by the agency in question. This was deemed necessary in order to avoid presenting a picture which, based solely on file contacts, would neglect a lot of the more 'humdrum', though nonetheless important enforcement work which has taken place both before and after the passage of the 1985 Act. In this context, two additional research strategies were implemented. In the absence of the hoped for computerised record, we retrieved documentary evidence about routine requirements, hazard control and complaint contacts not warranting file generation, on the one hand, and about attendance at Provisional Improvement Notice disputes and Work Cessations on the other.

3.4.1 Routine Requirements, Complaints and Hazard Controls

As indicated at 2.3.1, above, we collected documentary data from four regions in relation to enforcement activities involving what were classified as routine requirements, complaints and hazard control investigations. These contacts, it should be emphasised, involved matters which, in each of the respective categories, were not deemed appropriate or serious enough for the opening of a registered file. In all, there were 434 contacts of these kinds, distributed as shown in Table 2.12, above. Since some 84%, 85% and 91%

respectively of the contacts in these categories involved factories, the analysis which follows is not broken down by type of premises, though it should be noted, once again, how insignificantly non-factory premises featured in these types of enforcement processes (see Tables 2.14, 2.15 and 2.16, above).

Turning first to 'routine requirements', verbal or written requirements arising out of routine inspection activity where nothing warranting the 'raising' of a file was found, 212 sets of documents were recovered. These documents embraced 342 blocs of issues, and they were distributed by type and Act as shown in Table 3.20.

TABLE 3.20

DISTRIBUTION OF BLOCS OF NON-FILE ROUTINE REQUIREMENTS CONTACT ISSUES BY TYPE AND ACT@

Nature of Issues	Pre 1985 Act		Post 1985 Act		
	No	%	No	%	TOTAL
Machinery Guarding	47	72.3	167	60.3	214
Flammable Substances/ Spray Painting etc	6	9.2	29	10.5	35
Fumes/Ventilation etc.	2	3.1	9	3.2	11
Amenities/ Housekeeping etc.	4	6.2	18	6.5	22
Protective Equipment	1	1.5	9	3.2	10
Access/Egress	2	3.1	13	4.7	15
Other	3	4.6	32	11.6	35
	65	100.0	277	100.0	342

@ It will be recalled from Chapter 2 that because of differentials in the period of document retention between Regions, no set time-span is covered by these documents.

What is reflected immediately in the above table is a general change which took place in the wake of the new legislation. Just as overall file generation for factories was seen to drop in the post-1985 period (see Chapter 2, above), so this is matched now by a jump in the raw number of issue blocs being processed without raising a file in the much shorter post OHSA period covered by the research. This applies to every category of issue and is a pattern which, as we shall see, is repeated for the two other types of routine non-file enforcement processes. The explanation proferred by one departmental official for this pronounced trend, and for the overall drop in file generation, was that after the 1985 Act was implemented and particularly after regionalisation, it became agreed policy that if an Improvement or Prohibition Notice had been issued, there was no need to open a file. In the earlier period, however, instructions required that where requirements had not been met after three visits, consideration should be given to preparation of a Breach Report, not to mention the 'raising' of a file (M.S. 2.2; M 19.1; M.S. 12).

With reference to the second of these propositions, some scepticism can perhaps be justified on the grounds that around 30% of these pre-Act routine non-file matters managed to drag out beyond three visits without a file being opened. With regard to the first, whether or not the 'slack' in the system can be accounted for by the use of Notices remains to be seen, though the extent of their utilisation in the other contexts already covered in this chapter scarcely gives cause for optimism.

This obvious trend apart, Table 3.20 once again exhibits the same, and by now totally predictable, characteristic of domination by machinery guarding issues in both periods covered by the research. The same feature becomes even more salient when the total spread of individual issues is considered. Out of 165 pre OHSA issues raised by routine non-file contact, over 88% involved machinery guarding; of the 561 post OHSA

issues possibly reflecting the shift away from file generation, 88% also fell in the same category.

When the focus shifts to the final enforcement outcome in relation to these issues, (Table 3.21), the same impression of 'plus in change, plus c'est la mème chose' becomes even more vivid. Whereas over 90% of the blocs of issues being dealt with by verbal requirements in the pre-reform era is perhaps to be expected, the fact that over three-quarters of them are dealt with in this way, after passage of the 1985 Act, is not. Moreover, the mere 12% and 5% use of Improvement and Prohibition Notices in the post-Act period corresponds no more fully with the above explanation for the drop in file generation than it does with the Ministerial Guidelines pertaining to how 'generally speaking' compliance with the 1985 Act is to be achieved.

TABLE 3.21

ENFORCEMENT OUTCOMES: NON-FILE ROUTINE REQUIREMENTS

Enforcement Outcome	Pre 1985 Act		Post 1985 Act	
	No	%	No	%
Verbal Requirements	59	90.8	212	76.5
Written Notification of Requirements	2	3.1	17	6.1
Written Directions	3	4.6	N/A	-
Improvement Notice	N/A	-	32	11.6
Prohibition Notice	N/A	-	13	4.7
Other	1	1.5	3	1.1
	65	100.0	277	100.0

As shown in Table 2.15, above, documentary evidence pertaining to 74 complaints which failed to generate files was recovered. Nearly 44% of these complaints were anonymous, while 34% came identifiably from employees or their relatives; only 4 definitely

came from union sources and only 3 from health and safety representatives: 18 emanated from the period before the 1985 Act and 56 from the post-Act period. Of the 18 pre-Act complaints, 3 were found to have been unsubstantiated, outside the Department's jurisdiction or already taken care of. In the post-Act sample, 24 of the complaints fell in one or other of these categories. Thus, we are left with 15 pre-Act and 32 post-Act complaints to which it was held there was some substance falling within departmental jurisdiction. These 'justified' complaints produced 88 blocs of issues requiring action, as shown in Table 3.22.

TABLE 3.22

DISTRIBUTION OF BLOCS OF COMPLAINT ISSUES BY TYPE AND ACT

Nature of Issues	Pre 1985 Act		Post 1985 Act	
	No	%	No	%
Machinery Guarding	4	14.8	11	18.0
Spray Painting/ Flammable Substances etc.	3	11.1	3	4.9
Fumes/Ventilation etc.	6	22.2	7	11.5
Amenities/ Housekeeping etc.	8	29.6	15	24.6
Protective Equipment	0	-	3	4.9
Access/Egress	2	7.4	7	11.5
Miscellaneous	4	14.8	15	24.6
	27	99.9*	61	100.0

* Figures rounded to one decimal place

Once again, it must be emphasised, great caution should be used in the interpretation of these figures. This said, however, it is interesting to note how, once more, non-file contacts thrown up by use of the same sampling fractions within, even if not across regions, should yield so many more non-file contacts in the post OHSA period. Equally worthy of note is the fact that although machinery guarding matters continue to represent

a significant percentage of the total in both periods, this area of occupational health and safety concern is substantially overtaken by general issues pertaining to amenities and housekeeping etc. when the triggering agent is complaint. Not surprisingly, the same pattern was apparent in the nature of the complaints originally lodged, whether substantiated or not, general conditions complaints exceeding guarding complaints by some 17% and 30% in the pre- and post-OHSA periods respectively.

What this means is not entirely clear. Certainly, it does not mean that in any objective sense the Department's preoccupation with or engulfment by machinery guarding issues is necessarily misplaced. What it does indicate, however, is a clear gap between the nature of the matters which, rightly or wrongly, concern the Department on the one hand, and those which concern those who were moved to complain, on the other. Nor, it can be assumed, would the complainants be totally enthralled by the enforcement response provoked by their intervention. As can be seen from Table 3.23, all of the pre-OHSA blocs of issues requiring attention, largely a euphemism for contravention, were dealt with by verbal requirements. In the post-Act period, this pattern changes somewhat, but not, it must be said again, towards the use of Notices as the major enforcement response. Only something around 12% of responses fell in this category, while verbal and written requirements accounted for nearly 79%.

TABLE 3.23

ENFORCEMENT OUTCOMES: NON-FILE COMPLAINTS BY BLOC AND ACT

Enforcement Outcome	Pre 1985 Act		Post 1985 Act		
	No	%	No	%	Total
Verbal Requirements	27	100	38	62.3	65
Written Notification of Requirements	-	-	10	16.4	10
Improvement Notice	-	-	7	11.5	7
Other	-	-	6	9.8	6
	27	100	61	100.0	88

Accidents which did not generate files were classified by the Department and its predecessors as 'hazard controls'. As indicated in Table 2.13, above, 148 sets of documents pertaining to such matters were retrieved from the four regions whose retained materials were sampled. In 73 of these instances, no issues deemed to require departmental attention arose, leaving 75 cases where such issues did arise. These cases generated 18 blocs of pre-OHSA issues and 67 blocs of post-OHSA issues, involving 20 and 85 individual issues respectively. The distribution of issue blocs by type and Act is as shown in Table 3.24.

TABLE 3.24

DISTRIBUTION OF BLOCS OF HAZARD CONTROL ISSUES BY TYPE AND ACT

Nature of Issues	Pre 1985 Act		Post 1985 Act	
	No	%	No	%
Machinery Guarding	11	61.1	41	61.2
Inadequate Instruction /Supervision	2	11.1	3	4.5
Other Guarding	1	5.6	3	4.5
Machinery Cleaning	-	-	5	7.5
Miscellaneous	4	22.2	15	22.4
	18	100.0	67	100.1*

* Figures rounded to one decimal place

Once again the similarity across the two periods is almost uncanny, with machinery guarding winning the race for first place by a very long head. So too, as can be seen from Table 3.25, the pattern of enforcement in relation to hazard controls very much took the same shape as has already been described in connection with the other types of contact covered in this chapter. While Improvement and Prohibition Notices indeed come onto the scene after 1985, they by no means became the 'principal instruments' used by the Department for securing compliance. That distinction continued to rest firmly with verbal requirements which, in the post OHSA period, still accounted for nearly 69% of enforcement responses relating to documented contacts retrieved during the research.

TABLE 3.25

ENFORCEMENT OUTCOMES: HAZARD CONTROL ISSUE BLOCS BY ACT

Enforcement Outcome	Pre 1985 Act		Post 1985 Act	
	No	%	No	%
Verbal Requirements	14	77.8	46	68.7
Written Notification of Requirements	-	-	2	3.0
Written Directions	3	16.7	N/A	-
Improvement Notices	N/A		11	16.4
Prohibition Notices	N/A		2	3.0
*Other	@1	5.6	@6	9.0
	18	100.1*	67	100.1*

@ In both the pre-Act and post-Act periods one case was dealt with by verbal advice; in the later period 5 cases subsequently resulted in files being raised.

* Figures rounded to one decimal place

3.4.2 Non-File Enforcement Processes: Disputes and Work Cessations

As reported in Chapter 2, we visited four regions to supplement our expectedly meagre data on disputes, principally over Provisional Improvement Notices, and Work Cessations. In all, details pertaining to 100 disputes were retrieved, the nature of 4 being unclear and a further 2 being concerned with designated workgroups under s. 29 of the 1985 Act. When these are set aside, we are left with 64 disputes involving Provisional Improvement Notices and 30 cases in which Inspectors were called to Work Cessations. Once again, it should be remembered that the data presented here very much represents what was actually retrievable and should therefore be treated with appropriate caution. Once again too, the lack of systematic information presented a major problem, not only for the research project but arguably for the operation of the system itself. The latter problem

may or may not have been ameliorated by improvements to the INSPIRE computer system which have been made since the cut-off point for this project passed.

Disputes involving Provisional Improvement Notices could arise in a number of ways. The most obvious of these is, of course, the situation where an employer exercises her or his right under s.35 of the 1985 Act, to require the attendance of an Inspector within seven days of such a Notice having been issued for purposes of adjudicating upon its validity. Other disputes revolving around such Notices could occur, however, and were dealt with by the Inspectors in the same way as s.35 disputes. Health and Safety Representatives, for example, might call in the Inspector because a Provisional Improvement Notice was allegedly not being complied with, and particularly in the somewhat confused early days of the Act, employers might involve the Inspectors in a dispute, even though they had not availed themselves of the processes provided by s.35.

Table 3.26 shows the distribution of disputes involving Provisional Improvement Notices according to the type of workplace involved and the initiating source of the Department's involvement. As one might expect, given the provisions of s.35, most requests for or requirements of attendance emanated from management. Nor does there appear to be much difference between the factory and non-factory sectors in this respect, around two-thirds of the retrieved dispute cases being triggered by management in both instances. Health and Safety Representatives were the other main source of Inspector involvement in both factory and non-factory disputes involving Provisional Improvement Notices, 11 out of 16 of the contacts initiated by them involving claims that Notices were not being complied with.

TABLE 3.26

DISPUTES INVOLVING PINS - BY TYPE OF WORKPLACE AND INITIATOR

Initiating Source	Factory		Non-Factory		
	No	%	No	%	Total
Management	12	66.7	30	65.2	42
Health & Safety Representative	4	22.2	12	26.1	16
Union	-	-	2	4.3	2
Not Clear	2	11.1	2	4.3	4
	18	100.0	46	99.9*	64

* Figures rounded to one decimal place.

Under s.35 of the 1985 Act, an Inspector who is required to attend a workplace in connection with a Provisional Improvement Notice dispute may affirm, modify or cancel the Notice. Although, as already pointed out, a number of the disputes being dealt with here did not specifically arise under s.35, it is appropriate to use the framework provided by the latter as a basis for analysing the outcome of departmental involvement in disputation involving Provisional Improvement Notices. The relevant data is shown in Table 3.27.

TABLE 3.27

OUTCOME OF DEPARTMENTAL INVOLVEMENT IN DISPUTES INVOLVING PINS

Adjudication	Factory		Non-Factory		Total	
	No	%	No	%	No	%
Affirmed	7	38.9	21	45.7	28	43.8
Modified	3	16.7	4	8.7	7	10.9
Cancelled	5	27.8	14	30.4	19	29.7
Notice Withdrawn	3	16.7	3	6.5	6	9.4
Not Clear	-	-	4	8.7	4	6.3
	18	100.1*	46	100.0	64	100.1*

* Figures rounded to one decimal place.

What immediately stands out here is that in well over half of the disputes, the Inspectors either affirmed the Notice, or affirmed it with some modification. (Interestingly, INSPIRE data covering a fifteen month period from January 1988 to March 1989, produces figures of over 67% in this respect). Conversely, of course, it can be said that in something approaching 30% of the disputes they felt compelled to cancel the notice. On closer scrutiny, however, these 'cancellations' do not confirm the hypothesis that Provisional Improvement Notices are promiscuously employed. In 5 of the 19 cases in question, cancellation was on the grounds that compliance had already taken place or been agreed to; in 4 instances, the Provisional Improvement Notice was indeed cancelled but replaced by an Improvement Notice issued under the Inspector's own authority; another 4 Provisional Improvement Notices were cancelled on the basis of legal technicalities; verbal negotiations or industrial relations processes were deemed more appropriate ways of proceeding in another 4 cases. In only 2 cases was cancellation made on the grounds that the Notice had not been justified in the first instance.

Under s.26 of the 1985 Act, where an issue arises which involves an immediate threat to any person and is of a nature unsuitable for resolution by agreed procedures, then the Health and Safety Representative, the employer, or both may direct that work shall cease. Where Work Cessation has been directed, either party may require attendance by the Inspectorate of the Department of Labour. An Inspector must attend as soon as possible.

Only three of the four Regions visited in the course of this part of the research yielded instances of Work Cessations to which Inspectors had been summoned. In all,

documentation pertaining to 30 such cases of Work Cessation were retrieved, and the attendance of the Inspectorate was triggered as shown in Table 3.28.

TABLE 3.28

WORK CESSATIONS BY TYPE OF WORKPLACE AND INITIATOR*

Initiating Source	Factory	Non-Factory	Total
Management	12	3	15
Health & Safety Representative	-	1	1
Union	3	1	4
Joint	1	-	1
Not Clear	6	3	9
	22	8	30

* In three instances, work cessation was not technically a s.26 matter. In two cases work-bans were involved while one further case arose out of failure to comply with a PIN.

While paucity of cases here renders use of measures such as percentages quite inappropriate, it is clear that in the cases where the point of initiation is beyond dispute, management, as one would expect, predominates. As for the outcome of these, the most contentious disputes, it is interesting to note that, as Table 3.29 shows, well over 50% of the Work Cessations were upheld, and this not allowing for the considerable and significantly high number of cases where the outcome was unclear. Again, and contrary to some pre-legislation predictions, resort to Work Cessation does not appear to have been capricious. One interesting difference with the pattern relating to Provisional Improvement Notice disputes should be noted however; whereas the latter predominantly had to do with non-factory premises, the pattern is reversed when we come to Work Cessations. Factory premises were much more likely to generate disputes involving Work Cessation, while non-factory premises were more likely to produce disputes involving Provisional Improvement

Notices. Once again, it may be that this difference reflects variation in the pattern of industrial relations between the two sectors of the economy.

TABLE 3.29

OUTCOME OF WORK CESSATION DISPUTES BY TYPE OF PREMISES

Outcome	Factory	Non-Factory	Total
Upheld	11	7	18
Dismissed	4	1	5
Unclear	7	-	7
	22	8	30

One or two final comments about these disputes involving Provisional Improvement Notices and Work Cessations are warranted. First, and as with complaints, the role of machinery guarding in these externally generated contacts is minimal. Only 3 issues of this kind were at stake in the Work Cessation cases recovered, and only 5 in the cases involving disputes over Provisional Improvement Notices. On the other hand, issues involving chemicals and asbestos featured more prominently in the Work Cessation category, 5 and 6 cases respectively, while general amenities, safety standards in general and, again, chemicals easily outstripped machinery guarding in the context of disputes over Provisional Improvement Notices (17, 9 and 9). Once again, there is a hint here of the possibility that the issues which preoccupy the Inspectors are not those which concern the people immediately involved. Again, it should be emphasised that this does not mean that in any objective sense the Inspectorate is necessarily misguided in its emphasis, though many contemporary Occupational Health and Safety practitioners would indeed question it, but it does perhaps indicate an interesting gap between its concerns as indicated earlier in this chapter and those for whose health and safety it carries responsibility.

Apart from adjudicating in disputes, Inspectors could of course take various forms of enforcement action, again occasionally involving more than one response where a number of different issues are involved. In Table 3.30, the distribution of these responses for disputed Provisional Improvement Notices and Work Cessations, respectively, is shown.

TABLE 3.30

ENFORCEMENT RESPONSES: DISPUTES INVOLVING PINS AND WORK CESSATIONS

Enforcement Response	Provisional Improvement Notice Disputes		Work Cessations	
	No	%	No	%
No Further Action	3	4.7	2	6.7
Advised	-		1	3.3
Verbal Negotiations	19	29.7	18	60.0
Section 40(2)	12	18.8	4	13.3
Verbal Instructions	3	4.7	1	3.3
Letters	3	4.7		
Improvement Notice	16	25.0	2	6.7
Prohibition Notice	2	3.1	1	3.3
Not Clear	6	9.4	1	3.3
	64	100.1*	30	99.9*

* Figures rounded to one decimal place.

Here, an interesting pattern emerges. In the case of disputes involving Provisional Improvement Notices, something approaching 30% of enforcement responses entailed verbal negotiations, and another 25% the issuing of Improvement Notices by Inspectors. In the more extreme situation of Work Cessation, however, no less than 60% of responses comprised verbal negotiations, while only some 7% involved Improvement Notices. Prohibition Notices featured only in a minor role in both types of situation. Significantly in the context of a study focused on law in transition, s.40(2) - the requirement that Inspectors supply information to employers and representatives about observations made and actions

proposed as a result of visits - already constituted more than 18% of the responses to situations involving Provisional Improvement Notice disputes and 13% in the context of Work Cessations. Overall, it is clear that in this transitional period, the Inspectors did not grasp the strategy of Notices, the Minister's principal envisaged means of securing compliance, with any great degree of alacrity as far as situations of disputation were concerned. Even later in the piece, and despite all the qualifications we have been urged to enter, it is interesting to note that according to INSPIRE records, during the 15 months between 1st January 1988 and 31st March 1989, some 22% of s.35 Provisional Improvement Notice disputes and around 30% of arbitrations on Work Cessations took the form of s.40(2) written observations.

3.5 The Logic of Enforcement

What kind of reasoning lies behind the enforcement decisions and practices which have been described in this chapter? Examination of files revealed that the most consistent and explicit statements of the reasons for making particular recommendations were to be found in accident files and in those files where the question of prosecution was canvassed. Since, as we have already seen, the vast majority of prosecutions arise out of accidents anyway, it was decided that more detailed analysis of a sub-sample of accident files would go some way towards mapping out the 'logic in use' of the enforcement process. Accordingly 100 randomly chosen factory accident files from the pre-OHSA period and 45 from the post-Act period were subjected to closer scrutiny. The three non-factory accident files from the post-Act period were also examined, and these will be discussed separately at appropriate points.

3.5.1 General Profile

When reporting on her or his investigation of an accident, an Inspector almost inevitably would cite more than one reason for the course of enforcement *action proposed*. In consequence, the number of reasons extracted from the accident files considerably exceeds the number of accident files examined. By looking at the nature and distribution of these reasons, regardless of the action being proposed, we can gain a general idea of the sorts of factors which weigh with Inspectors in formulating their initial enforcement responses. Table 3.31 shows the initial enforcement reasons stated in the course of initial investigations into 135 accidents.

TABLE 3.31

Enforcement Reasons Stated After Initial Investigation of 135@ Accident Files

Nature of Reason	Pre-Act Accidents		Post-Act Accidents	
	No	%	No	%
Safety Record	66	29.2	33	29.2
General Standard of Machine Guarding	47	20.8	10	8.8
Timely Action etc.	42	18.6	14	12.4
Role of the Injured Person	13	5.8	7	6.2
Satisfactory Explanation etc.	6	2.7	1	0.9
Factual Statement	23	10.2	16	14.2
Evidentiary Matters	4	1.8	3	2.6
HSR and HSC		N/A	12	10.6
Miscellaneous	25	11.1	17	15.0
	226	100.2*	113	99.9

@ In 10 files no reasons for recommendations made were offered at any stage.

* Figures rounded to one decimal place.

In many ways the pattern revealed by this table is not surprising. Thus, for example, the salience in the Inspectors' thinking of the employers' safety record and their general standard of machine guarding is fully to be expected. For one thing, attention to such factors is institutionally required in the investigation form which asks for 'relevant information which would assist in determining action to be taken e.g. state of general guarding, safety attitude, previous history etc.'. Moreover, as previous studies have shown, even where legal liability is strict, Inspectors will look to whether performance is good or bad in these kinds of area for cues to what might almost be described as corporate mens rea as part of the decision-making process (Carson, 1970). Thus comments about a poor record or general standard will generally be used to bolster an argument for firm action, while a good record or standard will be cited in support of a more lenient approach. So too, the speed of employers' responses and the cooperativeness or otherwise of their attitude are frequently taken into account. Occasional recommendations for firm enforcement reaction 'despite' a good safety record, good general guarding standards or a speedy response to the problem behind the accident only serve to underline the importance of these factors in the enforcement reasoning of Inspectors. Concomitant with all of this is the observation that bald factual statements to the effect that a machine was unguarded, was subject to specific regulations, or that a breach had occurred were relatively infrequent. Similarly, the lack of concern with matters evidentiary is consistent with an organisation ungeared to the likelihood of court proceedings, as it is with the difficulties which arose after the 1985 Act when Inspectors claimed that they were being required to treat the issuing of Notices as, in effect, the first step in a process which might end in court.

Only two features of Table 3.31 are in any way surprising. One is the relative infrequency of references to the part injured persons are thought to have played in acquiring their injuries, and the other is the infrequency of allusion to the existence of Health and Safety Representatives and Health and Safety Committees in the period after the 1985 Act. On the first of these counts, the common belief that enforcement processes are heavily permeated by a 'blame the victim' ideology does not seem to be substantiated, or not at least as far as the explicit and quantifiable evidence pertaining to those processes is concerned. With reference to the second issue, with an Act so heavily committed to the idea of self-regulation, one might have expected attention to progress with putting in place the basic mechanisms for achieving that objective to be taken into account as a cue to general attitudes. Again, however, it must be remembered that we are looking here at a transitional period.

Tying enforcement reasoning to the actual types of recommendation involved is a more complex affair, but in Tables 3.32 and 3.33 the broad profile with regard to initial enforcement responses is set out. In the light of what has gone before, again there are few surprises. To begin with, no further action tops the rank order in both periods by a substantial margin. Moreover, if the detailed reasons behind this priority are further broken down, it becomes apparent that allusion to general safety record, to general standards of guarding, the latter particularly in the pre-OHSA period, and to timely responses and cooperative attitudes etc. are important. Appropriately enough, the references in both of the first two instances are the positive merits of the record in these closely interwoven respects. Much the same pattern prevails if the substantial number of reasons for making no recommendation are analysed for the pre-OHSA period, though it is notable how this kind of response tends to drop away after the 1985 Act.

TABLE 3.52

INITIAL ENFORCEMENT REASONS ACCORDING TO TYPE OF RECOMMENDATION INVOLVED: PRE 1985*

REASONS STATED	TYPE OF RECOMMENDATION INVOLVED								
	Prosecution	Submit Breach Report	Breach Report but no Prosecution	Warn	Verbal Requirements	No Further Action	No Recommendation	Other	Total
Safety Record	4	4	4	5	7	18	21	3	66
General Standard of Machine Guarding	2	2	2	4	6	14	13	3	46
Timely Action Etc.	1	1	7	7	6	16	5		43
Role of Injured Person	-	-	-	2	1	6	4		13
Satisfactory Explanation		1	1	1			2		5
Factual Statement	2	-		2	1	12	4		21
Evidentiary Matters	1	-		1		1	1		4
Miscellaneous	2	3	1	5	4	5	7	1	28
TOTAL	12	11	15	27	25	72	57	7	226

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TABLE 3.33

INITIAL ENFORCEMENT REASONS ACCORDING TO TYPE OF RECOMMENDATION INVOLVED: POST 1985*

REASONS STATED	TYPE OF RECOMMENDATION INVOLVED							
	Prosecution	Breach Report but no Prosecution	Warn	Improvement Notice	Verbal	No Further Action	No Recommendation	Total
Safety Record	3	3	5	3	4	10	5	33
General Standard of Guarding		2	3	1	-	3	1	10
Timely Action etc.		2	3	-	-	6	3	14
Role of Injured Person	1	1	1	-	1	3	-	7
Satisfactory Explanation		-	-	-	-	-	-	-
Factual Statement	6	-	-	1	1	7	1	16
Evidentiary Matters		1	-	-	-	2	-	3
HSR and HSCs	1	2	6	-	1	1	1	12
Miscellaneous	6	1	1	1	2	6	1	18
TOTAL	17	12	19	6	9	38	12	113

* All three non-factory accident files were also examined. In one instance, no further action was proposed because general guarding was good; in another the same recommendation was made because there was no breach involved; the third recommendation was the same, the case being said to fall outside ministerial guidelines for prosecution.

More interesting, though scarcely less surprising, is the fact that where, towards the other end of the scale, the recommendation came close to, but ultimately backed off from prosecution, the same pattern prevailed. Thus, where Breach Reports (a necessary prerequisite to prosecution) were or were required to be recommended, but prosecution was not being proposed, in both periods good records and cooperative attitudes dominated the expressed reasoning involved. In the earlier period, no fewer than 13 out of 15 reasons for this form of recommendation were positive, while 3 out of 4 references to general and guarding standards, and obviously both of the reasons associated with timely action etc. fell in this category during the later period. Equally, if we look at warnings, all 5 references to safety record in the pre-OHSA data were positive citations in support of a mitigated response, as were 3 of the 4 references to guarding standards, and all of the 7 mentions of timely action etc., accounting in all for 15 out of 27 reasons offered in justification of warning. Post-Act warnings followed the same pattern. All of the 5 references to safety records in this connection were positive as were the 3 mentions of guarding standards and, of course, all of the allusions to timely action etc., 11 out of 19 reasons for warning thereby being accounted for.

When it comes to prosecution itself, not surprisingly negative comments on attitudes, standards and record come more into their own. Out of the 12 reasons adduced for taking this line of action in the pre-OHSA period, 4 were of this kind, while a further 3 amounted to bald factual statements about breaches, regulated machines etc. In 3 instances, however, reference was made to positive features of performance which had to be set aside, so to speak, in order to justify legal action. In the post-Act period only one recorded comment fell in this latter category, while 5 out of the 17 reasons involved were unequivocally negative and a further 6 straightforward statements of fact.

3.5.2 The Logic Behind Changed Enforcement Strategies

Initial responses and the reasons advanced for their adoption are not, of course, the whole story. At some subsequent stage in the biography of an issue, recommendations might change. A superior might call for sterner or more lenient action; previously unnoticed evidentiary problems might emerge or, on occasion, the agency might simply run out of time in the legal sense for initiating proceedings. Indeed, as it turned out, so wide was the range of reasons advanced for changing recommendations, that tabular presentation is inappropriate. This is not to say, however, that there was no pattern whatsoever, and to map out what this was, the pre- and post-OHSA reasoning behind changed recommendation will be dealt with separately.

In the pre-OHSA period, 80 reasons were advanced for changing original recommendations. As already indicated, while the reasons in question were very varied there was still some pattern. To begin with, around 70% of them pertained to just two types of proposed change - suggestions that the enforcement response should alter to either warning or no further action, 36 and 21 respectively. While the second of these categories self-evidently involved a reduction in the severity of response, moreover, it seems highly probable that movement in the same direction was a major component in the arguments for switching to the use of warnings. Thus, out of the 36 reasons advanced in this respect, 11 referred to a good, very good or excellent safety record, 5 to timely or cooperative action by the employer, 3 to the role of the injured person in causing the accident, and 2 each to the employers' belief that they were complying, to a generally good standard of guarding and to the fact that the Department had run out of time for taking legal action. Taken together, these cited factors account for nearly 70% of the arguments put forward for changing to warning. As for proposed switches to no further action, the most commonly advanced reason was that the legislation was either now being complied

with or always had been (5 cases), followed by timely action and cooperative attitude (4 cases), a good or very good safety record (3 cases) and the injured person's role (2 cases).

While many reasoned proposals for changed responses in the pre-reform era do seem to reflect a tendency to reduce rather than strengthen the original recommendation, this was not always the case. Most obviously, where the argument was in favour of a change to prosecution, a strengthening of resolve was clearly in mind, and although few in number (8) these reasons are worth elucidation. Thus, in 3 instances the reason put forward simply amounted to a statement that the machine involved in the action was a regulated one or that regulation had been breached. Severity of injury was cited in one instance, as were a company's resources, the fact of a previous conviction, and the unhappy logic (from the offender's point of view) which ran that the action subsequently taken showed the machine could have been guarded in the first place. The two final cases involved arguments about the circumstances leading to the accident.

When the focus shifts to reasons for proposed changes to enforcement responses in the post-OHSA period, the numbers involved are, of course, much smaller. In all, only 26 reasons pertaining to proposed changes were put forward. Here, the largest category was a series of 9 cases where arguments were advanced in support of no prosecution, despite the preparation of a Breach Report. Not surprisingly, evidentiary problems were the issue in 4 such cases, while running out of time again cropped up twice. Reference to a good safety record and to difficulty in foreseeing an accident completes the series, with the exception of one case where the nature of the argument is unclear.

Proposals for no further action produced the next longest series of stated reasons for change in the sampled files from the post-OHSA period. Here again, the pattern is familiar. In 2 cases the Department was said to have run out of time, and the prompt

response of employers was quoted in another 2 instances. Departmental policy, the minor nature of the injury, the injured person's alleged contributory role, and the fact that the legislation was, or was now complied with, were the factors alluded to in the remaining 4 cases. Only 3 instances of argument in favour of a change to use of warning were encountered, timely response, difficulty in foreseeing an accident and a straightforward statement that prosecution was inappropriate being the reasons put forward. Only 2 cases of reasons for action being stepped up to the extent of prosecution were discovered. In one case severity of injury was cited; in the other, the employer again fell victim to the Catch 22 of having subsequently taken action which showed it could have been taken before the accident occurred.

REFERENCES

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CHAPTER 4

The Inspectorate In Transition: A Qualitative Assessment

In Chapter I, the extensive utilisation of qualitative methods in the course of this project was outlined. Presentation of the entire wealth of data gathered by these means would justify production of a separate and lengthy report in its own right, and indeed it is envisaged that a book based largely on this aspect of the research will be one of the major outcomes of the project. In this and the following chapter, however, qualitative data will be used economically by way of exemplification and illustration, in order to accomplish two things: the fleshing out of points thrown up by the quantitative analysis presented in preceding chapters, and the discussion of additional issues which, by their very nature, are less amenable to investigation by quantitative methods.

4.1 The Information Problem

The Department of Labour inherited, and this project very early encountered, an information system which in the investigators' experience was almost unparalleled in its inadequacy. Selecting a random sample of factories, for example, became a protracted affair because officials, through no particular fault of their own, were not sufficiently familiar with their basic data base to advise on how representativeness and sufficiency in numbers of contacts might be achieved. Thereafter, drawing the files pertaining to sampled premises was even more cumbersome. Manual searches of two card systems had to be undertaken in relation to each sampled factory, and there were followed by further manual searches of a computer printout which recorded contacts under half a dozen or so different categories. After that the files in question had to be physically located. Significantly, there was no

single file giving the history of all dealings with each set of premises, an exhaustive search of chronologically organised files having therefore to be undertaken in order to assemble the files needed for purposes of the research. As we have already seen, moreover, records of many non-file contacts with premises were not always maintained in a uniform and systematic fashion across different areas.

If this all created great difficulty from a research point of view, it also of course posed immense problems for the implementation of the new system following the 1985 Act. Indeed, the difficulties in this respect were recognised even before the Act came into effect. A report prepared within what was then the Department of Employment and Industrial Affairs in June 1985 stated:

> 'The present OHS information systems operating in the DEIA have been inherited from the past. They are mainly manual and grossly inefficient. They provide only a minimal capacity to review and audit the Inspectorate's activities, while the generation of data reflecting the levels of occupational injuries and disease is virtually non existent' (DEIA, 1985,39).

Not surprisingly, the proposed solutions to these basic deficiencies in the information system involved computerisation. More specifically, it was suggested that OHS Administration, as it was then known, should establish 'a comprehensive and integrated OHS Data Base' which should handle all licensing and registration arrangements, all investigation and inspection reports, all available data on hazards and all enforcement activity. The proposed system was to be linked to other data bases under development, particularly those being established by the Accident Compensation Commission (ACC) and the Victorian Accident Rehabilitation Council. Inevitably, the assistance of outside consultants was proposed, one Canadian company being originally nominated in 1985 and another Canadian company subsequently being engaged in 1986.

From the point of view of the present research, the proposals for improving information resources which are of most relevance were those involving investigation,

inspection and enforcement, and here, it must be said, the authorities initially shot themselves very substantially in the foot. In interviews conducted with Inspectors across the State during 1988, the Department's efforts in this respect appeared to become almost a symbolic focus for resentment of and even resistance to the new régime. Inevitably, of course, some interviewees simply admitted honestly that they found it difficult to adjust to the idea of entering data of their activities etc. onto a computer as a routine part of their employment. Thus one of the older Inspectors readily expressed his annoyance that anyone would presume 'to make me a keyboard operator after all these years'. He had not, he continued, 'adjusted well to that'. At the other end of the experience scale, one of the newer generation of Inspectors expressed his feeling of insult that management would even consider that people like himself should do clerical work rather than being out in the field. The change of work practices entailed in operating what was known at that stage as the Establishment Inspection Record, more affectionately known as Fred to some Inspectors, was not his idea of what he had been employed to do.

Such responses are, perhaps, perfectly understandable. Others, however, appeared to betoken a much more basic sense of disillusionment and resentment. At one extreme, EIR was seen as a means of surveillance. Thus one very experienced Inspector who himself could see the benefits, nonetheless reported that 'Advisors are being made accountable ..... and this system' (whether or not it would highlight their activities) 'they see ..... as maybe a threat because it is a change'. References in the original 1985 document to minimal capacity to review and audit the Inspectorate's activities can scarcely have helped in this context (DEIA, 1985, 39). Certainly, they can have done little to allay the fears of one Inspector, a relatively recent appointment at the time of his interview. People did feel a kind of Big Brother surveillance as a consequence of EIR, he agreed, adding:

> ' ..... because they can press a button and have a look at your last month's work, just by pressing a button. It's just - not that that's a problem as such - but to have in the back of your mind that someone's watching you, or the potential's there for someone to watch you'.

Comments such as these were by no means uncommon and were shared to some degree even by those who recognised the need for an improved information system and maybe even more accountability. 'I think if they can do what I expect of it' said another Inspector, 'it will be pretty good'. But, he continued, 'if they are going to sort of draw - sort of compare me with someone somewhere else and say X (has) done 12 hours, say 4 visits a day, and Joe Blow over at Y is doing a dozen visits a day ..... if they are going to draw that sort of information out of it, I don't like it .....'. While some, like one former senior member of the Department, may see such concerns as evidence of 'paranoia about their autonomy, their independence from the centre', a more plausible account would be one which suggested that a Department which, arguably more than any other should have been sensitive to the impact of its probably more than justified strategies upon its personnel, significantly failed to carry the Inspectors with it in attempting to create an information system appropriate to the latter part of the 20th Century. Indeed, the impression was created, at least in some quarters, that surveillance and accountability - however justifiable, if argued for - comprised some sort of hidden agenda behind the programme.

Nor, according to a number of the Inspectors interviewed during the project, was there anything much positive in the actual operation of the system to persuade them that this or other equally sinister moves were not afoot. In particular, we were told time and time again that, despite a 'sales pitch' which claimed the effect would be a reduction in paperwork, EIR was consuming rather than economising upon Inspectors' time. Equally unlikely to allay fears was the claim made by many interviewees, that the system simply

did not provide the information needed by the Inspectors, (eg. the content of a Notice rather than just the fact of one having been issued), while it did provide statistics wanted by other people. Some measure of the Department's problem in this respect can be gained from the comments of one interviewee who, having asserted that EIR simply ought to be a tool for the Inspector, went on to comment that 'if it's just going to be something to gain statistics for someone else, we are going to lose interest in it'.

It would appear, however, that early attempts to improve the informational base of the Department's activities may have had an even more damaging effect during the transitional period covered by this project. As a former and fairly senior official of the Department explained, under the old system, inefficient as it may have been, the Inspectors nonetheless did have their own 'set of knowledges that they gathered on the job': 'they had their own system of taking notes, keeping diaries, and sort of referral systems which depended a lot on local knowledge'. Coupled with its integration into utilisation of Accident Compensation Commission statistics for purposes of generating a data driven programme of inspection, however, the new EIR system was perceived, at least by some, as part of an unwitting process of de-skilling. Moreover, the new data driven programmes themselves were seen as undercutting the deployment of skills accumulated over a long period of time in the course of regular systems of inspection. One very senior Inspector put it graphically when he said that if we asked him how good the Accident Compensation Commission data was, 'I would say it is fine - it tells me 67.6% or whatever of people have got soft tissue injuries, but I bloody knew that; I knew that 20 years ago because every factory I went to had the same problem, manual handling ..... '. Or again, it was claimed by one Inspector, that if the system of routine inspection had still prevailed rather than being subordinated to data driven programmes, there was a fair chance that the particularly horrendous injury which sparked off a blitz on butchers' mincing machines would not have happened in the

first place - 'if the Inspector was out there doing his routine, he visits the butcher shop at least twice a year because he's always aware of the mincer'. As a result of the blitz, he went on, 'now we are leaving the meat industry alone (and) may not get back to it for another five years'. The same sentiment, emphasising the downgrading of local and personal knowledge was expressed even more forcibly by another interviewee in more general terms:

> '..... once we've been there and done a safety audit, to a certain extent their awareness of occupational health and safety is going to be raised, their equipment, work practices and things like that will be better and we can probably leave them alone. But if you look at that in the long term it means that, to my way of thinking, for the next five years there are certain industries that are not going to get touched until we get around to them. Now I can tell you straight away places that I could go to now and find things missing because they're the scoundrels who don't like doing anything, and they do it when you are present there, you're the policeman to them you know.'

What this all seems to add up to is some less than adequate personnel management in the rectification of what were obviously major deficiencies in an antiquated and outmoded information system. As a consequence, and predictably enough, the Department encountered both passive and even active resistance to its crucial efforts designed to upgrade the data base upon which it was operating. Asked whether some officers were abusing the system, one Inspector could only say that from what he had been told this was the case. Another conceded that 'people aren't taking it seriously because they know it's not of much value, so they're not really worrying too much about what they put on the thing, as long as there's something in the slot to make it move on to the next one.' 'Don't fill it in', was another response, this time from an Inspector who regarded EIR as 'just another waste'. The extent of disillusionment among what appeared to be a significant number of Inspectors is evident in the following extract from an interview with someone who, in principle, was well disposed to the new system:

> 'I think it's getting a bit better now but it's been a long while. We've been at this Act for two and a half years or thereabouts, and we are in a bigger

> shambles than we've ever been. I reckon it's this EIR thing. I think it's a great system providing it's working properly ..... I think the whole thing could be redesigned, probably in a minimal sort of way to make it so much better.'

Once again it must be emphasised that this is a study of law in transition. As such, it should expect to encounter teething problems in the introduction of a new information system, not least because of the overtones which such a system rightly or wrongly might appear to have in terms of basic industrial relations within the organisation. This said, however, it should be emphasised that even in the piloting, as it were, of the new system, the authorities managed to antagonise and frustrate a substantial number of field operators. In so doing, they at the very least exacerbated the problems of morale which came to constitute a major obstacle to implementation of the 1985 Act and its very different philosophy from that which had gone before. Moreover, while many of the technical problems may have been overcome by the subsequent development of INSPIRE (Inspection Information Recording System), there is no doubt in the minds of the investigators that an immense amount of damage was done in the process of updating an outdated system, largely with personnel familiar with and to a large and understandable extent wedded to the latter. Nor, we would have to say, can we be entirely satisfied that even the technical difficulties have entirely been ironed out. Against an appropriately optimistic overview of the INSPIRE and other information systems produced by the Department in August 1989, 'Overview of Information Systems', we would have to set the fact that, only four or five months earlier, we were authoritatively informed that INSPIRE data was so unreliable that it should not only be used with great caution, but perhaps not even used at all! Of course, a lot of upgrading can happen in the space of four or five months, but on the basis of previous experience we feel entitled to be sceptical, at the very least. How efficient the new system which became operational in 1989 may be, is not something upon which this Report can therefore comment with any authority; it is, however, an issue which needs to be

addressed urgently on the basis of further investigations carried out by experts external to the Department itself.

4.2 The Morale Problem

In November 1988, a policy seminar based on this project was held at La Trobe University and attended by a number of senior officials from the Department of Labour. Claims that there could be a serious crisis of morale among the Department's Inspectors were strenuously denied by the Director General on the grounds that he knew these people, that he knew their morale to be high and that those who voiced discontent were just in effect pulling the legs of the investigators or 'having them on'. Apart from the extraordinary methodological assumption which asserts that employees are more likely to be open in voicing their grievances before the most senior official in their Department then they would be before disinterested interviewees who guarantee anonymity to any use of their views in a report, this response marked a strong difference of opinion over what the researchers had found to be one of the most pronounced features of their qualitative investigations. It must of course be conceded that during the year which has elapsed since the policy seminar took place, the Department may have taken steps substantially to reduce the extent of any problem. Indeed, if this is so, we would hope that the 1988 discussions played some small part in setting the process in motion. At the same time, given what appeared to us to be the extent of the problem, and being mindful of how slow institutional change on this kind of level frequently is, we think it is still relevant to map out the broad contours of the morale problem, as we saw it. The Report, therefore, does not resile from its previous position. Whatever the situation now, poor morale, while not by any means universal among the Inspectors interviewed, was nonetheless extensive and, in some cases, acute to the point of interviewees becoming quite emotional.

Reasons given for low morale were many and varied and cannot easily be placed in any order of priority. Probably central to the concerns of many of those who expressed some measure of disillusionment, however, was the feeling that a hierarchal structure within which they had been comfortable, taking their orders, seeking advice, filling their visit quotas, looking at a predictable career structure, enforcing the law by well-tried if not necessarily very effective means, and so on, was no longer quite so straightforward. Instead, a new generation of decision-makers in Melbourne was intent upon the implementation of new ideas, ideas which, although in the nature of things not always fully fledged as policy packages handed down for ready implementation, had the potential to subvert a culture of enforcement which had been built up over a period of a century. Thus, for example, Inspectors were now to assume a more prominent advisory role, although they had always acted substantially in that capacity, but with the status and perhaps the power that goes with the role of Inspector always in the background. Accustomed to the 'taken for granted' fact of managerial prerogative, they were now being required to involve worker representatives in the enforcement process, and to witness the involvement, at least on paper, of those representatives within the workplace. As already mentioned, attempts to upgrade an archaic information system were underway, without any apparent benefit to the Inspectors, at least as they saw it, thereby compounding a sense of de-skilling arising from other sources. Thus, data-driven programmes cut deep into the sense of the craftsman's skill whereby he knew where to concentrate his efforts, who could be trusted to remedy irregularities upon request and the rest of it; a new cohort of Inspectors including women and people who were bi-lingual, but neither group necessarily having the trade training of the older generation of Inspectors was being introduced; a new generation of managers who often were generalists rather than experts in occupational health and safety was brought in, again fracturing the idea of a chain of command that ran

up through and to people who knew and appreciated the nuances of a century-old enforcement culture; the idea of multi-skilling was in the air and perhaps inevitably appears to have devalued the focused skills of the past for some Inspectors. And added to all of this was formal regionalisation of the Department of Labour, in the name of service-delivery, which meant that just when the Inspectors were being bombarded with change and therefore most needed the support, persuasion and even the evangelism of the pace-setters at the centre, a structural obstacle was interposed. One of the pace-setters later recalled this aspect of the process in very colourful terms:

> 'I mean it was very much like the dogs in front of the horses in a fox-hound chase. Certainly in this issue, management at senior level people like myself ..... were so far in front of our Inspectorate that it was difficult. And when regionalisation came into the Department, it gave the Inspectorate a power base (from) which to resist that direction, and in many ways meant that management in occupational health and safety, instead of continuing to drag their workers with them, got hauled back at a rate of knots .....'

Given all of this and more, it is surprising that the morale of many established Inspectors did not take more of a beating than it did. But damage there certainly was. Thus according to one interviewee, the Department simply was not taking responsibility any more, responsibility being thrown back onto the Inspector. He could see absolutely no possibility for promotion in his region, and concluded 'I'm just that disillusioned with the whole set-up on occupational health and safety, I want out.' 'In fact', reported another, as far as his particular area was concerned, 'the people that are well qualified and have experience and everything else, are cheesed off with the Department and trying to get out, which is a bad thing.' Again, one insisted, he had no wish to 'knock' Regional Managers although he did not think any of them came from an occupational health and safety background. 'I'm just stating', he continued, 'that before, there was a central policy regarding certain things, the Chief Inspector through his people underneath him, said "thou shalt do ... " ' One old hand bitterly resented being, as he put it, 'arbitrarily drafted

somewhere' under the auspices of regionalisation. As for the shift of emphasis towards the advisory role, again it was one of the central policy makers who conceded in retrospect that, in terms of enforcement, 'it was never articulated; so the troops were left hanging, they were really rudderless and confused, and I think that's part of the morale problem .....' On the question of the effects of multi-skilling he was equally candid: 'I think that did harm to the Inspectors' self-image too', he said, 'because they were a very proud group of people, they had a history .....'.

It should be emphasised here, of course, that some well seasoned Inspectors voiced no really grave problems of morale, though there were hardly any who did not make some serious criticisms of the 1985 Act and of the mode of its implementation. Some others were simply sanguine about the whole affair and, although not liking it, had opted to make the best of a bad job. Referring to a pretty bleak career future, one admitted to having 'had a bee in my bonnet twelve months ago, but I've sort of changed my tune a bit, and I think maybe career paths aren't really the be all and end all - it's nice to get out into the field and do a bit of fieldwork and that sort of thing, rather than (being) stuck behind a desk all the time.' At the other extreme, however, and it should not be understated, some were very bitter indeed. 'The biggest problem is our leadership' opined probably the bitterest of them all, adding, 'we've got to the stage where we've got no discipline left either.' All of this, he continued, was showing itself in staff morale: 'No-one wants to do anything anymore; in fact, no-one's telling them to do anything anymore.' After some hard knocks at the kinds of people obtaining advancement in the Department, he was asked whether it was not just inevitable that people accustomed to operating an old system are not going to have much time for the new one? His reply was extreme and protracted, but not by any means atypical of the sentiments which had surfaced, albeit more momentarily, in other interviews:

> 'No worries about that. That has gone; that has faded away. We've now got despair. That's how I put it - we've got despair in the ranks. Now I don't know who you've been talking to ..... , but everybody is discontented. And it's coming back to management all the time. Everyone's saying it's the management. A lot of the people, including myself, have come from outside industry ..... we want to get on with the job, but we're not allowed to get on with the job. Now it's going to come to the stage where we're going to be getting out of work.'

If the above comments reflect how some of the longer established Inspectors were feeling, what about the cohort more recently appointed in the wake of the 1985 Act? Once again, while reactions were by no means uniform, there was substantial reason to believe that there was indeed a problem with morale. At the simplest level, for example, and recognising that there may indeed have been some knee-jerk selection process in order to recruit more people in special categories into the Inspectorate (eg women!), it would still be interesting to have precise figures on how many of those post-1985 recruits still remain in post. Our information, impressionistic as it is, suggests very few. According to one informant, 13 out of 17 newly recruited Inspectors in the post-Act cohort had resigned, including most of the women (the very special circumstances surrounding the employment of female Inspectors will be dealt with separately at a later point). Reflecting the impact of regionalisation, another commented on how the new Inspectors had lost contact with each other, their being left to be submerged as it were, by the older generation. Had it not been for a particularly good Supervisor, the same Inspector reported, she too would have left. Difficulties with ethnic integration into an 'Anglo-Celtic bunch' lay behind another interviewee's avowed intention of quitting the Department. Another member of the same intake took a more general line. Morale, he reported was very low:

> 'It's very low. I've only been in the Department three years, but it's ... very low. People openly talk about moving on and leaving ... The constant interference ... People putting barriers in your way so that you can't pursue the job and do the job properly ... (it's) just that I'm disillusioned with senior management. I don't think they understand, and I don't know. Maybe there's even a conspiracy there to prevent us from actually going out and doing the job. They don't want us out there doing the job ... '

While suggestions of a conspiracy may perhaps be regarded as hyperbole, there seems to be no doubt that substantial numbers of the younger Inspectors did experience a sense of frustration about their inability to achieve as much as they would have liked. Nor, according to some external observers, was this just the inevitable consequence of misplaced realism. One union official talked of 'younger Inspectors being demoralised by being told not to deal with issues other than the particular ones upon which they had been called in to deal with.' The same official even claimed that there were instances where 'the decent people (were) shifted from one office to the next, where they are under better control and where they are not standing on some large employer in the area's toes.' Another union safety officer had a more general explanation:

> ' ..... I know why the new people are leaving; because it is still being dominated by the old brigade, if you like, and a lot of those people have got no commitment to the Act at all. They just do not want to change. I don't know ..... something is wrong, and so, I mean they've gone into places of authority within the Department, and they are the ones telling these younger people what has to be done.'

No discussion of the morale problems confronting the Department of Labour during the period covered by this research would be complete without reference to the particular problems confronted by women Inspectors. Part of the difficulty, here, was that the women appointed in the wake of the 1985 Act mostly lacked the trade training background of the older Inspectors, and therefore attracted their full share of the resentment shown towards all of the new recruits who were in that position. In their case, however, that predicament was exacerbated by their gender. As one senior woman told us, 'the Department put those females in an awful position.' 'I think,' she continued, 'anybody coming in without the appropriate skills to equip them for the job is in a very dicey position, and particularly when you are coming into such a male dominated workforce, ... (is) doomed to failure.' Nor, leaving aside the question of appropriate skills for the moment, is there any dearth of evidence to support the contention that the new women Inspectors were often received with

less than enthusiasm because of both their skill and gender 'deficiencies'. 'How can you, at your age, ... come in as a health and safety Inspector when I had to go through a trade training programme and time in industry ..... and you haven't even got a trade background ...' was the attitude attributed by one former member of the department to the 'old middle-aged Inspector from the trades background ..... feeling threatened by women coming in without a trade background.' One Inspector admitted in interview that he knew of one 'lass over in Region X (who was) very good.' 'Some of the other women,' he went on 'I think they were brought in purely because they were women under the, whatever they call it, the equal opportunity - hopeless, utterly hopeless.' Field notes record another Inspector going through a number of the new women Inspectors by name and categorising them as 'keen but nervous', 'next to useless', 'next to useless' and 'next to useless' respectively. Another very balanced interviewee admitted that one woman who had left the Department would indeed have had technical difficulties as far as the machinery side of things went. But, he asserted, there was more to it than that:

> 'Secondly, she would have encountered a lot of sexual harassment with her job, and I know this for a fact ..... and I am familiar with the sort of comments that were being made to her - very, very offensive ..... sexual remarks with innuendos and derogatory remarks (of a) kind that a woman was totally incapable of doing this sort of job, dismissive remarks because that person was a woman .....'

Apart from alleged skill deficiencies in the areas of traditional inspection emphasis and, of course, suggestions that employers would be less responsive to requirements imposed upon them by women - 'no man likes to be told what to do by a woman' - the other major problem seems to have been that little effort was made to capitalise upon the particular skills that the new women Inspectors had. 'I think they don't want to accept the women's skills,' one woman Inspector reported, ' ..... they have a lot of prejudice because most of the Inspectors for 50 or 60 years ..... I don't know ..... they always have been a male dominated profession, and they don't want to accept women's skills.' Neglect of

possibly superior negotiating skills was cited by another interviewee as a specific example. A union official took the obvious example of the possible advantages to be derived from using women Inspectors in situations where the workforce is predominantly female:

> ' ..... do you reckon these people would bloody utilise these people - no they bloody don't. They don't utilise the women. You've got places where it is predominantly women and ..... (it) seems logical to me to bring Cathy (one of the interviewers) down as an Inspector. No they don't bloody do that. They will send their traditional, you know, conservative bloke down there. And then (they) say they are a bunch of bloody women; they don't know what they are bloody talking about ..... and all that sort of crap. Either they get fair dinkum about it, or it is just not going to work.'

Much of what has been related thus far is fairly predictable in a society not distinguished for its lack of sexist attitudes. 'Just the usual', said one woman Inspector, 'always talking about the blokes ..... my presence is hardly even acknowledged as a woman.' 'What did she do to get there?' was the thinly veiled query allegedly raised in relation to another woman who had gained some measure of seniority. Such commonplace attitudes and innuendos apart, however, it does seem that the Department of Labour had a particular problem in relation to sexism and harassment during this crucial period of transition. Thus one woman asked us to turn off the tape-recorder at one point in her interview, and then recounted a series of events which allegedly took place on a training course and which, if true, possibly amounted to not just sexual harassment, but violation of the criminal law. According to a union health and safety officer, a case involving a female Health and Safety Representative who was seeking action from an Inspector on a Provisional Improvement Notice 'basically came down to the fact that yes, if she was prepared to "put out" and cooperate with the Inspectors, they might consider launching the prosecution.' Asked whether this should be interpreted as meaning the woman in question claimed that she was being propositioned, the interviewee answered in the affirmative. An anecdote from a former member of the Department speaks for itself:

> ' ..... in the context of a Department of Labour where you have (an) equal opportunity unit and sort of everything fairly high profile in terms of non-sexist

> approach in the workforce and whatever, you go into the men's toilet and there's a great big nude hanging on the back wall. Some places in industry that's nearly a dismissable offence these days ..... '

Once again, the by now familiar caveats must be entered. We are not claiming that all of the older generation of Inspectors or even that the majority of them are necessarily part of a culture so sexist that at least some women felt driven to resignation. Moreover, this matter having been raised at the policy seminar in November 1988, it would be only reasonable to expect that the Department has taken steps to counter at least the more egregiously offensive forms of sexism and discrimination which have been outlined. Again too, however, we are entitled to a healthy degree of scepticism, particularly given the views of a former senior official who admitted that it was all somewhat difficult because the managers in several areas 'were some of our worst male chauvinists around.'

As with gender, so too with ethnicity, the transition of Victoria's occupational health and safety regime to a system more appropriate to the multi-cultural Australia of the late 20th century was not without its problems. 'Hatred' and resentment because, among other things, 'we were of non English speaking background' was how one of the more recently appointed Inspectors recalled his early days in the Department. 'So there was a lot of racial prejudice', he continued, 'which we felt very, very strongly in the beginning, and there were definite instances that I can recall where we were spoken to in a manner which betrays those prejudices and those fears.' According to another Inspector, the bi-lingual interpreters appointed after the passage of the Act were under-used because 'they (the Inspectors) believe why should we interpret to the employees, they don't learn the English.' One new Inspector put it very succinctly when he said that the Inspectorate struck him 'as a very Anglo-Celtic bunch of people.' And, he continued:

> 'Yes, they keep saying "never mind about integration ..... you're not a bad bloke ..... we treat you as an Australian." I say, "Thank you very much, I'm an Italian, and I thank you for your kindness and generosity, but I'm not Australian. They seem to know that we come from other backgrounds .....

and so they come and say "what are the problems? Do they have problems in the workforce? Why don't they learn English?" '

4.3 Regionalisation

Within two years of passage of the 1985 Act, the Department of Labour became formally regionalised, partly, it is said, because of a Director-General who believed in this as a policy, and partly because of a more general government move in this direction. 'It was seen', explained one particularly well-placed observer, 'that it was more important to the Department to have a service delivery focus in the field, in terms of the way a government delivers all its services, than it was that it might have hindered the delivery of occupational health and safety at that time.' With a newly forged Department bringing together a number of activities in addition to responsibility for the areas covered by the old Factories and Shops Inspectorate, not to mention other occupational health and safety areas such as dangerous goods, lifts and cranes, and boiler and pressure vessels, such an approach was quite understandable. According to the Director of Regional Services appointed at the time, the idea was to retain policy determination and coordination at the centre, while out in the Regions, managers who were skilled in management per se and who could transcend orientation towards single issues would oversee the development of this broader delivery of service. Initially, apparently, it was hoped that people from the occupational health and safety area might fill these positions, not least, presumably, because the vast majority of the work to be done in the regions would be to do with occupational health and safety, in one form or another. In the end, however, the general management versus the single issue skills ruled these people out, and a new generation of regional managers was appointed.

Right at the outset, it should here be explicitly stated that, with one possible exception, no-one spoken to in the course of this research expressed outright opposition

to regionalisation as a concept. Indeed, a number openly praised it as an idea and saw it as being ultimately the correct path to go down, both for the Department in general and for occupational health and safety in particular. This said, however, the vast majority expressed reservations which, while very varied in nature, added up to the conclusion that regionalisation, at the particular point at which it was undertaken, constituted a serious error of judgment and a severe setback to the brave promises of improvement proffered by the 1985 Act with regard to occupational health and safety.

Much of the difficulty here seems to have stemmed from infelicitous timing. Regionalisation, as a well thought-out concept based on the idea of carrying an established philosophy, agreed policies and detailed procedures out to the ten regions of Victoria may have had a great deal to recommend it. Unfortunately, however, just at a time when a new central philosophy, new policies and new procedures for their implementation were all still in the making, regionalisation intervened by erecting barriers between the centre and the field of operations. As far as the new Inspectorate was concerned, for example, one central participant recalled, 'the umbilical cord was cut.' Another key actor in what was a fairly major institutional drama put the same point in more general terms:

> ' ..... there are difficulties, I think, in the regionalisation of the department with the lack of direct policy control over the Inspectorate. Now I don't think that's a problem per se, but I think in the circumstances that it happened, where a 180 degree shift had to be achieved in the way the Inspectors were operating and ..... the implementation of that shift had only been going two years, when all of a sudden, they lost that direct policy line control and (the Inspectors) went out into the regions and became the biggest single group in each of the regions and therefore started to capture the agenda again.'

Ironically enough, what is being complained of here in one sense is almost the corollary of the complaints voiced by many of the regionalised Inspectors, who now saw themselves as being cut off from the central authority, advice and control with which they were familiar. The following excerpts from interviews speak for themselves.

> 'There's no coordination whatsoever. We're becoming ten separate regions, ten separate departments. This is what is happening, and I think the only

> thread that's holding us together is some of the older people like myself. We have big problems all the way through. I don't knock regionalisation for the sake of knocking it, but they've let go too much central control.'
>
> 'From where I sit, we've got now ten Departments of Labour in Victoria -like ten regions - each one works differently. There's no central body in Melbourne. Everybody's probably told you the same thing. That's the biggest problem I've incurred - your're stranded ..... I wouldn't say the brains of the Department disappeared - it's the central library of things you know.'

Not all responses, of course, were so unequivocally derogatory. Indeed, most, it would be fair to say, gave initially positive responses to the concept, before going on to catalogue what, in their view had gone wrong, how badly and why. While some were almost lost for words, albeit colourful ones in this respect - 'It's got the potential to work, but ..... it's the biggest balls up I've ..... ' - others were quite specific. The sense of isolation as a result of feeling yourself to be part of a smaller team, problems with working with managers substantially unversed in occupational health and safety, or so it was said, were two not infrequently voiced misgivings. In the latter context, according to one Inspector he 'could be out there selling ice-creams and they would think it's a part of the job; they have no idea of what we do.' More than anything else, however, the complaints came back time and time again to the absence of central direction ensuring uniformity in policy and practice. Even out in a country area where, as one Inspector explained, the Inspectors had in a sense always been regionalised, a loss of direction was felt. Concerns that a prosecution in one region might fail on the grounds of what was tolerated in another were fairly common, as was the way that the same thing could happen on the much more mundane plane of imposing notices or issuing requirements. Thus, one Inspector who initially voiced no problems over regionalisation, later went on to specify some major difficulties:

> ' ..... I think there is a lot of times that you get arguments from large organisations that have establishments in two or three regions, and they will play one region against the others ..... they'll say that the interpretation of a particular piece of legislation is different in one region that the other. I think they play that pretty well, some organisations.'

Parenthetically here it may be added that one official suggested to us that some of the unions which were better organised on a state-wide basis were also not above adopting the same tactics, leaving the Department 'vulnerable to being picked off on the grounds of inconsistency of application of the Act?' Unions or companies, however, the common threnody was for more central coordination. 'Policy Branch has got to keep their finger on the bloody button', was one Inspector's plea, while another, who described the experience of working under regionalisation as akin to 'working for ..... separate proprietary companies' would doubtless have endorsed the views put to us by representatives of one of the major employers' organisations.

> ' ..... regionalisation of the Department's services is prima facie a good thing because there is a capacity to provide service locally ..... What you must have though is clearly a coordination of that activity at the central office level, and you can't just say, "you're a separate business, go and do your own thing." That would be quite ridiculous. It needs to be controlled; there needs to be an appropriate form of training and education of Inspectors. a monitoring of issues, so that what may be happening in one region, is clearly understood elsewhere, because the same issue may come up.'

Back at the centre, in the meantime, just how much control and coordination of policy was being maintained at this time is very much a moot point. According to one senior Inspector speaking in 1988 'at the moment, central control doesn't exist'. One former actor in the drama explained that while, out in the field, managers 'temper the Department's directives substantially by the rank and files' objections,' at the centre, itself, the fact that regions reported back through a separate part of the bureaucracy, Regional Services, means 'what we've got is a power base that protects the Regional Managers from the initiators of policy.' Describing the process whereby proposed policies would be put to the fortnightly meeting of managers under his control, the then Director of Regional Services admitted that the process was indeed a slow one. 'Inevitably, when you reorganise there are territorial imperatives,' he pointed out, '(and) it makes the process a

bit slow to start up.' What those territorial imperatives may have been, we are unable to say, but one well placed observer had no doubts as to that geographic location within the bureaucratic terrain:

> 'I think it's lost a lot of ground because there seemed to be a period, at the time of regionalisation ..... we tried to fit in with regionalisation where we set up meetings with the regional coordinator for the regional division and tried having exchanges of views and whatever. And that ended up falling by the wayside because the regions were saying, "look ... we don't need to talk to you, get stuffed' which was the basic message.'

Once again it must be heavily underlined here that this is a study of Victoria's occupational health and safety legislation at a particular point in its transition, and cannot therefore purport to be describing a state of affairs which necessarily still prevails. Indeed, we have been explicitly asked to stress that organisational and other changes have taken place since the period covered by the study, in the present instance the abolition of Regional Services clearing the way for the reassertion of more central control at the policy level. Although we obviously have not been able to research the matter, we have certainly gained the impression that reassertion of such control is being vigorously pursued, while retaining the model of regionalised service delivery. All of this said, however, there are two comments we do feel able to make. First, and although it may all be in the past, the timing and mode of regionalisation did seriously impede the implementation of this legislation, even if the organisational objective itself was a laudable one. Second, and most imponderable of all, we have no way of knowing how successfully the damage has been undone.

4.4 The Pattern of Inspection

In Chapter Two above, data bearing upon trends in patterns of inspection were presented. Information on this aspect of the transitional process was also sought in the

course of the qualitative part of the project, considerable additional light thereby being cast on some of the data already analysed in this report.

On one thing there was almost universal agreement among the Inspectors interviewed, namely, that the number of visits they were making had declined since the Act's inception. Various estimates of the extent of this decline were offered. One Inspector reckoned to be doing 25% fewer visits now than before, while several commented on the issue in terms of raw numbers. Under the old system 'we would visit roughly a hundred places a month,' calculated one old hand, whereas 'we wouldn't be visiting a hundred places a year now.' Another Inspector produced lists of registered files that had come back from Melbourne requiring a further visit. Whereas, he said, they would have had 688 such visits in 1985 (effectively pre-OHSA), 'this year or last year we would have succeeded in doing 266.' One of the newer generation charted the change which had taken place in greater detail:

> 'When I started the job we were advised by our superiors that an acceptable level or a recommended level of visits per day was somewhere in the vicinity of between 6 to 8 visits a day. And some of those visits would be just what we call routine visits where you just drop in on a place and take a look, and more or less take them by surprise ....., you know you just drop in because you're curious or you've seen something that looks a bit suspicious. Those sorts of visits have been dramatically reduced; we just don't have the time for those sorts of visits.'

Many reasons were adduced for this changed inspection pattern. Inevitably, inadequate resources were cited on more than one occasion, while equally unsurprising is the fact that several respondents put it down to the amount of time being spent on compiling and entering data onto what was then the EIR system. Whereas a visit might only have taken five minutes in the past, say to check that a hot water system was working, said one, 'now you have to go out, you have to fill in an EIR form, you have to find out who you're talking to, whether they have Health and Safety Reps. there - the form might take twenty five minutes to fill out - then you have to come back in and it has to be

fed into the computer.' According to another Inspector, programmes (i.e. targetted programmes directed at particular industries) were the explanation - 'whilst engaged in those sort of things, that's when you're not getting to what was termed, you know, some time back, the routine inspections.' More than any other single factor, however, the amount of Inspectors' time consumed by Health and Safety Representatives was cited as the problem. Asked if Representatives took up a lot of time in his region, one senior Inspector replied:

> 'Yes, I think about 90% of our work is planned work, like years ago we used to call routine visits ... but the planned work I call it is when a Health and Safety Representative rings up or a union rep. rings up and says I work at so and so, I've got a problem. OK, so I'll take a note of it, and give it to the Inspector and say "OK when you're next out (in) this area call in there ... They are generating more work for us.'

Another Inspector was equally candid:

> 'Yes, we seem to spend more time in the places that have got Health and Safety Reps. than we do anywhere else, always responding to their requests because, once again, they don't seem to know what to do ..... What we've tried to do is to wean them off the bottle, if I can put it that way, ...but when I sat down earlier to write down the companies that I know ....I went through my book ... and interestingly, there were about ten or fifteen that came to mind straightaway because ... I keep going back there in case anybody asks questions.'

Not everyone, it should be pointed out at this stage, was automatically in agreement that a change to fewer visits was necessarily a bad thing, though most did tend to lean in that direction. One Inspector who had noted the trend, pointed out to the field researcher accompanying him, that after the Act, the emphasis switched from quantity of visits to quality of visits. One particularly thoughtful interviewee explained that 'you (are) probably doing a lot less visits, but I do believe we're doing a better job ... .' During a field trip with one of the researchers he elaborated on this by saying that in the old days he used to be expected to cover approximately fourteen premises a day. But this, he continued, suited management quite well, because it meant that Inspectors did not have the time to audit the

workplace thoroughly. Another insightful comment came from one of the new Inspectors who, having conceded a reduction in the number of visits, added that the places being visited by the data driven risk management system did 'correlate with the places where I have the most difficulties as far as accident rates go.'

We must be careful, therefore, not to slip into the trap of assuming too readily that less means worse. This said, however, it is germane to ask if there are fewer visits to be spread around, then who, so to speak, is missing out? And to this the unequivocal answer given by most Inspectors was that apart from the investigation of individual accidents thrown up by ACC claims data, the smaller, probably non-unionised workplaces, where there are less likely to be Health and Safety Representatives. 'You're losing contact with the small, individual little garages, corner workshop sort of thing' was one comment. 'Who cares for workplaces in Flinders Lane?' asked another Inspector. 'Who cares about them - I mean you don't have time to care about them - you have to go to Victoria Dock or ... to GMH ... .' Yet another, while prepared to accept that the new regime had its merits, nonetheless conceded that there was a definite down-side to what was taking place:

> ' ... by dropping out on the routine visits, by doing less routine visits as we have been, the smaller and medium sized places are missing out on being inspected, that's for sure. They're getting much less attention now than they were before.'

The point was put even more forcibly by a very experienced Inspector:

> 'I think what's happened, the big places that have got the unions, the places that have got Safety Reps., that are probably doing the better job out of all that have got Safety Reps., that are prepared to get in and have a go. So what's happening? You find that Shell, Ford, etc. places where you've got your big unions, Health and Safety Reps. are prepared to get in and have a go, and you find you spend probably more of your time at those places ... and the small places, particularly the real small places ... we're not visiting them at all.'

Does this matter? To this question there are several different answers, depending upon one's starting point, as became abundantly clear at the November 1988 policy

seminar. Probably not, for example, if the primary interest is *in* the fiscal dimensions of the 1985 Act. More can probably be achieved in this respect by getting things right in a few very large workplaces, and of course we should never forget that, after all, the 1985 Act was designed to reduce WorkCare claims as part of a three-pronged approach to improving economic performance by reducing labour on-costs. Probably not, we may also say, if it is assumed that there really is no problem with the smaller workplace anyway. Demonstrating an extraordinarily naive view of the structure and ideology of the contemporary Australian family, one senior participant in the 1988 seminar, for example, asserted this to be the case because the small workplaces, being like families, can take care of things quite satisfactorily on their own.

Another starting point, however, is one that, for a start recognises that, as more than one Inspector reminded us, the majority of Victorian workers are employed in smaller workplaces. Viewed through the lens of managing personal risk rather than fiscally consequential monetary claims, therefore, more people are affected by conditions in smaller than in larger workplaces. Moreover, the family analogy can be pursued rather less naively to very different conclusions. As any Family Court judge, social worker or psychologist can attest, families often do not sort things our for themselves very satisfactorily. More concretely, it is by no means fanciful to hypothesise that with regard to, for example, soft tissue injuries, the worker in the small 'family' workshop lacking union support is less likely to lodge a WorkCare claim. Indeed, and akin to the 'satisfactory' family solution of being invited to leave home, one Health and Safety Representative alleged that in smaller workplaces employees might even be threatened with the sack if they were to put in such claims. Thus in terms of programs, targetted inspections, a data driven system and the reduction of routine coverage of the small Victorian workplace, it is legitimate to raise some queries about the data doing the driving.

Even when the focus shifts to more serious accidents, there is reason at least to question an approach which increasingly leaves the small workplace to its own devices, responding reactively to such incidents when they occur in such locations rather than proactively to their prevention by maintaining a higher level of routine inspection coverage. Here, the Department is more than slightly hoist with its own petard because, as seen in Chapter 2, when Accident Compensation Commission claims data are used for purposes of selecting specific accidents to investigate, accident files generated in connection with premises employing less than 50 people jumped rather dramatically (See Table 2.4 above). Nor, on the plausible assumption that selection for individual investigation as opposed to targetting or programming revolves around seriousness, is this in any way incompatible with the earlier assertion about reluctance to lodge claims. Pressure to refrain from so doing would be more easily and effectively applied in relation to, again, soft tissue injuries than to an amputation or a fracture. Hence Accident Compensation Commission claims data may indeed lead you to a blitz on manual handling in the motor vehicle industry, though at least two regions audited the relevant premises for machine guarding anyway(!), but emphasis on more serious accidents does not necessarily point in the same direction. Apart from the trend in the Inspectorate's own pattern of accident investigation, moreover, there is cogent external evidence to support this contention. Thus a study produced by the British Health and Safety Executive (HSE) in 1987, suggests 'that the reported major injury incidence rate was higher in manufacturing establishments with fewer than 100 people employed, and lower in establishments where 100 or more are employed (HSE, 1987:47). Equally, Theo Nichols has recently lambasted some Australian research for its endorsement of the so-called 'size effect'. 'It is not too difficult to construct a theory,' he concludes, 'which ... suggests both that small establishments are likely to be more dangerous, as found by the HSE study of major injury rates, and that they may have lower "accident rates"

(lower, that is, when the rate is measured with reference to more minor injuries than major ones), (Nichols, 1989:57). Support for this view can also be found in a recent Canadian study of work related injuries and illnesses in small workplaces between 1977 and 1985 (Government of Alberta, 1987).

Nothing which has been said thus far in this context should be construed as an assertion that the Department of Labour is simply 'wrong-headed' in the direction it is pursuing. Rather, the intention has been to enter a cautionary note to the effect that amidst the understandable and indeed long overdue enthusiasm for new technologically sophisticated and data informed strategies, amidst the inescapable economic 'imperatives' which underpinned the enactment of the 1985 Act and its implementation, a desperate error leading to the greater neglect of the majority of Victoria's working people should not inadvertently be made. Paraphrasing one recent critic of the 'size effect' thesis, it would be dangerous if the notion gained currency that small firms could effectively be deregulated at no risk to their employees (Tombs, 1988). Thankfully, however, as has clearly been demonstrated, there are those within the Department who already recognise this potentially worrying development. Outside the Department as well, there are people who appreciate the danger. One union health and safety officer, for example, noted that while the Act 'is meant to be diverting attention to those "weaker" areas, that maybe isn't happening.' The Chairman of Victoria's Occupational Health and Safety Commission was also acutely conscious of the problem:

> 'When I had a look at the UK in 1985, the things people were saying there ten years out with their legislation ... was essentially the good got better, and where Health and Safety Reps. were in, in the areas where the unions were still reasonably strong, they certainly kept things at a reasonable level, and they put substantial demands on the Inspectorate to keep them that way. And the result from that was that those areas where either the unions were weak and therefore the Reps. were ineffective or where there were no Reps. at all just withered on the vine because the Inspectorate simply wasn't getting to them. There was no basis to get at them, and the consultative approach couldn't work because it wasn't there ... .'

Moreover, he was confident that this experience had been salutary as far as Victoria was concerned:

> 'I think it is happening here. But that's why when we came back and started to implement the processes, we looked at covering that area quite specifically ... If the theory is right and if, as we get on, consultative processes start to bite even more and those areas improve, then they should start to decline as issues that come out of the ACC data, and what should come to the top, at least in theory, is those areas that need more attention ... .'

Another caveat which must be entered with regard to a pattern of implementation driven by data derived from Accident Compensation Commission claims is that, in general terms, it can become unduly reactive rather than proactive. Such a general trend can, moreover, have quite specific implications. One former Department of Labour official pointed out, for example, that an Accident Compensation Commission data driven risk management survey of Simsmetal would probably have emphasised issues like manual handling rather than the correct labelling and storage of chemicals. Yet it was the latter that was to prove tragically crucial when, in 1987, four of that company's workers were killed as a result of sodium nitrate rather than potassium chloride being used in a smelting furnace (see further 6.7.1 below). On the general problem, itself, the same informant was quite clear about the limitations of the data driven approach:

> ' ..... my view was that the ACC data base is historically driven, and in that sense it's got assumptions about moving from the past into the future in terms of occurrences, and it's based on sort of a probability model ..... That's fine as far as it goes, but what it doesn't do is to address the issue of potential hazards, because ACC isn't concerned with potentiality. If something hasn't happened, it hasn't happened!'

Nor is it just the risk of the 'one-off' explosion that is at stake here. As is well known, modern technological processes rely heavily on the use of chemicals and other substances about which little is known vis à vis their long term health effects. Thus, a Department driven primarily by Accident Compensation Commission claims data could all too easily turn health into a casualty, since it does not direct attention to longer-term, less visible and as yet unclaimed for hazards at the workplace. Furthermore, since many

illnesses of this nature take ten to twenty years to develop, there is often difficulty in tracing their origin back to the workplace, opening up the possibility that comparatively few of them will ever find their way into the Accident Compensation Commission statistics at all. Once again, the Chairperson of Victoria's Occupational Health and Safety Commission saw the dangers in this respect very clearly, even though he could also see the value of Accident Compensation Commission data as 'an important priority setter.':

> ' ..... it's obvious that if we don't do something in the short-term about hazardous substances generally, then the issue will run over the top of us. And yet you couldn't pull that out as an issue from the ACC data base; there's no way you could pull it out because it just doesn't show up ..... '.

Some members of the Department, those who are most firmly wedded to the legitimacy of claims data as the driving force behind implementation of the 1985 Act, are not perhaps so alert to this problem, a long way off as its effects may be. Thus when the issue was put to one senior official, the response was, 'that doesn't worry me ... I'm not aware whether the Department is doing anything in that area.' Confirming the existence of such an attitude, another expressed concern at the failure to recognise that Accident Compensation Commission data, whatever its value, was still superficial and short-term, not least because it ignores health issues. One particularly astute and well-informed member of the Department saw the issue quite clearly:

> 'I think health problems are going to be hidden on the whole ... just because they are barely significant compared to safety problems on the ACC data base. I mean, they're 10%, if that. ... If the Department decided to be entirely data driven, they would do no health work at all, and talking to a few people in industry, they are finding it very hard to justify a hygienist because, you know, health problems in terms of money they see as extremely insignificant. ... But I think the Department also can't afford to be entirely data driven; ... if it does, it is going to lose out in the political arena because, I mean, health matters are what people are concerned about.'

Finally, in this context of inspection patterns and the forces behind them, there is of course the question of premises other than factories, all those non-factory workplaces

to which the 1985 Act applied by dint of its application to all employers, and its definition of that term under s.4 as 'a person who employs one or more other persons under contracts of employment of apprenticeship.' As we saw earlier (see 2.2, above), such premises certainly seem to have generated relatively few file contacts, a random sample of 1000 such premises only yielding 22 such contacts in the three year period following the Act. The pattern for non-file contacts was very much the same, factories continuing to predominate in the post-OHSA era, with the exception of data on Provisional Improvement Notice disputes where non-factory premises enjoyed a more than 2:1 predominance among the retrieved documentation.

Once again, the qualitative side of the project lent strong confirmation to these findings as well as casting some light on the apparent anomaly surrounding Provisional Improvement Notice disputes. As far as the general pattern is concerned, some Inspectors were very candid. 'To a certain extent', said one, 'these other places ... the rest of the workplace has almost been forgotten ... .' 'We're still not getting to these' admitted another, unless of course they are thrown up by some programme. 'So most of your workplaces are factories,' he went on, 'that's where the bulk of the people are employed, in manufacturing.' In confirming the pattern already described, one Regional Manager went further and connected it with other factors already alluded to:

> 'Historically it's been factories, and it's only in the last year that we've been saying 'it's supposed to be workplaces and not just factories." And that's where the difficulty arises with the training of our staff. They are not trained to go into a commercial area where there may be 30 or 40 clerical people doing typing etc. ... We possibly have people at the centre but not out in the regions. Basically all our advisors are male with a trade background.'

A union official could perceive very little change with regard to one of her areas of coverage, thereby paying the Department a somewhat backhanded compliment:

> ' ..... looking at that sort of area, then they never saw an Inspector in the first place, and they don't see an Inspector now, and so really what is the difference ... I don't know that they are worse off, but they are certainly no better off. I mean probably in some other industries where Inspectors may

> have occasionally gone in, maybe that is true, but certainly in this industry, where Inspectors have never gone in and they have never had anything to do with it, they don't want anything to do with it now.'

This is not to say, of course, that activity outside the factory sector was totally non-existent. Indeed, for example, local Government body became the subject of a programme when Accident Compensation Commission claims data showed its low levy level to be badly out of kilter. Moreover, the anomalous statistical pattern in relation to Provisional Improvement Notices referred to above, seems to have resulted from Health and Safety Representatives in the public, as opposed to the private sector, being particularly assiduous in considering issuing Provisional Improvement Notices which then involved the Inspectors in one capacity or another. 'The public sector has been a problem, because the Health and Safety Reps. often came to us for advice on how they're going to do it.' was one comment, while another interviewee described how an upheld Provisional Improvement Notice relating to a children's court had a snowball effect:

> 'That children's court issue was pivotal in opening up the issue of health and safety in the public sector, because that clearly put down in black and white what the conditions were ..... The way it read that one of the most obvious solutions was a new courtroom and once that sort of filtered upstairs, we had to negotiate a solution which wouldn't be the high cost one, but at the same time ..... And that was the trigger for the Police Association, to bring on Mornington ..... and after Mornington was sorted out they were saying to us "well, watch for Geelong", and they had a systematic programme worked out of things they were going to bring on under the Act.'

Whatever the processes involved, it seems that the public sector made more demands upon the time of Inspectors than did any other non-factory area of employment. Among possible reasons for this could be the relative strength of unionisation in some parts of that sector, higher levels of Health and Safety Representative education and confidence in some areas (eg. among teachers), and not least, a public sector management less accustomed to the idea that in a field like occupational health and safety it was both subject to regulation and obliged to recognise the legitimacy of employee participation.

Regardless of the explanation, however, as we shall see in the next section the Department was driven to some extraordinary stratagems in order to contain the 'problem'.

4.5 The Inspection Process in Transition

Just as the new regime which was introduced in the wake of the 1985 Act had fairly profound implications for the pattern of the Inspectorate's activity, so too it had important ramifications for the way in which that activity would be carried out. Thus, a group of people long accustomed to operating within a framework of implicitly acknowledged, if unstated, managerial prerogative now had to adjust to acknowledging the existence and powers of worker representatives. Similarly, a system which had been able for so long to treat occupational health and safety issues as separate from industrial relations ones, now had to confront the fact that, through union involvement in the selection and support of Health and Safety Representatives, the two categories might uncomfortably conflate in practice. Moreover, its practice now had to play up the advisory side of the Inspector's role to a greater extent than previously, and with reorganisation of the bureaucracy it now had to face what, for at least some of its members, was the unsettling prospect of accepting that they should become multi-skilled. Concomitantly, the new regime potentially required them to accept a much broader brief than their traditional one in which the issues of machine guarding figured so prominently. And on top of all this, of course, there was the practical problem of adjustment to the new salience of programmes and blitzes, data-driven or otherwise, to the practice of risk management as opposed to the more traditional carrot and stick approach, and by no means least, to a new and constantly evolving system whereby compliance was to be secured.

Just which of those changes proved most difficult for the Inspectors in the course of transition to a new set of practices is difficult to say. Intuitively, or perhaps even

arbitrarily, however, having to operate in a climate of ostensibly reduced managerial prerogative and recognition of worker participation would seem to have been one of the most difficult hurdles to be overcome. And here, not surprisingly, there were some inevitable signs of resistance. In its mildest form, the evidence suggested that 'there was a period when, under the new Act, when they went into workplaces, they wouldn't automatically also ask for the Health and Safety Representative.' 'They were operating in the old mould,' continued the same respondent, 'we'll talk to management.' At the other end of the scale, one or two of the newer Inspectors found the prevailing attitudes to the involvement of Health and Safety Representatives less than enthusiastic. 'People treated them with contempt because they're just workers, despite the fact that (they are) Safety Reps', was one comment. 'I know that many Inspectors are going to workplaces and not asking if they have one', was another, somewhat more guarded report. And no less inevitably, one or two of the older generation were not slow to provide evidence in support:

> ' ..... the Inspector doesn't feel that he is in charge ..... like he used to (be) under previous legislation. It is tripartite rather than just you and him, you know what I mean. I feel basically that is the overriding thing. What you know is best for the problem often has to be moderated, particularly with the industrial ambitions of the Health and Safety Rep.'

This said, however, it should also be reported that the overwhelming majority of Inspectors who were interviewed, both old and new, displayed considerable sympathy for the plight of the Health and Safety Representatives. To be sure, comments about them taking up Inspectors' time were common, as were calls for them to be given more training - an implicit criticism of their performance to date. But on the whole, the qualitative side of the project could lead to no other conclusion than that the Inspectors, admittedly with exceptions, wanted to see effective Health and Safety Representatives in the workplace. Their absence in many premises was most commonly cited as a principal reason for the 1985 Act's alleged ineffectiveness; their reluctance or inability to take care of themselves,

so to speak, was frequently put forward as one of the main obstacles to the Act's implementation; and most surprising of all, perhaps, many Inspectors conceded that the Representatives occupied an invidious position in which, apart from pressure emanating from unions or workmates, they were subject to the risk of intimidation or even loss of their jobs if they became too active. 'If the Rep gets the sack here, he'll have a hard time getting another job' was the view expressed by one country-based Inspector, conscious of the ways of small and relatively closed communities. The Health and Safety Representative system 'work(s) well if it's a big place where the unions have got clout' reported another Inspector. Where this situation did not prevail, he went on, 'they don't have a hope -they'll just get the sack, one way or another.' Less extreme, but no less significant were references to reluctance to issue Provisional Improvement Notices 'because they feel threatened by management', to Representatives being moved around or isolated from other employees, or to a sense of general unease. As one Inspector put it:

> 'I think a few of them have been worried about their jobs because of this business. They don't want to make waves. They want to do the job but are frightened to because of repercussions from management. Even though they have the union backing to the hilt in most cases ..... I think they are still a bit worried or apprehensive about it.'

Whether or not this possibly somewhat rosy view of the Inspectors' reaction to the involvement of Health and Safety Representatives in matters traditionally worked out between themselves and management is shared by the Representatives, themselves, is something that will be discussed in the next chapter. One issue upon which the Inspectors were much more uneasy, however, was the extent to which the activities of Representatives were drawing them onto industrial relations terrain which they would much prefer to stay away from. One Inspector, it is true, claimed vehemently that '95% of the time, the Health and Safety Rep is pursuing health and safety matters', the employers only saying it was something else 'to try and water down what the Health and Safety Rep is saying.' Others,

however, were not so sure. 'They're getting in many cases, the safety issues involved with the industrial issues', was one contrary opinion, while another Inspector insisted that, initially the 1985 Act was used as an industrial relations tool, particularly in the public sector. '35% to 45% of the time, the two things are running side by side' was one interviewee's estimate, while one Regional Manager enlarged at length upon what he saw as the improper conflation of industrial relations and occupational health and safety issues.

What this reveals, of course, is the power of the inherited ideology which says that industrial relations matters and occupational health and safety issues fall in separate categories in the first place. And like so many other groups, including business, the Inspectors were heirs to this way of thinking. 'The Inspectorate at large, the old mode Inspectorate, shied away from the IR type situation' was how one former member of the Department put it, adding that in this area 'they were uncomfortable'. Nor, to be fair, was it just the 'old guard'. One of the most self-consciously forward looking among the new cohort of Inspectors appointed after the 1985 Act, was just as wary:

> 'But in many cases you'll find that it's an industrial relations issue which overlaps a health and safety issue or has deliberately been made to look like a health and safety issue. So that is a problem, and that's something you've got to sort out very quickly because otherwise you might find yourself trying to arbitrate on an industrial relations issue.'

In the practice of inspection then, the attitude towards Health and Safety Representatives might best be depicted as one of ambivalence. On the one hand, they were viewed as being largely the key to any chance of ultimate success which the 1985 Act might have, their deficiencies, relatively small numbers and lack of adequate training accounting for its relative failure in the meantime. On the other hand, they were also viewed with some suspicion as the possible vehicles whereby industrial relations issues might 'illegitimately' be imported into the domain of occupational health and safety. Thus, whether or not they posed a threat in terms of a hitherto comfortable accommodation

within the framework of managerial prerogative, because of their frequent union connections they were also seen as something to be wary of, something that might lure the unwitting Inspector into new, unfamiliar and not terribly friendly country.

Understandably enough, being drawn or even dragged into new and unknown territory in this way was one of the biggest transitional problems to be faced by the Inspectorate in exercising its Inspectorial functions during the period covered by this research. Thus, once again, the heightened salience now being accorded to the Inspectors' advisory role, while not particularly discomforting to some, for others introduced a new element of awkwardness and even loss of power into the carrying out of their everyday duties. Hence several interviewees took the line that they had always been Advisors anyway, while some others were quite comfortable with the idea of changing hats as circumstances demanded. ' ..... [Y]ou wear whatever hat suits' was one response, while another senior Inspector proffered the metaphor of 'horses for courses.' Others, however, were much less comfortable with the advisory role. 'I am an Inspector, that's what I am appointed as' one flatly asserted, but some others perceived more adverse consequences in the shift towards greater emphasis on the advisory role. 'You'll find that the day you call everyone an Advisor, then you may as well forget about enforcement' was the dire prediction offered in one meeting with a group of Inspectors, while similar concerns were clearly on the mind of the author of this following quotation:

> 'Yes, I'm not that keen ... I know that's the way the Department wants to go, to be Advisors, to advise them all. But I'm not that keen on being an Advisor. I'd rather be out there advising and enforcing the Act. And I believe that you have to have that power to enforce it, and not just to go in and tell them you MAY do this. Because it that's all, they'll just tell you where to go.'

Another new policy vogue, multi-skilling, was greeted with a similar degree of ambivalence. Here again, some felt that to an extent, for example, particularly in the country, Inspectors had always been multi-skilled. Equally, there were Inspectors who had

no difficulty with the concept if it merely meant knowing enough about another area to be able to call in the relevant specialist. When it came to what one interviewee called the nitty gritty of other areas, however, many Inspectors were more than uneasy about their lack of expertise. 'Multi-skilling - multi-fools', and 'Jack of all trades, master of none', were two of the more colourful remarks in this context. Moreover, as illustrated by the following extracts from a document circulated by one sub-branch of the Victorian Public Service Association (VPSA), there were quite strong feelings about hidden agendas and the need for training, even in the occupational health and safety area, itself:

> 'During the last 18 months, with the change to Regionalisation, there has been continual moves from within the various Regions to change the role of the Inspector and the duties they are required to undertake. It is becoming apparent that quantity rather than quality of service is the order of the day. Hence the much discussed term "multiskilled".
>
> The doubts and fears of the majority of W.I.B. (Workplace Inspection Branch) Inspectors, is that the Department rather than ensuring that Inspectors are equipped to cope with the demands placed on them by the pure nature of the job, is in fact one of trying to distract the attention away from O.H. & S. enforcement in the workplace (a long term programme) into areas which are relevant in the short term.
>
> The feeling among W.I.B. Inspectors is that they should be trained in their own discipline first. It is also desirable that additional training be available for all Inspectors, either that request or are requested by their immediate supervisor to undertake again these O.H. & S. subjects, to mention a few: Asbestos - Laser - Hearing - Confined Spaces - Effects of Chemicals - Robotics - the list goes on. All the above are now being encountered by the Inspector with very little or no training.
>
> While it would suit the Department if all Inspectors were experts in all facets of the Department's functions ..... it is the feeling of the sub-branch that this is a pipe dream. The changes taking place in the O.H. and S. Branch are numerous. The Inspectors find if difficult to keep up with these changes let alone take on new skills. The Department's drift away from enforcement to advisory requires Inspectors to be retrained.'

Perhaps not surprisingly, pretty well every change which was imparted upon the established role of Inspectors produced a similarly mixed reaction. Some, for example, took to being data driven quite readily, like the Regional Manager who hoped the

Inspectors would become more and more so; at the other end of the continuum, the response of one not particularly backward looking Inspector was 'it's bullshit!' Concomitantly, programmes or 'blitzes' were not greeted with uniform acclaim. 'Programmes are designed by people without any consultation with the people down here who have to implement them', the result being 'chaos', was one candid assessment. 'Knee-jerk reactions' and 'a prop for poor inspection', were other adverse comments indicating a more than slightly ambivalent response to the adoption of the policy and its impact upon the role of the Inspector. So too with risk management, one Inspector took the view that it was 'a total waste of time ..... because all they do is go out and talk to the employer about these are the systems you should have set up, and walk past 10, 15, 20 hazards that they could fix up while they were there.' More commonly in this context we encountered uneasiness about mixing the enforcement role with the consultative one implied in the notion of risk management. 'I think it really compromises this sort of consulting role, and they feel compromised by it', was how one respondent centrally involved in the risk management side of things viewed the prospect of enforcement action being taken in conjunction with risk management activities. From the front line, so to speak, one of the Inspectors lent his support to this view:

> 'I think you've got to be doing risk management and nothing else, or the enforcement side, one or the other ..... I just believe it's got to be one or the other. I don't want to do two. I'll either do risk management and that's it, or just do the ordinary Inspectors.'

Possibly the most significant challenge of all to the established Inspectorial role, however, was the way in which Victoria's new occupational health and safety regime put that role's traditionally overwhelming emphasis on machine guarding under great pressure. The Department, it would seem, was slow to transform a culture of enforcement based largely upon machinery, and to equip its fieldstaff with the requisite training and support for dealing comfortably with other issues. Thus, in particular, many Inspectors expressed

apprehension about their capacity in the field of health issues. Inevitably, many felt that there was not enough training, or as one of them put it, ' ... health is a very specialised area, ... it's not something you can go out and give Advisors, say, two weeks training and they're going to have all the answers.' Moreover, it was commonly reported that with regionalisation, the amount of central back-up in areas such as health had been diminished. There was 'not as much back-up', reported one interviewee, going on to add 'when you're able to get it, it takes longer' ... because ' ... the whole range of people (ergonomist, noise specialists and hygienists) that we had access to ..... they've diminished in numbers now in Head Office'. This view was confirmed in more general terms by a more senior respondent:

> 'The whole emphasis, the whole approach to health and safety within the workplace has changed over the last couple of years, but there hasn't been a commensurate change in the resources, or the type of resources which the department wants to tackle the job at hand. I mean you've still got people who are largely expert in machine guarding, when you've got something like 8% of accidents on machines and the bulk of them on noise and manual handling and we've got no one who is an expert on addressing those issues.'

One of the consequences of this mismatch between resource allocation, training and the new role being imposed upon Inspectors became all too evident in the course of a review of the motor vehicle industry undertaken after the passage of the 1985 Act. Something of a debacle, by all accounts, this review launched Inspectors who were mostly steeped in the culture of machine guarding into an arena where things like manual handling were the issues at stake. There was, at the operative time, 'only one ergonomist in the place who couldn't spread himself across the whole thing', we were told.

Coupled with this was the by no means defunct allegiance of Inspectors to machine guarding as their forte:

> 'Two Regional Managers rang up and said "look we're unhappy about our guys going into these particular plants to look at these particular sections on the specialist issue of manual handling. The Inspectors feel uncomfortable

about it, so we're not going to do it. We're just going to go in and do what we do best, which is look at **machine guards**' (emphasis added).

Such a response has to be viewed, of course, against a background of Inspectors traditionally recruited from a trades background and priding themselves on their area of expertise. Moreover, not only was this an area in which they, by and large, had clear and concise regulations from which to work, it was also one in which they could offer solutions by drawing upon their own or shared knowledge, experience and skills. Faced with less familiar, less visible and 'unregulated' hazards with which they felt ill-prepared to deal, they not only felt overburdened, but also affronted with regard to their professional credibility. They were no longer the 'expert'. When it comes to the 'nitty gritty' of it, one Inspector explained, 'we don't have the expertise ... to tell them there and then how to rectify that problem.' Stated more positively, as did one of the more experienced and senior Inspectors, there was also an understandable and commendable element of professional pride at stake in such matters:

> ' ..... if they get a problem, they don't like to be beaten by it. They want to be able to go back and tell the people what to do.'

Lack of expertise in areas such as health, not surprisingly, does not seem to have presented quite such a problem for some of the newer recruits. Indeed, a good thing about the 1985 Act, according to one of them was that 'it gives us the powers to ask the employer to employ hygienists ..., to give us reports.' 'I just say "right"', he continued, "I want you to get a hygienist in ... to get me a report on this process, and I want it as soon as possible"'. For longer serving Inspectors, however, such an implicit derogation of personal expertise was not so easy to take. Nor, for many, did the general duty of care provisions of s.21, provisions allowing for situations in which no detailed regulations exist, offer much of a way out in terms of reasserting the professional expertise of their role. One

Inspector spoke for many of them when he said that the general duty of care was 'not enforceable as it stands'. A senior official put it very bluntly:

> ' ... nice black and white regs. ... they still want them. (They're) screaming for them - the guard isn't on there, or isn't exactly like that. We can win that one we can't win s.21. We can't win this other stuff, we're not comfortable with it.'

The 'Section 21 problem' will be addressed elsewhere in this report (see 4.6 and 6.4.2). Here, however, it suffices to note that without the training, expertise, self-confidence and, perhaps most of all, the clear support of the Department, this section of the 1985 Act came to undermine the older Inspectors' perception of their professional role rather than to enhance it, as the almost all-encompassing sweep of its purview might initially have suggested. Instead of a confident Inspectorate moving out into the broader and often long-term hazards of the workplace, the Department was left with a majority of dedicated and highly professional group of people, very skilled in the area of machine guarding, but very substantially at professional sea in other areas.

4.6 Enforcement in Transition

As pointed out earlier in this report, the 1985 Act was designed to introduce a substantial measure of self-regulation into Victorian workplaces, particularly the larger, unionised ones where a system of Health and Safety Representatives was in place. In theory, employers and Representatives would first of all attempt to resolve issues by agreed or prescribed procedures, the matter in question thus being dealt with 'in-house'. Theoretically too, the use of Provisional Improvement Notices (PINS) and the directing of Work Cessation by representatives need not involve the Inspectorate in any enforcement action, the requisite remedial work being carried out without further ado. Only if a Provisional Improvement Notice or Work Cessation order is disputed, or presumably if a Representative calls in an Inspector because a Provisional Improvement Notice, while not

disputed at the time, has not been complied with, would the Inspectorate become involved in this context.

In Chapter 3 we set out some statistical data on enforcement responses in relation to disputed Provisional Improvement Notices and situations where Inspectors were called in because of alleged non-compliance with such notices (see above, 3.4.2). There, it was suggested that on the basis of data which was subject to all kinds of qualification, it nonetheless appeared that in around 55% of all such disputes the Provisional Improvement Notice was affirmed or affirmed with modification. Moreover, it was shown that where cancellation had taken place this had usually been on grounds other than that the Notice had not been justified in the first place. INSPIRE data on the more specific issues of formal Provisional Improvement Notice disputes during the fifteen months from January 1988 to March 1989, yielded the somewhat higher figure of 68% for affirmation or affirmation with modification. During the qualitative part of the research, we were therefore anxious to elicit Inspectors' own estimates and views in relation to the operation of this aspect of the 1985 Act. And needless to say, we encountered some very varied responses in this respect. One Inspector, presumably reflecting his own personal practice, put the figure for upheld Provisional Improvement Notices at around 25% - 30%; conversely, another estimated that he upheld close to 85%, albeit often in a modified form. In general, however, estimates tended to concentrate at the top end of the range, with the qualification that modifications would frequently be made. In particular, it was suggested, the need for modification arose because Representatives frequently would not specify a completion date within which the work could reasonably be completed, reflecting a failure to negotiate adequately around the issue. 'I always say', said one interviewee 'if you are going to give them a PIN notice, give it to them by all means, and find out who is going to do the job, try and have a talk to them and ask why it is going to take so long ...' 'Yes, they just write out a PIN, and

don't negotiate for long enough' said another, continuing 'he (the employer) might say "conservatively it'll take us two weeks, but he's given us eight days"'. As for cancellation, inevitably it was someone who estimated that relatively few were justified who waxed most eloquent on the subject:

> 'Where PINS have been issued, I would say in an inordinate number of instances, they are just inappropriately issued ... Some are issued without any substantive evidence, I mean, if it ever had to end up where it could end up, that is in a Magistrates Court, there would be no case to answer for the employer. ... We have got statistics on the number of PINS we attend on, how many we affirm and how many we knock off, and off the top of my head, I don't think there is a hell of a lot left because you are not in a position to, there is no substantiating evidence.'

When a disputed Provisional Improvement Notice is affirmed, it is deemed to have become an Improvement Notice issued by the Inspector under s.43 of the 1985 Act, and the use of these notices will be discussed at a later point. Equally, the extent to which Health and Safety Representatives share the Inspector's general view of the extent to which support is forthcoming in connection with disputed or uncomplied with Provisional Improvement Notices will be explored in a subsequent chapter. It should also be reiterated, moreover, that we simply have no reliable data on compliance patterns with regard to Provisional Improvement Notices where there is no dispute or the Inspector is not called in. It will be recalled that only 4 instances of Inspectors attending workplaces in connection with non-compliance with such notices were recorded by INSPIRE during the 15 month period ending in March 1989. While such a figure seems highly implausible as a measure of voluntary compliance, at least to the present writer, there was support, even in some union circles, for the idea that most employers simply comply. As one public sector union health and safety officer explained:

> 'But the interesting thing that I have found about PIN notices ... and I didn't expect it, was that when they issue PIN notices, the vast majority of times the Inspectorate are not called in. About 80% of the time what management basically do is cop it, and they do it.'

Turning to the question of Work Cessations called under s.26 of the Act, once again the qualitative side of the research confirmed the impression created by the quantitative data. 'We've never had a s.26 callout', was the response from one pair of country-based Inspectors; 'we haven't had a lot of experience with Work Cessations either', reported a Regional Manager; 'very, very, very few ... in the last two years we would have had half a dozen at the most' asserted two other Inspectors; another had only encountered one (which he had dismissed). In general, the clear impression was that Work Cessations were not a frequent occurrence under the 1985 Act. Moreover, the Inspectors generally seem to have regarded them as justified, when they did take place, phrases like 'a reasonable concern' and 'usually for a good reason' being typical kinds of comments. In fairness, however, it should also be reported that, inevitably, there were accounts which laid some Work Cessations at the door of industrial rather than occupational health and safety concerns. In one case we were treated to a lengthy and fairly gratuitous description by a Regional Manager of how recent Work Cessations at a particular plant were dependant on the capriciousness of the Melbourne weather:

> 'I wake up in the morning, look outside, the sun is shining and it's a blue sky, and I say "shit" they're going to be out again today. And they were. We used to work in here on a bright sunny day and absolutely just wait for the phone to go, because out they go again on some ridiculous issue. We would go out there and tell them it was a ridiculous issue, and half the staff would be gone down the bloody boozer ... By the time we got there, there was probably 30% of the staff left. They'd all gone to the beach or wherever they were off to.'

Such outbursts were, however, atypical of the Inspectors' response on the s.26 issue, the more general reaction being such as to put to rest the minds of those who had predicted the end of industrial life as we know it, consequent upon passage of the 1985 Act. Nor do they appear to have had many transitional problems with the use of Prohibition Notices in their own right. As one of them put it, such notices as a matter of on the spot discretion were a good idea, because 'in the past we had to ask permission

from the Chief Inspector.' Indeed, one of the very few criticisms encountered in this respect was that the notion of 'immediate risk' might be difficult for the Inspector to prove, a better arrangement being for the onus of proof to be shifted onto the employer.

On the question of Improvement Notices, however, there was much more contention and difficulty. Initially, by one authoritative account, the idea was to have an establishment inspection form, and 'only to have Improvement and Prohibition Notices'. But this plan soon ran into difficulties:

> 'We got that up to the last hurdle and managers and Inspectors said "hang on, but we issue a lot of requirements" (the old system of verbal requirements subsequently noted for follow-up by the Inspector if warranted). We said, "we don't want requirements, we want nothing verbal ..... " '.

Several factors, it would seem, lay behind what turned out to be overwhelming resistance to the idea that the Inspectors' own first line of attack should, short of immediate danger, be the Improvement Notice. For one thing, as many Inspectors were at great pains to tell us, filling in an Improvement Notice for everything requiring action was cumbersome beyond belief, almost to the point of impossibility. If 90 unguarded machines were encountered, to take a typical example of Inspectorial preoccupation, would you really be expected to issue an Improvement Notice, in relation to each machine? Perhaps even more basic, was the feeling that the thrust towards such notices as the primary enforcement response was both unnecessary and deskilling. The old system, one Inspector confided, was a mixture of 'bluff and bullshit', and one which worked alright. As another explained, they knew when to put requirements on and 'whether they'll do it or not'. One old hand put the point more bluntly.

> 'Once you've been around the traps, you don't even have to put a pen to paper. If it's not a really bad thing, just say "Do the bloody thing, and if I come back here tomorrow and it's not done, then I'll start putting pen to paper and you'll regret it."'

Against the background of an Inspectorate which reckoned it knew who could be trusted, when firmer action was needed and the rest of it, the pressure to issue Improvement Notices, was bound to become a controversial issue. 'If I have to use a Notice I feel like I have failed', was how one Inspector summed it up, going on at another point to explain that the policy was making Inspectors into 'robots' with no room for personal opinions. A similar view was expressed, somewhat archly, by one Regional Manager who opined that Inspectors should be able to do the job without Notices, resort to using them indeed indicating a lack of interpersonal skills. Possibly just a little more familiar with the kinds of relationship traditionally involved in enforcement processes of this kind, an Inspector put it somewhat differently:

> 'With the issuing of Notices, alright you've got to go into a place that's had problems. You give them an Improvement Notice ... you've been going to the same area for 12 months, you know the people there. By giving them an Improvement Notice on your first visit, the hairs on the back of their neck stand up, so you're breaking down any sort of relationship ... any sort of relationship you had with the occupiers in those places ... . You give him a notice, and he says, "why am I getting it? You know I'm going to do it ..."'

Coupled with the impression of an assault upon skill-based activity, there were also other problems. Some Inspectors expressed problems with the need to lay down time limits in Improvement Notices, partly because of the problems this could raise in getting back to the premises within the specified time-frame, and partly because, it was argued, there was no room for subsequent alteration once the compliance date had been specified. Although it apparently was explained to them at some length that prosecution for non-compliance by a specified date was not mandatory, and that the date, itself, could be changed if there was good reason, many of the older generation remained intransigent. Indeed for some, this issue meant their very credibility was on the line:

> 'If you ever go back and don't submit a Breach Report, that bloke has got you. You've lost all credibility. You tell him he's got to have it done by the time you come back. You say "you haven't got it done? Oh, I'll see you again". It's ridiculous. If you put a time on it and the Act says you can book him for failing to complete that notice, that's what you should do.'

With comments such as this, one might be forgiven for thinking that Inspectors before and after the 1985 Act were queuing up to get into the courts! As we saw in Chapter 3, however, such an impression would be more than a slight exaggeration. And indeed, it was the prospect of the courts that probably turned out to be the straw which broke the back of the Improvement Notice system as originally envisaged. At the outset, it seems the idea was that such Notices should not be treated as the imposition of sanctions, that concept being reserved for the point at which failure to comply with a Notice was established. Unfortunately, however, in the pretty chaotic process of arriving at a compliance and prosecution policy, 'someone in the past has instructed them (that) as soon as any Improvement Notice is issued, that they are to start gathering evidence.' The same Regional Mmanager continued:

> 'That's silly. There may be good reasons for it I'm not aware of, but I don't see why you should issue an Improvement Notice and get the camera out and start collecting evidence. Why not wait until the compliance date and then if the Improvement Notice has not been complied with, then you start'.

The issue of time constraints and the relationship of Improvement Notices to the prosecution process 'had the effect of giving the Inspectors something about which to organise', with regard to Notices we were told. Nor was the strategy for successful resistance difficult to find. Under s.40(2) of the 1985 Act, upon concluding an inspection, Inspectors were required to leave information about observations and proposed actions with employers and with Health and Safety Representatives, and relatively early on in the piece, the Department started to give way to pressure for the use of this section as a way around the improvement notice problem:

> 'We said, we don't want requirements, we want nothing verbal, we want you to be protected so that you come back at the end of issuing some instructions and there's some record of what that instruction was and hence some outcome expected. So o.k., we'll give you the option of issuing some modification of your old requirement. That doesn't exist under the Act, but what we'll use is s.40(2) of the Act which provides for a report on your

inspection as a way of falling back, but that should be used as an exception rather than as a rule.'

Disaffected Inspectors, however, rapidly latched on to s.40(2) as much more than an exceptional strategy with which to replace Improvement Notices. As the following extracts from interviews with Inspectors demonstrate, the s.40(2) strategy offered what was seen as an efficient alternative to the Improvement Notice, a measure re-skilling with regard to the use of discretion, and an effective means of resistance to the policy makers.

> 'Section 40's are good ... in that it achieves a result. I mean the employer's not aware that it's not a legal document, they're not aware that it's not a notice ..... it appears to all intents and purposes to be a notice. And it achieves the same result'.

> ' ... give them a s.40(2) and say "o.k., these are the things that have got to be done. I'll be back whenever", and you give a copy to the H & S Rep and say, "o.k., these are the things that have got to be done and that's the date we want it finished by". And 99% of the time it's done. But, see, what people in the city or even our manager - probably shouldn't say that - he doesn't know - but we're the turkeys out there. We deal with these people and you know exactly what's going to happen if you give them a s.40(2) notice, if they're going to comply with it or not. and it you think yourself they're not going to comply with it, don't give it to them, give them an Improvement Notice ..... .'

> 'Oh yes, s.40(2) is used for unguarded belts, unguarded machinery which would ..... could require (a) Prohibition Notice. If you issue (a) Prohibition Notice or an Improvement Notice then they might appeal against it. That means more work. If I presented you with a sentiment that one of the people downstairs said to me ..... when he heard that for everything you must issue a Notice, he said to me, "Don't worry, we are public servants, we are the ones in the field, we are the ones that decide. We are the winners, we are the ultimate. They can come up with all these policies, but if we don't do it, it will never work.'

In the policy paper which was prepared in November 1988, we addressed the s.40(2) issue, noting that the Department had taken some steps towards it formal recognition as an enforcement strategy and endorsing these moves subject to some heavy qualifications. We shall return to these questions in our concluding chapter, taking cognisance, where possible, of further developments which may have taken place since then. Here, however, it should be noted that the s.40(2) issue lay close to the centre of

a protracted saga involving attempts to develop an agreed compliance policy to be used across all regions. Thus, the Compliance Policy promulgated in September 1987 referred to s.40(2) 'as a means for providing information to the workplace parties on issues that need not receive Improvement Notices, defined as issues which are not serious and do not breach the Act or regulations' (C G 040GM, 1988). Reflecting the emerging practices described above, not to mention the growing rift which developed between the centre and the regions, however, Regional Services Division subsequently drew up draft guidelines which, among other things, proposed a new "s.40(2) Notice" and broadened the criteria for not issuing Improvement Notices 'to include alleged breaches of the Act or regulations' (ibid p.1). The Occupational Health and Safety Division of the Department took marked and protracted objection to these proposals noting, en passant, the not unrelated infrequency with which Improvement and Prohibition Notices were being used (an average total of 73 per month for both across the entire state up to May 1988), and went on to reaffirm the Improvement Notice as the main enforcement instrument to be used where there 'is an apparent breach of the Act or regulations and where the risks involved are not considered to be immediate' (ibid., p.3). Some ground was surrendered, however, it being conceded that a Notice need not be issued 'where the Inspector believes the employer and Health and Safety Representative can demonstrate competence to address an identified issue within a specified timeframe and where they meet the criteria for effective consultative arrangements .....' (ibid. p.3).

Finally, of course, no analysis of enforcement in transition would be complete without some discussion of prosecution. While a separate chapter, largely extending beyond the technical brief of the project, will be devoted to this subject, some preliminary discussion based on our qualitative data will be undertaken here. Once again, this

discussion should be read in the context of the fact that the Department's policy in this area is currently under review.

According to the Ministerial Guidelines gazetted in October 1985 (Gaz.103,1985) there were to be six sets of circumstances in addition to non-compliance with Notices in which 'proceedings will generally be instigated'. They were:

(1) When an alleged breach of the Act or regulations has resulted in a fatality or serious accident;

(2) Where an Inspector alleges an employer has wilfully repeated the same offence;

(3) When either an Inspector or a Health and Safety Representative alleges a Provisional Improvement Notice has not been complied with;

(4) Where offences in relation to Inspectors e.g. assault or obstruction are alleged;

(5) Where there is an allegation of discrimination against an employee for any action in relation to occupational health and safety;

(6) Where the issue of Notices is not considered appropriate for ensuring compliance with the Act or regulations.

The above circumstances apart, the intention was to rely on Notices rather than on prosecution as the main instruments for securing compliance with the Act. Referring to the guidelines outlined above the Director General confirmed this approach in interview when he said 'the number one priority is to try and get in procedures for consultative practices, and at the same time use Improvement Notices/Prohibition Notices, and that except where they (the guidelines) cite six instances occur, by and large you don't go out and maximise your prosecutions' Elaborating on the point, he continued:

> 'The philosophy of the Act is to reduce the number of industrial accidents and health problems in workplaces. Those guidelines reflect that, and it cites six instances, three of which occasionally occur, where the question is why not prosecute rather than why prosecute - that's industrial fatalities, continual breaches and so on. Now we have been, in my view, carrying out that philosophy. I'm not saying we've done it perfectly ... .'

As we saw in Chapter 3 above (see e.g. Table 3.7), pursuing a course which did not rely primarily on prosecution was scarcely new for the enforcement agency in question! Nor, for many Inspectors, did the new policy go against the personal grain. 'My bottom line is that if we have to prosecute, we've failed', said one Inspector, very much echoing the views of a colleague who saw 'court as the last resort'. By most accounts, too, the impression was of fewer prosecutions being taken in the wake of the new legislation. 'The policy now is not to breach' was how one front-line Inspector interpreted the Department's position, while a Regional Manager, after berating the Department for not equipping the Inspectors for their new advisory role, noted that 'there may now be a move away from prosecution as the primary tool.'

But there also seems to have been a lot more to this than simple adherence to a departmental policy formulated in the light of ministerial guidelines. One view from relatively near the top was critical of the Department's legal branch for adopting a conservative 'belt and braces' approach of never taking a case unless it could be sure 'it didn't fall down on you'. This attitude, he continued, had gone out as folk lore 'and Inspectors are being convinced that they can't enforce because it's too hard, that they can't run a case for breach of an Improvement Notice unless they're prepared to call expert evidence.' Another senior, though former member of the Department located the absence of a coherent enforcement policy back in the broader context of the circumstances of the law's enactment:

> ' ... again you had the influence of ACC coming in, and rather than stepping back and looking independently at the Act and saying what is the Act's purpose, it was pushed into "what is the purpose of WorkCare"? And so you were losing, you couldn't sustain issues about prosecution policies in relation to what the philosophic intent of the Act was, when the major driving force was intervening in industry to get down the high cost industries in terms of their claims against WorkCare'.

Whatever the nature of the problems at the top, however, there is no doubt that further down the line Inspectors, who had never been prosecution crazy in the first place, experienced considerable frustration over prosecution problems. One of the newer and more self-confident appointees 'had to fight on at least four or five occasions to get my files to prosecution because I believed that's where they belonged'. Asked if Inspectors would like to prosecute more, a very experienced Supervisor responded, 'I wouldn't say they'd "like" to prosecute them more; it means more work and under this present Act it's very hard to prosecute, but the ones we <u>are</u> doing are not getting through, the ones that deserve to be prosecuted, they're not going through'. Another Inspector recounted the story of how one of his colleagues became disillusioned as a consequence of the Regional Manager's response to a proposed prosecution:

> 'He had an instance with a spray painter. He went to this guy, and he said "you've got to do this and got to do that and so forth ... ". Anyway, he gave him a chance, and he went along and the bloke finished up abusing him. So he breached him under spray painting regulations and sent it to the regional manager. Fourteen months later they returned it to his desk. Now the Regional Manager comments, "oh, we won't worry about this, it's a bit stale now". He (the Inspector) wrote on it "so is the Inspector" and sent it back. Now ... this particular Inspector said he would never, ever put in another breach unless he was instructed to do so or guaranteed prosecution would follow ... '.

Perhaps more than anything else, however, it was the 'Section 21 problem' and its corollary, the absence of detailed regulations or codes, that caused most consternation in the context of prosecution. Time and again we heard calls for more regulations on the one hand, and complaints about the difficulties with s.21 on the other. With regard to the former, the argument was quite simply that for everyone concerned, regulations made everything much more clear-cut and straightforward. Being able to say 'That's it, it's clear' was one succinct description of the advantage of regulations, even to Health and Safety Representatives. A Regional Manager captured the core of the argument very well when he talked about the continuing emphasis on machine guarding:

> ' ..... the reason for that is very simple ... there are machinery regulations which provide very clear and concise guidelines under which the Inspector can operate, and what he should expect to see in a workplace on machines ... . So if he issues a Notice, he's got a specific regulation they can call on. There is no argument in front of the Magistrates Court - they're either guilty or they're not guilty, they have either satisfied the reg. or they haven't satisfied the reg.'

When it came to s.21 on its own, however, the picture was quite different. Some were simply content to say that a provision requiring employers to 'provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health' was simply 'not enforceable as it stands'. Others were more specific, citing in particular all kinds of problems in connection with the definition of 'practicable' as specified in s.4 of the 1985 Act. Did the reference to costs contained therein mean that they had to be able to assess a company's capacity to pay for remedial work? If so, did that mean they should distinguish between employers according to their relative economic positions? Similarly, it was argued, practicability means 'you get into the game of experts', a game in which the Inspectors felt ill equipped to compete. As one reported, 'we can talk in our expert field, like machinery, engineering etc., but (at) 'general legalistic talk they can beat us'. In humorous vein, one Regional Manager suggested that the practicability provision must have been written by someone like one of the original chief investigators (Breen Creighton) because while 'at best it supplies ... an academic debate, it provides little bloody else'. On a more serious note, he contrasted the plight of the Inspector appearing before the Magistrate armed with regulations with that of someone who has to rely on s.21 alone:

> 'Whereas you get something like manual handling, they can look at it and say, "Gee, it's bad that guy has to bend over and pick up that box and lift it three feet above his head and push it in the air", But how do I substantiate this ban. I'm not an ergonomist. I get in front of a Magistrate and they call ... expert evidence. I haven't got any regs. that say he's not allowed to lift more than X amount of weight; I haven't got any regs. that say he's not allowed to lift it more than six inches above his head; I haven't got any regs. that say he should have a ... trolley or something. There is

none of that. So it makes it very hard for the Inspector to work on anything where concise regulations don't exist'.

Progress has now of course been made on the manual handling front, but the general point remains. Rightly or wrongly, in the absence of precise regulations or codes, many Inspectors were more than diffident about prosecuting. For some, this meant that the Occupational Health and Safety Commission should accelerate its processes. For others, the problems surrounding s.21 were damaging the public relations side of the exercise as well as internal morale:

> ' ... it's now been eighteen months since ... (the Act has) ... been in place, and we're not getting the public profile result that we may have thought; and that's having adverse effects down the line in terms of Inspectors who are very loathe to sort of push issues of s.21, because they're convinced it doesn't work.'

The issue of public profile was also, naturally enough, a matter of concern to the Director General. Interviewed in 1988, he explained that he had gone out of his way to publicise certain prosecutions, which in turn had 'caused the employers also to attack the Department for changing the philosophy and for being pro-prosecution'. Conversely, he suggested, Trades Hall was now saying they 'don't like the guidelines' and, by implication, were looking for a more prosecution oriented approach. Welcoming what he thought could well be a 'productive'debate, he went on to explain that he had no problems if government, on its own initiative or at someone else's urging, should change its guidelines.

What was being alluded to here was a controversy which blew up late in the research process about use of the Crimes Act and, more specifically, common law manslaughter charges in relation to particularly flagrant situations involving fatality. This was a debate which drew in a member of the Law Reform Commission of Victoria, the Legal Officer of the A.C.T.U. (one of the original chief investigators on the project), and John Halfpenny, then Secretary to the Trades Hall Council. The argument received considerable coverage in the Victorian media and seems to have led to a degree of spine-

stiffening within the Department of Labour with regard to issues like penalties and prosecution in general.

Fortuitously enough, as part of the qualitative side of the research, Inspectors themselves had on occasion been asked for their views about issues such as the use of manslaughter charges. It can therefore be reported that, in the main, those who were asked to comment on this issue were favourably disposed to the idea. It should also be reported however, that on quite separate and independent grounds, two members of the research team came to quite different conclusions from those of these Inspectors and the other people who were pressing for the use of manslaughter charges and the Crimes Act. While totally in sympathy with the aspirations of those advancing the case, it was our argument that plucking out a few egregiously offensive cases to be subjected to the rigours of 'real' criminal law would only serve to advance a structurally underpinned historical process whereby the rest of occupational health and safety crime, what was left behind, so to speak, would come to be perceived as even less criminal than it already is. The proponents of the case for manslaughter charges, we felt, were unwittingly colluding in a further decriminalisation of occupational health and safety offences, and for that reason we proposed that, instead, a new offence of causing death by violation of the OHSA, or its associated regulations, should be incorporated into the Act itself. Alternatively, an offence of industrial homicide should be inserted into the Act itself. A paper outlining our arguments in more detail is attached to this report as Appendix 2 (Carson and Johnstone, 1989).

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CHAPTER 5

Self Regulation: The View from the Workplace

One of the main purposes of the 1985 Act was to achieve a considerable degree of self-regulation whereby, through consultation, use of agreed procedures, negotiation and if need be, the use of powers vested in Health and Safety Representatives, many workplaces would in effect take care of themselves. Implicit in this approach was the idea that the larger, unionised workplaces would function in this way, thereby freeing up the time of the Inspectors for giving more attention to premises, usually the smaller and less unionized ones, where such participative arrangements might not exist.

Given the purpose of the Act outlined above, it is therefore important to look at the experiences of those on whom self-regulation relies - the Health and Safety Representatives, unions and employers. This chapter of the report will endeavour to do just that, by concentrating on the views of the personnel outlined above, in order to illuminate how the Act is working from their point of view.

5.1 Health and Safety Representatives and the 'Size Question'

As indicated in Chapter 1, our basic quantitative information about Health and Safety Representatives was derived from two sources. It came, first of all, from a survey involving questionnaires administered to 250 representatives undergoing first stage training under the auspices of the Victorian Trades Hall Council and to 43 non-union representatives who had attended training courses provided by the Department of Labour. Responses were received from 205 or 82% of the former, and from 10 or 23% of the latter. In addition, 24 questionnaires were administered to Health and Safety Representatives undergoing a second stage training course, 100% of whom responded. Secondly, though less reliably

because of a poor response rate, we derived information from questionnaires sent to some 900 employers, from whom only 142 responses were received. This may have been due to unnecessary complexity of questionnaire design or, alternatively, it may in itself reflect something about employers' attitudes to occupational health and safety.

In connection with arguments advanced elsewhere in this report, it is relevant to note the size of the workplaces from which our sample of Representatives was drawn. As can be seen from Table 5.1, premises employing more than 50 workers heavily outnumbered the smaller workplaces. Thus 77% of our sampled Representatives came from workplaces of this size, and indeed, 59% were employed in workplaces with more than 100 employees. At the other end of the scale, less than 2% were drawn from the very smallest premises where less than 10 were employed.

TABLE 5.1

DISTRIBUTION OF HEALTH AND SAFETY REPRESENTATIVES BY SIZE OF WORKPLACE (HSR SURVEY)

Size of Workplace	No. of HSR's	%
Less Than 10	3	1.3
10-19	24	10.0
20-49	24	10.0
50-99	44	18.4
100-199	37	15.5
200-499	55	23.0
500+	49	20.5
Not Known	3	1.3
	239	100.0

Perhaps not surprisingly, when one turns to the employer questionnaire, a similar pattern emerges. Of the 142 premises from which we received responses 50 or 35% had Health

and Safety Representatives in place and amongst these Representatives 47 or 94% were duly elected under the Occupational Health and Safety Act, whilst 6% had been appointed by management. On the plausible assumption that our small number of employer respondents were drawn from the ranks of those more positively disposed towards occupational health and safety matters, the above findings are somewhat disappointing.

As can be seen from Table 5.2, based on the employer survey, Health and Safety Representatives are once again primarily located in premises employing more than 50 workers. Thus 34 or 68% of the Health and Safety Representatives were located in this size category, and 54% were employed in workplaces with more than 100 employees. In the smallest workplaces, where less than 10 persons were employed, only 4% had Health and Safety Representatives in place. If self-regulation is to rely on Health and Safety Representatives, it is clearly not something upon which those employed in smaller workplaces should be relying too heavily.

TABLE 5.2

DISTRIBUTIONTION OF HEALTH AND SAFETY REPRESENTATIVES BY SIZE OF WORKPLACE (EMPLOYER SURVEY)

Size of Workplace	No. with HSR	%
Less Than 10	2	4.0
10-19	4	8.0
20-49	7	14.0
50-99	7	14.0
100-199	13	26.0
200-499	10	20.0
500+	4	8.0
Not Known	3	6.0
	50	100.0

In response to a general question about the potential benefits of Health and Safety Representatives at the workplace, 57% of the employers who responded felt that they played a positive role in promoting occupational health and safety. But whilst 22% of the smaller employers endorsed this view, Health and Safety Representatives were still seen as inappropriate given the size of their workplace. One such proprietor felt, for example, that while not utilised at his premises 'because of the low level of unionisation, they are a useful mechanism because they have A grass roots knowledge which is vital if health and safety decisions are to be followed at all levels.' Another saw their benefits as deriving from the fact that because 'one tends to take things for granted' a lot of hazards could be rectified that may otherwise remain unseen.

As already suggested, numerous employers in smaller establishments saw Health and Safety Representatives as inappropriate for their particular workplace. One representative of an employer association, made this quite clear when he told us

> 'we're representing, in the main, small business people who employ maybe 5 employees. In fact 85% of our membership is in that area. It was our view then and it is still our view that to have the sort of mechanism that the Act contains in terms of health and safety representation through a fairly elaborate process of consultative mechanisms is not appropriate for a small business operation.'

The reasons for this, according to the same interviewee were that

> 'these people are on first name terms, ... if something is dangerous or something's going to fall on them they're going to sing out pretty quick and lively, they're not going to worry about going through an elaborate consulting process to get something done about it.'

These views were certainly shared by employers themselves. Thus one felt that as a 'family business', these more formal consultative mechanisms were totally unnecessary. Another employer told us 'our workforce is small and communicates with management.' Still

another stated his view more forcefully when he said 'you don't need a special hat and clipboard to ensure safety in a small close-knit business.'

For other employers their own health and safety consciousness precluded the necessity of Health and Safety Officers. Thus as one told us,

> 'we run a vibrant and concerned business where health and safety consciousness is a very important part of the foundation of this company; therefore no one is able to do anything around here that is going to impair his/her health and safety or the "H & S" of colleagues either.'

This view was elaborated further by others who felt that 'most of it is commonsense and it wouldn't take too many lessons to teach that.' Commonsense or not, another stated, 'if workers ... have been educated into tidy, safe and healthy workpractices from the beginning of their working lives' participative structures are not necessary 'because being health and safety conscious becomes second nature.' One employer from the 'trades area' suggested 'our own instincts and knowledge of our profession institute adequate health and safety standards in the workforce.' Furthermore, as a representative from an employer association noted in this regard,

> 'trades people are not fools and they will perceive and understand the implications of things or processes that are obviously unsafe and would initiate action themselves.'

Alternatively, other 'environments' or 'industries', it was argued, do need Health and Safety Representatives. 'Factories' for instance were seen as more dangerous than offices or retail shops. Thus one employer noted 'in some industries they possibly do' while 'in our working environment ...(an office)... commonsense prevails and they would be a complete waste of time.'

Waste of time or not, other employers felt that given the size of their workplace and the 'openness' of communication between all members of the workforce, more formal

mechanisms of consultation such as Health and Safety Representatives 'could be unnecessarily disruptive'. As one employer told us, the 'team spirit' of their firm was such that they were able to achieve their aims through informal but regular forums and discussions. Thus it was felt that 'formal steps can only establish employer/worker barriers in a non-productive way.' Another stated this more forcefully when he said, Health and Safety Representatives are

> 'not necessary in our workplace; there are no trade unions to create problems. People communicate freely with one another on any issue of concern.'

Given the fact that many small workplaces do not have the participative mechanisms in place - neither Health and Safety Representatives nor Health and Safety Committees, the obvious question then becomes that of the role of the Inspectorate with regard to such premises. This issue has already been addressed at some length in Chapter 4 above. As for the experiences and views of employers and their representatives in workplaces that do have Health and Safety Representatives, these will be dealt with in the context of issues arising out of the Health and Safety Representative's role.

5.2 The Role of Health and Safety Representatives

Under the 1985 Act, the role allotted to the Health and Safety Representatives was a crucial one. Indeed, it was one which was pivotal to the whole purpose of the legislation, and in order to perform it, the Representatives were invested with considerable powers. Under s.31(1) they were accorded the right to inspect all or part of the workplace, to accompany an inspector during an inspection, to require the establishment of a Health and Safety Committee and with the consent of the person concerned, to be present at any Occupational Health and Safety related interview between an inspector and an employee.

S.31(2) requires employers to provide Health and Safety Representatives with access to a range of Occupational Health and Safety information, to permit a representative to be present at interviews between employers and employees, again with the consent of the latter, to consult with Representatives about all workplace changes with a bearing on Occupational Health and Safety, to allow time off with pay for both training and performance of the Health and Safety Representative's function, and to provide the facilities and assistance requisite to the performance of that function. Representatives were also empowered to seek outside assistance in carrying out their role s.32. Crucially, under ss.33-35 they were given the right to issue Provisional Improvement Notices, and where consultation should fail in relation to issues involving an immediate threat to the health and safety of any person, to order Cessation of Work s.26(2).

Crucial as the above powers may be, their introduction was extremely controversial, and, indeed, constituted one of the main factors behind opposition to the 1985 Act and delay in its passage, even in what was a watered down form of the original proposal. In general terms, the misgivings surrounding the allocation of such powers to elected members of the workforce could be said to have revolved around two fears: that empowerment of this kind would amount to a serious assault on managerial prerogative, and that the powers in question would be used for 'ulterior' industrial relations reasons having nothing to do with occupational health and safety. The power to order Work Cessation was seen by some as particularly fraught with dangers in the latter respect.

That Victorian industry has not ground to a halt as a result of abuse of power by the Health and Safety Representatives is now apparent to all parties. One representative of a major employer organisation made this quite clear when he told us '... the expected upsurge in or anticipated upsurge in abuse and stopping the job at the drop of a hat has not occurred, except in some isolated situations. It hasn't become a general trend.' This

view was also shared by another colleague who felt that the 'concern about the way health and safety reps might have acted with the new powers have not come into fruition.'

One positive interpretation of this would of course be, that within the unionised workplaces at least, 'consultative mechanisms are working', and in some workplaces this may well be the case. But the overall impression gained from discussions with both Health and Safety Representatives and union officials, is that the former have in fact been reluctant to exercise their powers. The fear of issuing Provisional Improvement Notices in particular, has from the unions' point of view given rise to some concern as to whether or not the 1985 Act is really working. The reasons for such reluctance and the problems encountered on the part of some Health and Safety Representatives when exercising their rights will be examined in the following sections.

5.2.1 Provisional Improvement Notices

Granted under ss.33-35 of the 1985 Act, the power to issue Provisional Improvement Notices is a key component of the new Victorian system. Although it may, in principle, be somewhat vitiated by the provision under s.26(4) which allows any party to the attempted resolution of an Occupational Health and Safety issue to call an Inspector if the issue is not resolved within a 'reasonable time', there is no doubt that, in practice, the Provisional Improvement Notice was, at least initially, viewed officially as the first line of defence once matters had gone beyond the level of negotiation, formal or informal (but see Chapter 4, above). As far as some of the more confident representatives themselves are concerned, such Provisional Improvement Notices can even have value as part of the negotiating process itself. As one representative put it, 'just a couple of times we've sort of said to the company "we've got the authority to give you a Provisional Improvement Notice ..." and they more or less realise we can do this and we have no trouble ...'. Another stated bluntly

that 'as soon as you mention Provisional Improvement Notices they start flapping'. One of his colleagues was even more expansive:

> ' ...every time I issue something I quote the Act and then I drop it on the desk and he knows the next thing I am going to do will be issue a PIN notice. When they just say 'no' or they've taken just too long, or they sound like they're beating around the bush, I send a memo and when they get the memo they know it's coming straight after that ... sort of the lull before the storm ...'.

Such confident statements should not, however, be taken as the norm. Of the 239 Health and Safety Representatives who responded to our original survey only 27 or 11% said they had issued one or more Provisional Improvement Notices. Table 5.3 shows the distribution of Provisional Improvement Notice utilisation among our respondents. Interestingly, while there is a noted increase in their use amongst the more experienced group of Representatives, it is still comparatively low at around only 7 or 29%. Respondents from the small group of non-union respondents made no use of this power whatsoever.

TABLE 5.3

USE OF PROVISIONAL IMPROVEMENT NOTICES

	Yes	%	No	%	Not Known	%	Total	%
Less Experienced Group	20	9.8	174	84.9	11	5.4	205	100.1*
More Experienced Group	7	29.2	16	66.7	1	4.2	24	100.1*
Non-Union Group	-		10	100.0	-		10	100
	27	11.3	200	83.7	12	5.0	239	100

* Figures rounded to one decimal place.

When interviewing, we encountered numerous reports of reluctance, diffidence and even fear in relation to the issuing of Provisional Improvement Notices. Thus one union official reported a lot of reticence in the matter, partly because the process was seen as very formal, and partly because, unlike attending a Health and Safety Committee, issuing a Provisional Improvement Notice was perceived as confrontation. This view was shared by another official who told us that 'the people see Provisional Improvement Notices as dreadfully confrontational, why I will never understand'. Confrontational or not, some Representatives held the clear view that issuing Provisional Improvement Notices could provoke an unwanted reaction from management. One told us of her own feelings and those of her colleagues on the matter:

> 'I thought it's not worth issuing PIN notices all over the place because they sort of tend to lose their meaning, and also you get management's back up ... I think the reason why quite a few people, from my experience, are hesitant about issuing a PIN notice is because they're frightened of having management come back on them in some sort of way like making their life miserable ... little things like changes here and doing things. I think that's about it or outright antagonism from your superiors ... '.

Such antagonism was well known to union officials, and while they bemoaned the reluctance of their Health and Safety Representatives to utilise these rights, they were equally aware of the potential repercussions for the worker if they did so. Threats against them in terms of losing their job had, they asserted, certainly been alleged, and according to one Health and Safety Representative it was a personal reality. He told us that after issuing a Provisional Improvement Notice, the manager 'was pretty pissed off ... so ... (a) job security type of talk was given to me saying I was a trouble maker ... '.

It was also reported to us that Health and Safety Representatives have been threatened with being moved to other sections of the workplace, or as one union official told us ' ... if you put a Provisional Improvement Notice notice on you'd finish up on the tar cart for a month or you'd finish up in some boring dreadful job'. In one factory, another

official recalled, the Health and Safety Representatives were called together by management and 'told off because they had issued a couple of notices'. This was seen as an extreme response, given the fact that only two Provisional Improvement Notice notices had been issued in the last eighteen months and those Notices were, in this Representative's opinion, on 'really valid issues!'.

Other forms of alleged 'intimidation' included responses from management like, 'how unreasonable you are', and 'you'd better be right with that Provisional Improvement Notice' or 'if they're not ... threaten that they can be disqualified because they were wrong'. Similarly, it was said that the employer can intimate the inappropriateness of a Notice by saying if it 'fails to be supported by an inspector it must be an unreasonable notice'. This 'constant needling' as one union official put it, was the most common form of harassment alleged. Another union official was even more expansive

> 'make no bones about it, it is fine and good to say to somebody you have the right to serve your employer with a Provisional Improvement Notice, but you are not there Monday mornings at 9.30; your boss walks past you ... and he says ... what bans are you going to put on today Mac ... and there is this constant insidious intimidation and harassment that is almost impossible for anyone like myself to pick up on when we come to deal with the dispute, because the employers are afraid of us and they treat us with some kind of respect but they have none of that respect for their own employees and they will use anything in their power to put that person under if they can'.

The pressures alluded to above were, we were told on several occasions, particularly acute in country areas. Given the fact that Health and Safety Representatives are members of relatively close knit communities, there is the risk of acquiring a 'bad reputation'. One union official illustrated this situation with a vivid account following a discussion with one of his members:

> ' ...if I do something on the job he says my wife knows about it before I get home' and if you are the bastard who put the PIN on the shire's grader, you are a marked man in the town. Now that sounds a little bit exaggerated but you've got to go down to the golf club, the football club, the pub, the school committee, walk down the street and everyone knows what you did and people don't comprehend what it is, they say "oh, he's put the grader off the road." So it takes a bit of doing'.

That the reticence of the Health and Safety Representatives may in fact be well founded in some workplaces, is borne out by the response to this issue by some of the employer respondents and interviewees. Their views ranged from seeing Provisional Improvement Notices as extremely confrontational and a somewhat 'drastic' measure to take, to recognising that Representatives may be frustrated by the lack of response to the resolution of issues and that their threats of or actual use of Provisional Improvement Notices were understandable.

The most extreme response was voiced by a Health and Safety Officer employed in the public sector. His feeling was that if a Health and Safety Representative is elected:

> 'he shouldn't be empowered to give a PIN notice until he has got the training so he knows what he is talking about because he could commit organisations to untold trouble, stir up all sorts of unrest and emotional feelings ... that are counterproductive to safety, not just to the organisation welfare but the safety itself'. He went on to give examples of an active Representative who had issued several notices which in his view were 'completely unjustified'. 'And he should have been told so'; he continued, 'in fact at one stage we were considering whether or not we should take further action'. This further action 'apart from appealing it' was to 'maybe have the representative cautioned if not kicked out of office'.

The response from another Health and Safety Officer, working in the private sector, was more tempered. Several Provisional Improvement Notices had been issued as a result of a 'perceived lack of response to a couple of items that they believed could have been done quicker'. When discussing the broader issue of powers given to Health and Safety Representatives he was quite open in his views, and told us:

> 'When they come back from their TUTA course you try to make a fine balance between what they've picked up there which when they come back, yes they're very fired up on the trade union way of doing business. And then you temper that with a balance of how the company operates and you take them into your confidence and show them the way the company operates and what the company is trying to do - nine times out of ten they also then get a very balanced picture as to how the place is running and they respond accordingly'.

This did not mean, however, that all issues are resolved in this manner, for 'every now and then they get off the rails' and Provisional Improvement Notices might be issued. In his view:

> 'The notices we've had are more the result of shall we say, less than satisfactory communication'.

The emphasis on negotiation and adequate communication rather than resorting to the use of Provisional Improvement Notices was also the view of another Health and Safety Representative. For instance, it was suggested that while no Provisional Improvement Notices had been issued at the place of work in question, there had been 'threats of that in the beginning', when:

> 'We had this new safety rep who came from the metal industry. But I think that was because ... (he was) ... a young man ... (who) ... wanted to make an impression and he was being allowed because they didn't understand the safety rep role here ... he was being allowed, rather than working together'.

Working together or not, one Health and Safety Officer felt that the verbal threats of Provisional Improvement Notices arose in his workplace because of a feeling on the part of the Health and Safety Representatives that, 'Look we've worn this long enough' and 'if it's not going (to be fixed) by next Friday, you know, that's it, we're going to carry out our rights to that extent'. In the same interviewee's view the Representatives have got the power if they really want to push it, but they rarely do'. Most issues, even up to 99%, he estimated, get handled by 'the informal system of safety discussions, through negotiation with their supervisor or by raising a 'hazard slip'. A similar procedure was also followed at another factory, where if the supervisor was not responsive to the Health and Safety Representative's request, then the Health and Safety Officer played a mediating role and discussed the issue with management. If the issue still remained unresolved, it, in her words 'goes back on the safety committee and then gets tabled and then has to be done, no choice'. The tendency of some workplaces to bypass the powers of the Health and

Safety Representatives through diversion into the committee structure will be discussed at a later point. But according to this Health and Safety Officer, the procedures had been working well because no Provisional Improvement Notices had been issued. In her view this was:

> 'because they come out to talk to us first and ... say 'look can that be done' and we look at it. There hasn't been a reason for it because of the steps they can take and they can talk to us'.

5.2.2 Work Cessations

As mentioned previously, the power to order a Work Cessation in situations that are deemed to be of an 'immediate risk' to the health and safety of employees was seen by numerous employers as fraught with danger. In particular it was felt that in the guise of occupational health and safety, this power could be used for industrial relations purposes. In the opinion of one Health and Safety Officer, this had in fact occurred at her previous place of employment where some Health and Safety Representatives had used their position to 'show the union's industrial muscle'. She recalled further that 'they will push the issue and say 'look officer I'll shut this down if I don't get this', and went on to recount an incident in which the 'new chappy':

> 'instead of going through the negotiation like we normally do here, he just went to the union and brought the union in and said "look stop this" and the officials say "get on to this we'll have a strike" ... (and) ... they did have a day strike on it'.

Some other Health and Safety Officers also shared a similar view. In one dispute involving the removal of asbestos, it was claimed that the Health and Safety Representatives were of the opinion that the process has not been adequately carried out. What happened thereafter was outlined at some length by the Health and Safety officer:

> 'the contractors really didn't do the job to the letter of the law and we had a small problem when we started up here with asbestos dust which is a fairly emotive issue which you can well imagine and it had the potential to run right away and become disastrous'.

The company had to employ consultants to monitor the cleaning up process and when the Inspectors were called in, they

> ' ... said the place was clean, that it was OK to work. Several of the safety health reps still agitated for further cleaning work to be done and we ended up saying it's no longer a safety and health issue, it's really an industrial issue'.

Industrial relations or not, in the experience of an occupational health nurse, the only time this right was utilised was when a newly trained Health and Safety Representative stopped the machine. In her opinion he:

> 'really didn't understand his role very well, initially. Management were allowing him to react in the sense that he would go in and stop the machine and not because of danger but because there may be problems with the guard ... Instead of going to the supervisor and saying look there's something wrong here let's sort it out, ... (he) stopped the machine. But that's all changed and the role is now understood well by him and by the others who are elected safety reps but not trained yet'.

Leaving aside, for the moment, whether or not Health and Safety Representatives followed the correct procedure, it is interesting to note how frequently they claim to have utilised their powers to order Work Cessations. Compared to the use of Provisional Improvement Notices, which had only been issued by 27 or 11% of the Health and Safety Representatives in our sample 56 or 23% claimed to have ordered a 'cease work' one or more times. As is clear from Table 5.4 below, this increases markedly when one looks at the responses of the more experienced Health and Safety Representatives. Thus in this category 12 or 50% claimed to have utilised this right.

TABLE 5.4

USE OF WORK CESSATION

	Yes	%	No	%	Not Known	%	Total	%
Less Experienced Group	42	20.5	146	71.2	17	8.3	205	100
More Experienced Group	12	50.0	12	50.0	-		24	100
Non Union Group	2	20.0	8	80.0	-		10	100
	56	23.4	166	69.5	17	7.1	239	100

One clue to a possible explanation for this anomaly came from one of the major employer organisations. Health and Safety Representatives, he suggested, found it easier to use what were in fact 'bans' rather than to issue a Provisional Improvement Notice:

> 'They said that they use the avenue of banning because it is a closed shop and they didn't hesitate to put a black ban on an aisle or a machine or something but they couldn't sort of relate that to PIN notices. So I think in the unionised areas it's probably going on the same as it ever was, it's just that the safety reps are doing it rather than the shop stewards'.

That this opinion may well be right is borne out by many of the views presented to us in the course of collecting in our qualitative data. Consequently it needs to be stressed at this point that many of these reported Work Cessations are more likely to have been traditional 'black bans' on a particular machine, or a work practice, rather than Work Cessations under the 1985 Act per se. Certainly the situation referred to previously by the occupational health nurse illustrates this point, as do the accounts given by several union officials and by some Health and Safety Representatives themselves. Prior to documenting this evidence, however, it should also be noted that in some cases Health and Safety Representatives are also shop stewards or union delegates and thus might revert back to

this more familiar technique of issue resolution. Having said this, however, only 36% of the Health and Safety Representatives in our sample held either of these positions. Thus while if may well be the case that many do resort to this more familiar strategy, they are not necessarily the only ones doing so.

According to one union official working within the public sector, Work Cessations are:

> 'not that frequent but ... often the cease work is ordered a little more informally than in a lot of other industries ... You get a situation where say it's a trench or a bridge or something, they'll say we won't work on that till you do that'.

This impression was also shared by another colleague whose membership covered both the public and the private sector. Detailing the varying types of Work Cessations that had been called, the account went on:

> 'We've had a few in our industry, they haven't all been total Work Cessations they've generally been cessations on particular products used in the industry or ... stopping work with particular kinds of equipment. So they haven't been full Work Cessations ... (In) ... the old days we would call them banning a product or banning a piece of equipment; so they have just ceased work on a particular part of the job rather than the whole job. And the few occasions when we have had complete Work Cessations, we've actually had no difficulty at all because I think that our Representatives have only done that in fairly outstanding situations'.

For one Health and Safety Representative, who seems to have operated in this way, the use of his powers to stop dangerous work was implemented in relation to specific machines. He told us:

> 'I've stopped the job till they've done repairs on it ... I've only stopped it because it's likely to cause accidents immediately but anything that can be held off for a couple of hours or till the end of the shift ... I get the maintenance to do it. I don't put a stoppage on that'.

In the case of another who had recently resigned from his position as shop steward, he had 'come very close' to directing a Work Cessation by calling a meeting 'because I didn't think things were getting done quick enough'. In relation to a different issue he had stopped a particular work practice once, and went on to explain how the

> 'other day with tank 36, I didn't put a notice on it because I didn't have to because as soon as I saw it the blokes immediately refused to work on it ... they just said "no way" '.

Other Health and Safety Representatives have also exercised this right in the fuller sense of s.26(2) of the 1985 Act, and for one Representative this was considered by management to be a serious challenge to their managerial authority. She had decided to close down the mine in a historical park until spasmodic power failures were rectified. In order to do so, she also had to stop all tourists from entering this area, and 'ended up being abused by the admin officer, and all the rest of it'. As she recalled:

> 'The Manager was saying "I don't think you can close down the mine. It is an act of law, you can't make that decision". I raced home, and I said "what's going on?" and I looked it up, and read that ... (if) ... management and health and safety reps can't come to a decision on any problem, then I have the right to stop the problem from happening until it's sorted out'.

She did just this:

> 'I just said "you will not let anyone down those steps and into the mine for the rest of this day". And he said, "well ... (on) ... whose authority?" I said, "as your Health and Safety Representative, both of the union and the government, and by an Act of Parliament; you let anyone through, and you're in trouble". Nobody else went underground'.

This particular person obviously felt that she was within her rights to act in the manner described, and the power to direct a Work Cessation assisted in making management take her role seriously. As she said, 'it was actually good as I told them that I meant business and I knew what I was talking about, and they couldn't put one over me, which they were trying to do in all sorts of areas'.

Most of the cases described thus far, have not required the Inspector to be called in to arbitrate on the validity of the Work Cessation. The dispute surrounding asbestos removal is an obvious exception, and there the issue of industrial relations was cited by the Health and Safety Officer as the reason for its illegitimacy. As has been mentioned earlier (see 4.5 above), some Inspectors shared this view and still find it difficult to deal with

situations where the conflation of industrial relations and Occupational Health and Safety might occur.

One particular Work Cessation highlights this dilemma and also connects it with the question of the role of the Inspectorate. According to the union official involved, a protracted dispute occurred at one workplace which in the end had to be resolved at the Industrial Relations Commission. What the dispute highlighted in her opinion was the difficulty in defining the concept of 'consultation':

> 'what tends to happen with cease work situations are that it is a matter that has gone on and on and on and on ... It is these minor problems, minor alterations are made or companies have promised to do something and never have ... in the end the whole matter just blows up and ... (a) ... cease work starts and it is difficult to claim to define consultation in that process because you know it is just a matter of some event ... (that) ... brings on the issue'.

The case in point here developed after a Provisional Improvement Notice was issued and the company complied, but not, it was thought, adequately. The Health and Safety Representatives then directed a Work Cessation, after which an Inspector was called in and decided that they should go back to work. The workers did not abide by this decision and sought 'another opinion from a higher person because no clear agreement to resolve the problem had been given by management'.

In this union official's view, this experience confirmed the impression that many Inspectors lack an understanding of the context of the dispute' and hence tend to apply the 1985 Act according to their 'individual' view:

> ' ... Now I think the inspector actually said in that situation that it wasn't reasonable grounds for a stop-work, yet I have had cases, a number of cases of that where inspectors have said it is a reasonable cause'.

5.2.3 The Right to Accompany an Inspector

From our survey data, only 48 or 20% of the 239 Health and Safety Representatives had utilised the right to accompany an Inspector during her/his visit to the workplace. As

can be seen from Table 5.5 below. with regard to exercising this right. 58% of the more experienced group had done so, compared to only 15% of the less experienced group.

TABLE 5.5

EXERCISE OF RIGHT TO ACCOMPANY AN INSPECTOR

	Yes	%	No	%	Not Known	%	Total	%
Less Experienced Group	30	14.6	160	78.0	15	7.3	205	99.9*
More Experienced Group	14	58.3	9	37.5	1	4.2	24	100
Non-Union Group	4	40.0	6	60.0	-		10	100
	48	20.1	175	73.2	16	6.7	239	100

* Figures rounded to one decimal place.

This marked difference could in part be explained by the lack of experience and additional training of the latter group, which may make them unaware of or reticent in utilising this right. Furthermore, some Inspectors have reported cases where Health and Safety Representatives have chosen not to accompany them on an inspection, which in their view was an expression of 'apathy' or 'disinterest'. Having said this, however, the utilisation of this right obviously depends on whether or not an Inspector has been to the workplace in the first instance. Furthermore, these findings also need to be viewed against the backdrop of our qualitative research in which it was not infrequently reported that Inspectors did not automatically contact the Health and Safety Representative when on site. As one told us:

> 'I feel that an Inspector should make contact with the OHS rep when they come on site. This has not occurred while I have been on shift'.

Another, who had not seen an Inspector, reported a similar experience. Colleagues said that they had visited the workplace at varying times but:

> 'there are times when the actual person didn't even know or that the time fell on an RDO which meant the person wasn't there and I was not informed until after the event.'

Others recounted similar stories of Inspectors who, for example, 'don't bother about trying to see the reps', or 'you know their answer is "oh yes, we tried to see the reps but they weren't on duty at the time"'. The same union official went on to say that when questioned on why the Inspector did not attempt to contact them they responded by saying:

> 'Oh yes, we told the employer to tell them that we had been and to contact us if they wanted to. You know, yeah, sure, the employer is going to tell them, aren't they. You know it all goes back to working through the employer'.

This suggestion that reliance on managerial prerogative dies hard was shared by some other Health and Safety Representatives. One felt, for example, that Inspectors were clearly 'still management type people' and consequently he too 'was the last to know what was going on'. Another who felt that while 'the Inspectors that have been coming down here have been pretty good', the only 'problem we had was sometimes they came down without seeing the rep'. He told us:

> 'They've been and gone before, we might have something ... that we'd like him to have a look at while he's here ... and a couple of times he'd come in over a specific thing and they've seen management, had a look at it and gone'.

These comments highlight the fact that as mentioned previously (see 4.5 above) some Inspectors are clearly experiencing difficulty in adjusting to the idea that occupational health and safety is no longer a matter exclusively for management. The tendency for some Inspectors to see only management or their representative still seems to be a not uncommon practice. Furthermore, the degree of involvement with Health and Safety Representatives also seems to rely upon the discretionary powers of the Inspector. One

private Health and Safety Officer told us that when an Inspector comes to the workplace, they

> 'come to me and then in fact if it relates to a particular area, we call the designated rep for that area. They don't all en masse accompany, but the designated rep for that area, if he requests that he wants to speak to them all, well then that's just a matter of calling them together'.

How often Health and Safety Representatives are seen is not known. Nonetheless, if Inspectors are seen to be too 'pally pally' with management, as one Representative suggested, it may be rather offputting. This was certainly the case for one Health and Safety Representative who worked in the country. Whilst she always made sure that she accompanied the Inspector, she felt that because the Inspector knew the management representative personally, and belonged to the same club, 'I knew I'd lost it immediately, so next time I'll know to get someone from Melbourne'. In this climate of friendliness she said that she would not be able to say 'oh no, I don't think that's right'. This is, of course, just one example, but other issues concerning the degree of support experienced by Health and Safety Representatives in their dealings with Inspectors will be discussed in greater detail at a later point in this chapter (see 5.2.11).

5.2.4 Requests for Information

Given the concerns about long term health hazards, and occupational illnesses deriving from the use of toxic substances, the right to request information about such substances was seen as crucial by many Health and Safety Representatives and unions alike. This of course was not the only type of information requested, but it seemed to be the area that was of most concern. Other types of information included results of hearing tests, for example, or copies of consultants' reports.

As can be seen from Table 5.6 below, 87 or 36% of our Health and Safety Representatives made use of this right. Once again, the more experienced group of

Representatives (and in this case also the non-union ones) made more frequent requests for information from their employers.

TABLE 5.6

EXERCISE OF RIGHT TO REQUEST INFORMATION

	Yes	%	No	%	Not Known	%	Total	%
Less Experienced Group	61	29.8	128	62.4	16	7.8	205	100
More Experienced Group	18	75.0	5	20.8	1	4.2	24	100
Non-Union Group	8	80.0	2	20.0	-		10	100
	87	36.4	135	56.5	17	7.1	239	100

In the view of one Health and Safety Representative who had utilised this right, this power was seen as important 'because we just had people opening drums and ... (they would) ... sniff and say "oh that doesn't smell right, we'll put the top back on that" '. To persuade his management to supply the data sheets on the chemicals in question involved 'a fair debate over it; I think it was two or three meetings before we got our satisfaction on that'. Others also experienced difficulty in this regard. As one told us, 'you can ask, but the information is not forthcoming'. For another, getting the data sheet became a very stressful episode. The response from management was:

> ' "oh yes, we'll get it, we'll get it", and that went on for a couple of weeks. I thought "I won't push him, I've asked for it, I've told him what to do, how to get it ...". And ... we were about to shift into a new factory ... and I didn't want to put him under too much pressure but I just kept niggling at them every week, just asked them if they'd chased it up. Anyhow one day they came along and gave me a half typed up sheet and they'd done it themselves. I had a look at it and I said "what's this?" "Oh that's a data sheet ..." And I said "no it's not, where did you get it?" "Oh off the side of the drum" '.

This particular Representative had to explain to the assistant manager, that the only way of acquiring a data sheet was from the manufacturer of the chemical 'not the supplier or anyone else'. Another week passed by, and

> 'up comes the boss, ... you could see him sort of coming and I thought "hello, it looks like storm clouds here". Well he threw it down in front of me and said what is wrong with it and I said, "Well, there's nothing right with it ... " I said "that's still not the information we want ...". He really didn't like it, you know, and I turned around and I pulled out a sample ... data sheet ... and I said "now ... every bit of that is the information I require and I need to have a copy in our keeping and you should have one in the office" and I said "and that's the law". Well he stormed off; oh just before he stormed off I said "now I've told you how to go about it, are you prepared to do it or do you want me to do it". I said, "because I will". And he just stormed off. And a week later we had the data sheet'.

According to the employers interviewed, provision of information to Health and Safety Representatives was 'freely given'. In an unusual joint interview with both a Health and Safety Representative and an employer, the following exchange of views was voiced. The employer told us there are 'no problems at all. Any information you want you get'. The Representative responded by saying 'we've asked the company and we're never happy with it and we say well you realise if we don't get it to work we'll go elsewhere and they've always given us information'.

In another workplace using toxic gas, the information about the 'health risks' was conveyed by 'signs stating that it is a poisonous gas in that building'. The Representatives had requested information from the employer who told them 'oh yes, that is available ... the health and safety people have a copy of that'. This level of access was also available at another factory, where the Health and Safety Officer informed us

> 'They've got access to the chemical data sheets. Nothing comes on site without a data sheet in terms of chemicals. They've got access to just about anything they so desire. The only thing we draw the line at is medical records, they can't have access to those. There's comments that our company doctor and medical nurse make that we regard as ours'.

This area of medical records is obviously a potentially contentious issue, and in relation to the question of access, an occupational health nurse expressed her concern. She in

fact guarded these records preciously, and felt that union involvement in health and safety was important, 'as long as they're not infringing on my confidentiality'. She continued:

> 'I'm very jealous of my confidentiality, of my records here, and as long as they don't ask to see them, I'm here and we can work together ... '.

5.2.5 Consultation about Changes to the Workplace

According to one union official 'we put a fair bit of emphasis on this section of the Act that I think is least carried out'. In his view the reluctance of Health and Safety Representatives to utilise this right and the ensuing difficulties that arise if it is used, were due to the fact that 'it's not in our tradition and it's not in management's tradition to consult the Health and Safety Representative'. In a more expansive comment he elaborated on this further:

> 'it's very hard to enforce consultation. By its very nature it requires good will and if you haven't got that reasonable relationship it's like saying to your kids "be friendly you little bastard or I'll belt you', It doesn't work that way. So that's very slow and the reps, to be frank, are a little reluctant to take that on because they're not used to it'.

As can be seen by Table 5.7 below, this right was exercised by 75 or 31% of the Health and Safety Representatives who responded. Once again the more experienced ones made more use of this power. Thus 75% of this group had requested the right to be consulted about proposed changes to the workplace one or more times. Similarly the non-union Health and Safety Representatives had also made quite frequent use of their power.

TABLE 5.7

CONSULTATION OF CHANGES TO THE WORKPLACE

	Yes	%	No	%	Not Known	%	Total	%
Less Experienced Group	51	24.9	137	66.8	17	8.3	205	100
More Experienced Group	18	75.0	6	25.0	-		24	100
Non-Union Group	6	60.0	4	40.0	-		10	100
	75	31.4	147	61.5	17	7.1	239	100

In the experience of some of the Health and Safety Representatives who had utilised this right, such information was not necessarily forthcoming. One recently appointed Representative was barely aware of potential 'changes going on and they could be done this year, they could be done next year'. The management of this workplace did not consult if they suddenly decided to implement some of these proposed changes. The Representative had approached management on one occasion:

> 'we said we'd like to have more information on what is done at the plant and he said sometimes he doesn't know much himself'.

In his view he would have to use his powers as a Health and Safety Representative to demand such consultation, but at the time of the interview had not done so.

For another more confident Representative, however, issuing a Provisional Improvement Notice ensured his notification of all new chemicals that were entering the workplace. The situation was described as follows:

> ' ... the chemicals kept drifting into the factory without chemical data sheets. They sneak them in through the laboratory and maintenance orders and store orders and things like that and the only time you're really aware of it is just accidentally ... walk past the store one day and you see something there that you haven't seen before. And we hit them with a PIN Notice on that and explained the rules and they really had to come up very quick smart with the data sheets'.

In some workplaces, the process of consultation occurs within the structure of the Health and Safety Committee. According to one manager, whilst the Health and Safety Representative had asked about proposed changes the consultation process generally occurs at such meetings. This was the most common avenue 'unless it is a rush job, something comes up all of a sudden'. Sudden changes or not, in the view of one Health and Safety Officer, the Representatives did not need to utilise this right in his workplace, for one of the items at such meetings was

> 'a thing called communication for change. Where anything that's about to be changed - technology, equipment, machinery - that sort of thing, we discuss at that meeting. Where possible we can have them sitting down with plans and we try to let them see everything from the blueprint stage rather than when it's on the floor saying 'there fellahs, have a look at it and it's all yours'.

Nonetheless, even for those Health and Safety Representatives whose committees operated in this way, the process of consultation was still considered to be a problem. As one recalled:

> 'we had already had a working party and they informed us when they were going to put it in, where they were going to put it in and how they were going go put it in and I walked in one morning and all of a sudden there they were ... We had specified that when the new terminals come in ... that they wouldn't do anything without our knowledge, without our input into it. But they just did it after we'd gone home from work on a Friday afternoon. We came in on a Monday morning and there they were in all their glory'.

Apparently this had occurred because 'administration had taken it upon themselves to put this in without even telling the safety officer'. The person involved had apologised to the Health and Safety Representative and said to her, 'well I wasn't aware'. She responded by stating

> ' "well you sat in on all those meetings and all that sort of thing ... how could you not be aware?" He said, "I assumed ...". I said "well from now on sir you don't assume anything" '.

5.2.6 Exercise of Right to be Present at Interviews

Neither the right to be present at an interview between an employer and employee, nor one conducted between an Inspector and an employee were utilised very frequently. In fact, the infrequency of their use is on a par with that of Provisional Improvement Notices.

TABLE 5.8

PRESENCE OF REPRESENTATIVES AT INTERVIEWS BETWEEN AN EMPLOYER AND AN EMPLOYEE

	Yes	%	No	%	Not Known	%	Total	%
Less Experienced Group	26	12.7	162	79.0	17	8.3	205	100
More Experienced Group	11	45.8	13	54.2	-		24	100
Non-Union Group	1	10.0	8	80.0	1	10.0	10	100
	38	15.9	183	76.6	18	7.5	239	100

Table 5.8 above, clearly shows the more frequent use of this power by the more experienced group and the reticence of the less experienced Representative. Thus 45% of the former group exercised this right, while only 13% of the latter group did so. Not surprisingly, when one turns to Table 5.9 below, a similar trend is evident.

TABLE 5.9

PRESENCE OF REPRESENTATIVES AT INTERVIEWS BETWEEN AN INSPECTOR AND AN EMPLOYEE

	Yes	%	No	%	Not Known	%	Total	%
Less Experienced Group	15	7.3	162	79.0	28	13.7	205	100
More Experienced Group	9	37.5	15	62.5	-	0.0	24	100
Non-Union Group	1	10.0	8	80.0	1	10.0	10	100
	25	10.5	185	77.4	29	12.1	239	100

The context of these interviews remains unclear, since none of our interviewees, as opposed to our questionnaire respondents, had exercised either right.

5.2.7 Exercise of Right to Outside Assistance

Given the structural context of power relations in which Health and Safety Representatives operate, it would not be surprising if they found it necessary at times to seek outside assistance in order to carry out their functions. The type of assistance commonly cited ranged between: requesting a consultant to take readings and provide reports on hazards such as noise, airborne contaminants or fumes; seeking the presence of a union official to enable them to negotiate satisfactorily with management or assist them in carrying out other Health and Safety duties, and asking an Inspector to come on site to conduct inspections, offer advice or provide other forms of support. Having said this, however, when one turns to our sampled Health and Safety Representatives only 30% had requested outside assistance. As is clear from Table 5.10 below, the more experienced group had exercised this right more frequently, 67% having done so.

TABLE 5.10

EXERCISE OF REPRESENTATIVES RIGHT TO CALL FOR OUTSIDE ASSISTANCE

	Yes	%	No	%	Not Known	%	Total	%
Less Experienced Group	37	18.0	145	70.7	23	11.2	205	99.9*
More Experienced Group	16	66.7	8	33.3	-		24	100
Non-Union Group	4	40.0	6	60.0	-		10	100
	57	23.8	159	66.5	23	9.6	239	99.9*

* Figures rounded to one decimal place.

Of the Health and Safety Representatives interviewed, two had called in an Inspector to assist them in inspections and offer advice, and one of these same Representatives had requested his management to provide a consultant to take readings on the level of fumes in a particular section of the workplace. Another had requested assistance from the union, in the form of verbal advice.

It may well be that for some Health and Safety Representatives this question, as expressed in our questionnaire, was somewhat ambiguous, for when one turns to the more specific issue of asking for help from one's union and the Department of Labour, findings are somewhat different. In the case of the former, 31% of the sampled Health and Safety Representatives had requested help from their union, and of the more experienced group, the frequency increased to 75%. See Table 5.11 below.

TABLE 5.11

HEALTH AND SAFETY REPRESENTATIVES REQUESTS FOR HELP FROM UNION

	Yes	%	No	%	Not Clear	%	Total	%
Less Experienced Group	53	25.9	139	67.8	13	6.3	205	100
More Experienced Group	18	75.0	6	25.0	-		24	100
	71	31.0	145	63.3	13	5.7	229	100

In this context, the more frequent requests for advice or other forms of assistance by the more experienced group may again obviously also be due to the fact that they have been in post for a longer period of time and furthermore have undergone additional training. In discussions revolving around the issue of training needs, for example, one union official suggested:

> 'I just find that the reps get out there and they have got the questions. You know they don't have the questions when they come in. And they get some training, they go out for the go and six months later they are desperate for that sort of contact'.

It seems therefore that training and thus greater awareness of potential hazards may increase the request for advice from the unions. A similar pattern emerges when one turns to the Inspectorate. It is interesting to note in Table 5.12 below, that only 35 or 15% of the sampled Health and Safety Representatives had requested assistance from Inspectors. According to our qualitative data this figure seems low, and once again was primarily in terms of advice, although as mentioned previously some did request Inspectors to come on site. Furthermore 50% of the more experienced Representatives had requested Department of Labour assistance, compared to only 10% of the less experienced group.

TABLE 5.12

HEALTH AND SAFETY REPRESENTATIVES REQUESTS FOR ASSISTANCE FROM DEPARTMENT OF LABOUR

	Yes	%	No	%	Not Clear	%	Total	%
Less Experienced Group	21	10.2	162	79.0	22	10.7	205	99.9*
More Experienced Group	12	50.0	10	41.7	2	8.3	24	100
Non-Union Group	2	20.0	8	80.0	-		10	100
	35	14.6	180	75.3	24	10.0	239	99.9*

* Figures rounded to one decimal place.

It may well be the case, therefore, that additional training for Health and Safety Representatives will not necessarily reduce the demand upon the time and resources of the Department, or for that matter, the unions.

In the case of the latter, it has been said that trade union support is on the wane as unions turn their attention back to the more traditional area of wage bargaining, notably what were, in the first instance, issues such as the 4% negotiations and superannuation and, more latterly, restructuring. Except for those unions that have persons committed to Health and Safety, which according to one official is 'only about 1 in 10 or 1 in 12 unions', many unions it has been suggested 'don't have the resources ... [to] ... provide a lot of backup for their Health and Safety Representatives'.

For some unions their resources are stretched to the limit. One official who works as the Health and Safety Officer in a very large union recognised that whilst her union did have 'some financial resources that we can commit to Occupational Health and Safety ... [but] ... having one person ... for 27,000 members is just impossible, it's just impossible'.

Another, also critically aware of the necessity of support for Health and Safety Representatives, stated that whilst half of the 14,000 to 15,000 of them in post have been trained, many do not receive adequate support. In his view

> 'It's all very well everybody saying you are going to be a health and safety rep and then just leaving them, and just leave ... (them) ... to do their own thing. And that's what is happening in a lot of places'.

Numerous officials reported that they were often called on to 'give ... (the Representatives) ... moral support' as well as assisting them 'to actually work through resolving Health and Safety issues'. In workplaces that were difficult for Health and Safety Representatives to exercise their rights, officials were requested 'to assist in the inspections'. Similarly in relation to issuing Provisional Improvement Notices, one official said that because the literacy problem was so bad in his industry, some requested assistance ' ... to actually issue them'.

Some of the Health and Safety Representatives also felt the direct effect of these scarce resources, and while most claimed their union was supportive, gaining access to key union personnel was often difficult. One expressed frustration:

> 'they don't have enough organisers ... to sort of give you someone there on the spot when you need them, so I would ring head office and by the time you got someone who could answer your query, once you got someone to talk to they were great ... . None of us were experts and we never professed to be and there are times when you needed some sort of clarification on what you could do and how you could go about it, where to go for information ... sometimes you could get that over the phone, other times you couldn't'.

5.2.8 <u>The Right to Time off and Facilities to Carry out Occupational Health and Safety Functions</u>

According to some union officials, the level of stress experienced by Health and Safety Representatives was in part due to the difficulties in carrying out their duties as well as their daily work. In the view of one union official

> 'most of them haven't got the time to do what they're supposed to be doing anyway. I mean they've still got a job to do ... . A lot of employers don't really accept or recognise or believe that the rep should be doing whatever they need to

> do in their normal time. Now partly that's a function of these days, most jobs don't have the fat in them that they might have had 10 or 15 years ago, because the whole nature of industry and work and so forth is a lot ... tighter than it used to be so there's those pressures as well'.

Few representatives took time off, but tended to perform their Health and Safety tasks on top of all their other work. For one, who estimated spending two hours a week on health and safety, it was necessary to get someone to relieve him from his normal work 'because it's pretty complex'. 'If it's immediate action' he went on to say 'I would ... (take him off) ... but if it's going to take a while, somebody relieves me and I go and have a good look' at the particular issue. In the case of another, keeping up with all his work let alone dealing with health and safety in work hours was difficult. He told us:

> 'it's very hard to; if I had been doing the shop steward's job, doing the leading fireman's job and doing this, all you'd do is be going to meetings all the time, you wouldn't do any work. At least with this, it takes up a fair amount of time but you can sort of leave it and go and check on your other jobs and you can go back to it'.

This process of juggling roles and duties was seen by another Health and Safety Representative as equally problematic. In his opinion one needed to be 'a full time health and safety rep and do nothing else to get around in a large kind of plant' like the one in which he was employed. And depending on the type of industry one was employed in, some situations would be more stressful than others. For instance one Representative who was employed in a large public hospital found it difficult to gauge when it would be suitable to leave the ward. As she explained

> ' ... Well the ward, you can't sort of judge how the ward is going to be. If it was quiet I'll think "well OK everything's up to date now". You walk out the door and all hell breaks loose and then when you come back you get all this, in other words "well why weren't you here, I mean this is what you were supposed to be doing" '.

The stress for some Representatives was, however, less intense, and in one case did not constitute much of a problem at all:

> 'I work casual hours, so I just say well I'm coming in to talk to someone. Or I might finish my shift at two o'clock and spend another hour on the health and safety thing before I go off and knock off'.

Given the experiences of many others, however, this situation may well be the exception to the rule. Furthermore, as is seen in Table 5.13 below, many of our sampled Health and Safety Representatives have found the task sufficiently onerous to warrant exercising the right to time off. Thus as can be seen below in Table 5.13, 128 or 54% had utilised this right, with the more experienced and non-union groups doing so much more frequently.

TABLE 5.13

EXERCISE OF RIGHT TO TIME OFF TO PERFORM OHS FUNCTIONS

	Yes	%	No	%	Not Known	%	Total	%
Less Experienced Group	100	48.8	73	35.6	32	15.6	205	100
More Experienced Group	21	87.5	1	4.2	2	8.3	24	100
Non-Union Group	7	70.0	3	30.0	-		10	100
	128	53.6	77	32.2	34	14.2	239	100

Under s.31(2) of the 1985 Act, Health and Safety Representatives are also, of course entitled to time off with pay in order to undergo approved training. Whilst most of those in our sample did receive paid time off to attend such courses, it is interesting to note in Table 5.14 below that 25 or 12% of the less experienced group had not exercised this right. The percentage who had, however, is even more notable, amounting to 85% and 100% of the inexperienced and more experienced groups respectively.

TABLE 5.14

EXERCISE OF RIGHT TO PAID TIME OFF FOR TRAINING

	Yes	%	No	%	Not Known	%	Total	%
Less Experienced Group	173	84.4	25	12.2	7	3.4	205	100
More Experienced Group	24	100.0	-		-		24	100
Non-Union Group	10	100.0	-		-		10	100
	207	86.6	25	10.5	7	2.9	239	100

Most of those interviewed found that there was 'no trouble' in getting time off for training. One Representative, however, had faced some difficulties when she requested time off to attend further training courses. As she explained:

> 'When I put in an application for a course,"oh, here she goes again". No problem as such. Attending health and safety courses, no, because the one time they tried to knock me back and they said "you've had too much time off already", I said, "excuse me, according to the Act I can attend as many courses as I wish".

It has also been reported by some union officials that while most Health and Safety Representatives are paid for their basic training, travelling costs are not always reimbursed and loss of overtime is rarely compensated.

Closely allied to time off for performance of occupational health and safety functions is also the question of the right to adequate facilities for that purpose. For some Health and Safety Representatives, it appears there was a reluctance on the part of management to ensure they had such facilities. For instance one union official reported:

> 'there is still not enough facilities ... I can't even get filing cabinets for most of my health and safety reps. I mean they have got all their materials in their locker along with their change of clothes and their lunch and their time book or whatever else they have to carry around'.

Having said this, however, none of those interviewed in the course of this research reported any difficulties in this regard. As can be seen from Table 5.15 below, moreover, numerous Representatives in our sample had requested the provision of adequate facilities.

TABLE 5.15

EXERCISE OF RIGHT TO REQUEST FACILITIES FOR PERFORMANCE OF SAFETY REPRESENTATIVE ROLE

	Yes	%	No	%	Not Known	%	Total	%
Less Experienced Group	81	39.5	105	51.2	19	9.3	205	100
More Experienced Group	20	83.3	3	12.5	1	4.2	24	100
Non-Union Group	8	80.0	2	20.0			10	100
	109	45.6	110	46.0	20	8.4	239	100

5.2.9 The Right to Inspect the Workplace

The right of Health and Safety Representatives to inspect the workplace or the area within their designated work group was exercised quite frequently and for most did not present many problems. As can be seen from Table 5.16 below, 146 or 61% of our sampled Health and Safety Representatives had utilised this right one or more times. Of the more experienced representatives 96% had done so, followed by 80% of the 10 non-unionised Representatives. Once again, and not surprisingly, those with the least experience made less frequent use of this right (56%), but compared to the use of some of their other powers this figure was relatively high.

TABLE 5.16

USE OF RIGHT TO INSPECT WORKPLACE

	Yes	%	No	%	Not Known	%	Total	%
Less Experienced Group	115	56.1	79	38.5	11	5.4	205	100
More Experienced Group	23	95.8	1	4.2	-		24	100
Non-Union Group	8	80.0	2	20.0	-		10	100
	146	61.1	82	34.3	11	4.6	239	100

For most Health and Safety Representatives, periodic or routine inspections were carried out with relative ease. Few reported experiencing difficulties, and those that did were eventually able to resolve them. In the case of one, he was able to inspect his workplace

> '.....all the time when I'm going around anywhere because being a fireman the two jobs started to blend in well because you have to be conscious of one or the other'.

The only trouble he confronted was 'once....with the foreman.... and the manager sort of gave him a hint' Similarly, another Representative in general had '...no difficulty,,,I usually tell them first' before inspecting an area. But she did face problems with the 'steam boiler' area, and told us

> 'The guy that runs that area is very protective of his steam engines, so I went around and talked to the boys involved and found out what was to go on and that. I got a message that X wants to see me, and I thought "that's it, I know what that's about". So I went and found him. I thought "who do you think you are, talking to these people, and interfering with my job, and all the rest of it?" I found X, and said "it's my duty as health and safety representative, if somebody places a complaint with me, I have to find out whether they are justified in that complaint before I approach you. With all the legitimate complainants, they're not going to come to you and say "what can be done about it?"

The conflict with this manager did not stop here, and when the Representative attempted to re-enter the area for a further inspection she found it to be locked. The room was being attended by 'one of the boys' who said "I'm not allowed to let you in". She demanded a right of entry and upon gaining it rang management. As she recalled

> "...[I] said, "I want a member of management down here immediately, I'm inspecting the boiler" That happened to be X's day off, and five minutes later he was there, so I had an independent manager of staff there the whole time, because I thought I would have had.... a big confrontation with this X, and I just wanted another member of management there"

This case illustrates a source of conflict that more than a few Health and Safety Representatives have experienced. Some members of middle management it seems, are still finding it difficult to recognise their rights and see their powers as an affront to managerial prerogative. But others, it must be said, had this side of affairs well under control. Thus, one Health and Safety Representative working in a large hospital had no real problems in this report:

> '(I) had no problems, if I wanted to go and inspect the place because that's where my girls are working and if I said to management, look I want to go in on such and such a day and do that, the only thing I think that they requested is another person to be available from management to attend with you and if that was agreeable.... they never stopped you because they couldn't for a start but they never sort of put pressure on you to not do it or anything like that...'

In this instance managerial presence was not found to inhibit the Representative's ability to carry out her duties. In other instances, more formal arrangements for management involvement were in place, as for example, in the case of one Representative who told us he was hoping to establish a monthly inspection involving either all the Representatives and management, or the individual Representatives with their foreman.

5.2.10 The Use of Negotiation

Negotiation between the Health and Safety Representative and his/her employer is seen as one of the key procedures for resolving health and safety issues. In fact, it could be said to underpin the whole philosophy and effectiveness of the 1985 Act itself, although

strangely enough, by some quirk of drafting it is enshrined in the Section of the Act which deals with Work Cessations. Its more general importance is, however, widely acknowledged. According to one union official, for example,

> 'skills in terms of negotiations...of putting together an argument, is the most important thing for reps. I means being able to and to have the confidence in their ability to do that'.

In this context, needless to say, adequate training for Health and Safety Representatives is seen as crucial. Of the 20 who responded to a small follow up survey carried out in 1988, 86% had only received first stage training, and all of them thought additional training would be highly beneficial. Moreover the two key areas in which they felt the greatest need for such training were negotiation skills and information on workplace hazards. Parenthetically, we may add here that training for the enhancement of negotiating skills might, where appropriate, cover literacy and language issues. It is interesting to note, for example, that only 5 of the 239 responding Representatives in our original sample were bilingual, while a further 7 spoke only a language other than English. The clear implication is that the 94% who said they spoke English, spoke only that language. In a multi-cultural society where management is nonetheless predominantly anglophone, such consonance may seem very convenient. But several officials from unions with a high non-English speaking membership, were not so happy, seeing lack of English as a barrier to equal representation for such members in the self-regulating occupational health and safety system. Indeed, one told us that rather than being elected because of their suitability for the post in other respects, 'usually they'll elect the Australian, the one who has got the English skills, that they are able to negotiate with the employer'.

As already implied, lack of literacy can also constitute a problem, the capacity to speak English notwithstanding. Even for some Health and Safety Representatives who are literate, who speak English and have received additional training, however, negotiating with

management still can present difficulties. According to several, assistance is often requested of their union in the form of guidance, advice and on some occasions they even wanted an official to accompany them. For one it was seen as necessary so that '... [I] could confront management and say "Now look, hang on, this is not how it's going to go on"'. Alternatively in the opinion of a more confident Representative who was also the shop steward, '...negotiating is negotiating. I mean.. you can invent a situation, it doesn't really matter, they change, every problem is... different'. For him, negotiation was the primary means of issue resolution, and whilst he had issued some Provisional Improvement Notice initially when there appeared to be reluctance by management to deal with a hazard, that situation had now changed:

> 'Well they might have slowed down now a bit because I can usually talk it out but when I first went about it....it was a "we don't want to talk about it" situation'.

In other cases, where agreed procedures are laid down, Provisional Improvement Notices may similarly be viewed as the last resort. Furthermore, in a number of workplaces, issues may be directed or diverted to the Health and Safety Committee for further negotiation. The problems associated with this will be discussed in detail at a later point (see 5.3, below). Suffice it to say here that it appears to be a somewhat common procedure. As one Representative told us:

> "If we had any problems....I used to go to the health and safety officer or through the meetings and one would try and sort it out. I mean you don't get anything done 5 minutes later, it's not how management works...."

In the view of some employers, moreover, committees are the correct place for such negotiations. Indeed, according to one Health and Safety Officer the training for Health and Safety Representatives was primarily inadequate because it did not address 'important issues such as meeting procedures and basic concepts of man/management and communication.

When we turn to the question of how often the right of negotiation has been exercised by our sampled Representatives, it is clear that it is one of the most commonly used of all. Thus as is evident from Table 5.17 below, 136 or 57% had negotiated on one or more occasions with some level of management. Of the more experienced group, 88% had utilised this process followed by 70% of the non-union Health and Safety Representatives.

TABLE 5.17

USE OF NEGOTIATION

	Yes	%	No	%	Not Known	%	Total	%
Less Experienced Group	108	52.7	87	42.4	10	4.9	205	100
More Experienced Group	21	87.5	3	12.5	-		24	100
Non-Union Group	7	70.0	2	20.0	1	10.0	10	100
	136	56.9	92	38.5	11	4.6	239	100

5.2.11 The Role of the Health and Safety Representative and the Department of Labour

Whilst in general, the Inspectors themselves in interviews appeared aware of and sympathetic to the problems faced by Health and Safety Representatives (see Chapter 4), the experience of the Representatives and union officials alike has varied greatly. References to the reluctance of some Inspectors to notify Representatives when on site, as well as their discomfort with industrial relations, have already been raised (see 4.5). The only area in which unanimous praise was given was in relation to disputes surrounding the

establishment of designated work groups. Thus numerous officials had experienced ' a lot of problems' in this area and found the Inspectors to be particularly 'supportive' and 'helpful'. As one union official told us

> '...now I must say on the question of designated work groups everytime I have gone to the inspectorate for an arbitration, the inspectorate has not only backed me, but in many times gone beyond it. I mean at one stage....I had asked for 7 reps and the inspectorate after arbitration said no you should have 12. Management had said I could have one'.

Having said this however, the variation in the level of quoted support in other areas has been very noticeable. One union official expressed frustration thus:

> 'you don't quite know how an Inspector's going to deal with an issue. I mean, I really think twice about ringing the DOL for help, because it might all backfire in my face'.

She went on to say 'I don't want to be unfair because some have been helpful, very helpful, but I don't think they've got a clear idea of what they want and it's not standardised across regions'.

The inconsistency between regional offices and between individual personnel, that is, between what 'one ..(inspector).. is prepared to do and what another might be prepared to do' was commonly cited as a problem. One union official felt that 'there's quite a different approach from the old style Inspectors and the new style Inspectors' even though in some cases 'there would be an overlap'. Thus she continued, there are 'those who have come with more of an open mind about what their role is than those who've come from the old style and want to continue in the old style'. Whatever the precise reason for the variation in approach, it was in the area of Provisional Improvement Notice disputes, in particular, that criticisms of the Inspectorate in this regard were especially vehement. The lack of consistency was so extreme in one case, that as one Health and Safety Representative recalled, the management of the company were able to '...play off one Inspector against another'. The case in point involved a protracted dispute over the

provision of safety boots, in which the union official we spoke to also became involved. He explained the situation as follows:

> '...one comes out, the one who does the area and he says "the unions are right, I agree with you, right"; so anyway... the employer didn't like that so they ring up (the regional office) and say "we don't like that, you'd better get somebody else to come out". Another guy comes out, so they change the inspector before them, his opinion and they put their opinion. And we said "Jesus what the hell is going on here?", so then they got somebody else, they got the Supervisor, and he was worse than the lot of them and he made another opinion. So I called him up on the 'phone and I said..."I'm not too bloody happy with what you are doing..., so you better be at the bloody thing tomorrow morning because I'm going to be there and I want to talk to you". So.. then he changed his mind again. Now we've got four different opinions'

Perhaps not surprisingly, the result of this incident was said to have been that '..the confidence in them is really dwindling down, and certainly amongst our workforce also'. Other less extreme examples about the reluctance of Inspectors to deal adequately with disputes were commonplace. Health and Safety Representatives had experienced situations whereby the Inspector came out and '...he grilled the hell out of me about the cost of repairs' and whilst he affirmed the Notice '...he wouldn't put a compliance date on it'. Another said that the Provisional Improvement Notice at this workplace '...was lifted whilst the Representative was on a rostered day off' and the Inspector wouldn't do anything about the '...stacking problem until he saw a badly stacked load'. In this case the Representative who was also the shop steward, felt that

> 'It's the guidelines that are given to the Inspectors, I found unless they can actually see a physical danger, if the danger is in... say container unloading...I...(strike)...a lot of problems with the Department'.

The Inspectorate's general lack of confidence about issues other than machinery guarding, and consequently their narrow approach to occupational health and safety, as has been mentioned earlier (see Chapter 4), was, according to other Representatives, equally problematic. One felt that the Inspectors see their preventative function as 'reactive and not proactive' and consequently 'in the absence of an injury they concentrate on keeping the peace'. This view was shared by a union official who expressed his

disappointment in the Inspectors' response to a number of Provisional Improvement Notice disputes. He told us

> '...if it was a guard missing, bingo!, they'd be in like a rat up a drainpipe, you know. But because it wasn't a blood and guts risk,...they more or less walked away from it, shrugged their shoulders and walked away'.

Similarly, in relation to a Work Cessation over the removal of asbestos, the Representative involved was less than impressed with the Inspector's response. According to the former's account even though there was '...asbestos dust... all over the roof and offices', the Inspector went back to the canteen where the employees were awaiting a resolution and told them to go back to work. In his own words, the Inspector said 'the cigarette smoke in here is going to cause you more harm than the asbestos out there'. The Health and Safety Representative's own view was the 'I don't smoke, but I'd take my risks with the cigarette smoke before the asbestos'.

Other Representatives reported that whilst they were happy with the level of support by the Inspectors in their dealings with the actual Provisional Improvement Notice dispute, they noted that the status of their Notice became ambiguous. In one case the Inspector had asked the Health and Safety Representative to '..lift my notice temporarily until the hazardous goods division could have a look at it because he couldn't make a decision'. The matter was resolved after four Inspectors came to the workplace, and the company agreed to work on the problem, but the actual status of the Notice remained unclear. This was so in another case where the Health and Safety Representative said 'you end up with more of the verbal agreement, and verbally the employer was told they were given some time to do something about it'.

It seems that in some cases Inspectors regard their role in connection with disputed Provisional Improvement Notices as one of conducting verbal negotiations between parties. If so, the implications of this method of resolution need to be seriously considered. Given

the fact that they carry out their duties in a structural context permeated by power relations of various kinds, care needs to be taken to avoid such negotiations becoming a method of 'normalising' relations between the parties.

This is not to say that in some cases it may not well be seen as an appropriate mode of operation. For instance one union official told us of a Provisional Improvement Notice which was cancelled because the Inspector '...said quite frankly that if it went to court he didn't think it would stand up, but at the same time he did assist in us negotiating a situation...' that was beneficial in its outcome. Nevertheless the emphasis on 'advice' and 'negotiation' by the Inspectorate, and their consequent reticence in utilising their powers under the 1985 Act was seen by numerous union officials as extremely frustrating. In some instances it was felt that the tendency to try to ' ..induce the employer to co-operate' was totally inappropriate. One frustrated union official said:

> 'perhaps I have just had dealings with very reluctant inspectors because in a few situations I've put the problem to the Inspector and the Inspector has gone out and done an inspection. We talk about it, he says "I can't get the employer to do it", I say "have you tried this or that"... and he keeps going back and forwards to the employer trying to induce the employer to co-operate. (I've) even had meetings with this particular Inspector's supervisor to you know, see, whether they are doing the right things, and the supervisor gives a commitment that "yes something will happen" and six months later our rep rings one up and says look they still haven't fixed....[it]...what are we going to do?'

Another official sharing the annoyance of colleagues, told us that even in cases where there was co-operation from Inspectors, they go into workplaces but will not issue Notices. Alternatively advice is given and

> '...six months down the line when they are contacted and told the employer had ignored your advice, "now are you going to issue a notice" they say "oh no, no, your reps can do that". "Well why the hell won't you? You know the reps are intimidated, the reps aren't going to do it because they are too bloody intimidated and you are not going to back them up"'.

The lack of confidence expressed in the Inspectorate to 'not back down... when there is trouble' and revert to their advisory role was particularly acute in relation to issues

of 'non-compliance' with Provisional Improvement Notices. The difficulties experienced, were illustrated by the following comment made by one union official whose Health and Safety Representatives are predominantly in the public sector:

> '...what happens there of course is that one of our reps issues a PIN, it goes out of time. The inspector is called in and he goes, "oh dear, what are we going to do?" And I say "prosecute the bastard", and he says "oh well you know, prosecution is no longer our impetus you know, we are trying to resolve problems". But I say "look they are already out of time, they have ignored their responsibilities under the Act, so hit them". But they won't do that'

The reluctance in this particular case, may have been exacerbated by the Inspectorate's uneasiness in dealing with the public sector. As has been mentioned previously, there was doubt amongst Inspectors as to whether the 'crown could prosecute the crown'. According to the union official

> 'That is exactly their reason and they have told me that too. They won't ever admit that in the public arena, but lots of inspectors have said, look you know I can't do anything with this'.

This apprehension was obviously freely admitted by some Inspectors, so much so that another official working in a different area of the public sector told us that

> 'we heard through the grapevine a couple of months ago that there was a policy that the public sector would not be prosecuted. We wrote to Bentley and asked them if this was true and we got a letter back saying "no it was not true, that the public sector...would be treated the same as anyone else"'.

With regard to non-compliance with Provisional Improvement Notices this may well be the case. Several Health and Safety Representatives working in both the public and private sector have reported cases where the Inspector has not followed up on a Provisional Improvement Notice that was out of time, and certainly did not institute legal proceedings against the occupier. Parenthetically it is worth noting that no prosecutions for non-compliance with Provisional Improvement Notices have to date occurred in either the public or private sector (see Department Of Labour Annual Reports 1986/87, 1987/88, 1988/89). Equally it is worth repeating that according to the Ministerial Guidelines produced

in 1985, one of the situations in which 'proceedings will generally be instituted' included 'when either an Inspector or a Health and Safety Representative alleges a Provisional Improvement Notice has not been complied with (Ministerial Guidelines, 1985).

The importance of the Inspector's enforcement role, both in relation to support of Health and Safety Representatives and in ensuring the enforcement of statutory duties, has been 'down played' by the term 'advisor', according to numerous union officials. Several lamented over this new terminology and were critical of the consequences some of which have already been expressed. One who was frank in outright opposition to this title, felt that within the 1985 Act they were clearly called Inspectors, and to call them 'advisors' was a ...'huge philosophy change in resolving health and safety matters....'. Whether or not the shift has been quite as dramatic is a debatable point; nevertheless the Representative went on to say:

> 'I think that employers and unions recognise that sooner or later somebody is going to have to be the arbitrator, someone is going to have to make the decision, and a lot of the times even the employer is quite happy to comply once they have been told that they really have to you know, and they say "oh well there is no choice now but to accept the umpires decision". And the problem now is that the umpire doesn't want to be the umpire anymore. He wants to you know, play with the ball...'

In the opinion of another colleague the Inspectorate's reluctance to enforce could compromise the viability of the 1985 Act, itself. In her opinion

> '...it is really putting a lot of pressure...on health and safety reps and the department has always said "we're relying on the health and safety reps to make sure the Act worked....". And they're not at this stage, certainly most of them are not in a position to do that....these pressures are increasing because of the fact that the inspectors apparently aren't going to play the role they should be, in our view, and have been, in theory in the past'.

5.2.12 The Role of the Health and Safety Representative and Stress

At least some Health and Safety Representatives experience the position as an extremely stressful one. Some of the more obvious sources of such stress have already

been mentioned particularly in relation to Provisional Improvement Notice disputes and the question of support from the Department of Labour. Another commonly expressed source of stress, however, is frustration at being 'fobbed off' with a middle management that is production oriented and relatively unversed in the 1985 Act. As one union official suggested 'it's very hard for a representative to assert these newly given and largely unknown rights and functions where there's such widespread ignorance among middle management.' That widespread ignorance existed at the time of our research was certainly the experience of many Representatives, and in their opinion it was one of the most difficult problems to deal with. One of them summed the situation up by saying:

> 'you still have some supervisors who don't know a thing ... and they're so management oriented ... you know the gravel rash on the knees to a certain extent that they don't want to cause waves, even though they're aware of a problem if you point it out to them often enough they just don't do anything.'

For one of the more confident Health and Safety Representatives, who was also a shop steward, the foreman's delay in dealing with an issue was so protracted that he decided to educate him in the 1985 Act:

> 'I gave him one or two PIN notices and said "that will help things along". And he says "I don't know what it is", and I said "well just show it to somebody in industrial relations or personnel and they'll tell you about it" ...'

He found that this response worked, and went on to tell us '... they may not recognise you ... (as a rep.) ... but they'll soon find out that they have to'.

Other Health and Safety Representatives saw this conflict as one not only deriving from middle management's ignorance of the 1985 Act, but also from the fact that the latter viewed the role of the Representative as an 'infringement' of their managerial prerogative. Thus, one felt that both his foreman and Head of Section went 'out of their way to give ... [me] ... a hard time', and if he tried to assert his rights, he was '.. branded as ...[a]... troublemaker and stirrer.'

Whilst it was recognised amongst union officials that 'something really has to be done about middle management' in terms of training, one union official saw the predicament as a reflection on the company structure as a whole. As this official stated:

> 'from middle management down there's a real problem ... in my experience we've often used that as an excuse and I believe that if the senior management were really committed to health and safety that would have flowed through right down to the bottom, so they often play you off one against the other and say well we agree with you and we believe this is right but you know it's a bit hard to get so and so out there to understand the importance ...'

This view was also shared by an official of one major employer organisation. He discussed the difficulty in gaining commitment to health and safety by some employers because 'of other considerations ... (like) ... we've got to keep producing'.

He went on to say:

> 'you said before you've spoken to a lot of middle management, health and safety officers, health nurses and I bet you haven't spoken to many managing directors and that is a problem. Until you get that commitment ... to actually get some time and then go through ... (the agreed procedures) ... and get them to come to the training courses is sometimes difficult for us. I'm not saying there's management obstruction across the board, it is just that it might be a time thing with them or something.'

In the opinion of another colleague the problem of training was also due to the emphasis of the 1985 Act itself:

> 'I think the main problem is middle management and line management and supervisors are really left out and the liaison is with management as such and workers, and really that's not the way Australian Industry is structured. There are three levels and it should be some sort of consultative arrangements with those three levels rather than management and unions. I think the emphasis on unionism has taken it off on the wrong track and the Act really emphasises unionism too much. I suppose as we perceive it that really leaves that middle management, that line management supervisor group out and you'll hear the safety reps on the floor complaining that their supervisors just don't know anything about safety and that is taken back to the employers because they're not training their line managers or supervisors, really they're not involved in the processes of the Act.'

For other Health and Safety Representatives it was not only middle management that made their task difficult, but also the expectation on the part of management that they would 'police' co-workers. Numerous employers, it seems, expect the Representative to 'police' other workers on their behalf. In effect the Representatives are seen as surrogate health and safety officers for the employer, as well as acting on behalf of the employees in their designated work group. Thus, for instance, at one large establishment the personnel manager felt that the Representatives 'took their role seriously and responsibly by providing additional 'policing' of safety rules'. This was also so at another factory:

> ' 'well the one I consider is probably a bit more interested than the other people, I speak to him quite often, and I have asked him on a few occasions to keep me informed as to any problems that he can foresee, which he has done on two occasions.'

Even though the manager felt that this particular Representative had 'the authority to go directly to the person' he was not aware of this actually happening. The usual procedure was for the Representative to tell the foreman or the manager personally. In his opinion there was no potential conflict for the Representative because 'after all they are there for their well being aren't they'. In the recollection of one Health and Safety Officer, however, this role had created some resistance from other workers, but he nonetheless saw the 'role of surveillance' as part of the Health and Safety Representatives' responsibility since it was inextricably linked to their preventative role.

Several union officials were adamantly opposed to the use of Representatives in this way, and stressed that in their opinion it was clearly the responsibility of the 'supervisor'. As one union official put it, this expectation was potentially 'stressful' and 'conflicting' for the Representative. On the one hand she elaborated, 'you're the Health and Safety Representative now, so you have to enforce that these blokes wear their safety boots' and on the other 'well I thought I was supposed to be a workers' representative and here's the employer telling me that I have to play the role of policing and also dob my mates in'.

Some Representatives saw quite clearly that this policing role was not appropriate, as one put it in detail,

> 'I put it back on management. I said "well that's your job ... I haven't got any right to tell anyone what to wear all I can do is advise them, if they choose to disregard it the management must be the ones who take it up as a disciplinary measure, It's got absolutely nothing to do with me." Now I think that's good because if you go the other way you're going to find that you won't have any health and safety reps, nobody would want to do the job because they make you feel as though you're dobbing them in.'

This view was also shared by several Occupational Health and Safety personnel working in large establishments. One Health and Safety nurse told us 'we shouldn't be reliant on Representatives to do a management role', while another felt this pressure was 'unfair, because they're going there dobbing their peers in, and I don't think they like to do that'.

Dobbing their mates in or not, some Health and Safety Representatives did in fact see the 'policing role' as part of their responsibility. One told us that he made it 'compulsory' that they wear protective equipment in certain sections of the factory. In order to do so he approached the 'union rep to make sure he was going to back me', and once these rules were established '..we keep our eyes open, we've had a few blokes break the rules a few times and we told them put your safety boots on'. Others tell the same story, although one did admit that one consequence of this action was 'you get called dobbers I suppose.'

High levels of stress of the types already mentioned have been cited to us as one of the reasons for the rapid turnover among Representatives. Whilst it is difficult to estimate the precise level of turnover, several union officials claimed it to be approximately 'one third'. This estimate is supported by our findings in our follow up survey of Health and Safety Representatives, and whilst we are dealing with very small numbers here, they are nonetheless suggestive. Of the 20 representatives who responded, 6 or 30% had resigned, 2 as a result of difficulties with their management and 4 through change of

workplace or occupation. One summed up the reasons for resignation as stemming from a feeling of 'beating my head against a brick wall' in dealing with management.

5.3 Health and Safety Committees

The other participatory mechanism established to enable worker and management involvement in occupational health and safety is obviously the Health and Safety Committee. Of the 239 Health and Safety Representatives who responded to our original survey, 72% had a Committee at their workplace, and of these 171 Representatives, 38% had utilised their right to request the establishment of such a Committee.

When one turns to the employer sample, and always bearing in mind the limitations arising out of a very low response rate, only 45 or 32% had Committees in place, and in only 7% of these workplaces was it unequivocally clear that the Committees had been set up by joint union/management negotiations. This may in part be due to the fact that many of these Committees were established prior to the passage of the 1985 Act, an issue that will be explored through the use of our qualitative data.

Not surprisingly, when one turns to the question of size, for both Health and Safety Representatives and employers alike, the predominance of Health and Safety Committees was in medium to large workplaces. Tables 5.18 and 5.19 below set out the distribution of Committees by size of workplace. As can be seen from Table 5.18, our survey of Representatives showed that premises employing more than 50 workers heavily outnumbered the smaller workplaces. Thus 87% of the workplaces of this size had a Committee, and indeed, 70% of these Committees were established in workplaces with more than 100 employees. As would be expected, the smallest establishments employing less than 10 persons did not have such Committees.

TABLE 5.18

DISTRIBUTION OF HEALTH AND SAFETY COMMITTEES BY SIZE OF WORKPLACE (HSR SURVEY)

Size of Workplace	HSC	%
Less Than 10	-	
10-19	9	5.3
20-49	12	7.0
50-99	28	16.4
100-199	32	18.7
200-499	47	27.5
500+	41	24.0
Not Known	2	1.2
	171	100.1*

* Figures rounded to one decimal place.

The employer questionnaire, with all its limitations, showed a similar pattern. As is clear in Table 5.19, Committees are once again primarily located in premises employing more than 50 workers. Thus 76% of them were established in workplaces of this size, and 60% were located in premises with more than 100 employees. Conversely, no Committees were to be found in the smallest workplaces of less than 10 employees, while only some 18% of those employing between 10 and 49 workers had such a Committee.

TABLE 5.19

DISTRIBUTION OF HEALTH AND SAFETY COMMITTEES BY SIZE OF WORKPLACE (EMPLOYER SURVEY)

Size of Workplace	HSC	%
Less Than 10	-	
10-19	2	4.4
20-49	6	13.3
50-99	7	15.6
100-199	12	26.7
200-499	11	24.4
500+	4	8.9
Not Known	3	6.7
	45	100.0

In response to a general question about the benefits of such Committees, of the 142 responding employers 63% felt they played a positive role. Whilst 27% of the smaller workplaces shared this view, such Committees were generally seen as inappropriate for their particular workplace. Thus as one director of a workplace employing 20 persons told us

> 'our organisation is one of the small business operations and to impose health and safety etc would be inoperative given the size of our business.'

For another small retail firm of 6 employees, the need for a committee was deemed unnecessary 'because we have few employees and we work closely, we are, in effect a committee.' Thus it was felt that Committees are appropriate in 'large operations', where size necessitates formal avenues of communication. For smaller workplaces it was suggested, 'if the employer is a responsible person the information about safety would be passed to their workforce through themselves or a foreman'. Alternatively, in large workplaces Health and Safety Committees would be of benefit 'because normal workforce consciousness of health and safety seems to be relatively low'. Another director of a small

woodworking shop also felt that attitudes to health and safety were the most crucial factor, and in his workplace there was no need for such committees because 'we are so tidy and safe in our work habits'. In his view, size alone was not the crucial determinant, but rather the workers' housekeeping habits. He said

> 'I've been to other places our size, they're not fresh they are just brothels, you know stuff lying all over the floor, you know if you trip over that you are gone.'

Furthermore, in the view of other employers, the appropriateness of Committees also depended on the 'type of industry' or 'work environment'. Thus they were seen as less relevant to small retail firms or offices, and in the opinion of one employer involved in the clothing trade, they were 'more suitable to manufacturing' rather than 'warehouses'.

Perhaps it goes without saying that most of these workplaces were not unionised and for some employers this was also clearly important. In one employer's opinion there was no need for a Committee as there was 'no trade union to create problems.' Similarly, another expressed his views on the issue of regulation itself when he said 'generally speaking the working environment is over-regulated and over-governed.'

For those workplaces which have Health and Safety Committees in place, the obvious question is how are they working? In response to a general question about the benefits of such committees to occupational health and safety, 97% of our sampled Health and Safety Representatives felt that in theory at least such committees were positive. As mentioned previously, of the 142 employers surveyed 63% also held this view. Having said this however, several union officials and Health and Safety Representatives alike voiced grave misgivings about these Committees. They were described as a means of 'diluting the role of the HSR', by diverting issues away from the Provisional Improvement Notice system into the committee room, there to be buried under the procrastinatory propensities for which such rooms are famed. As one union official told us 'if you want an issue buried,

send it to a committee.' This was certainly the experience of one Representative, who saw the need for clearly delineated areas of responsibility in dealing with Health and Safety issues. In his view:

> 'At the committee level ... something in the RSI areas and noise pollution and all the major ones. I wouldn't even want to discuss any problems on the floor if you understand what I mean. They're the day to day problems. I think those should be handled by the health and safety rep with the help of PIN notices if needs be or whatever ... but... they shouldn't get anywhere near a committee. And all the committees I've looked at so far they've all been dealing with day to day (issues) and they can bog people down very easily and very quickly.'

Rather than deal with long term problems, he felt that the types of issues management 'would talk all day about' would revolve around what others defined as 'trivial issues.' For instance, how:

> 'Joe Blow ran over somebody with a forklift. .. They will talk all day about that as long as you don't talk about the idea of trying to work out designated areas for fork lifts. If you want to get down into the serious area, they don't want to talk about that. It's just what a horrible fork lift driver he is, they'll talk all day about that.'

In one case the agenda set by management was so unsatisfactory that the Health and Safety Representative told us:

> 'we have had the committees and we're in the process of trying to arrange a committee that works now. We've pulled out of the committees because every committee that's been set up has been set up around what the company want and the idea of we'll give you a free pen if you don't report accidents and this kind of thing ...'

For another Representative, who worked in a large organisation in the public sector, it was the procrastinatory tendencies of their Committee that was seen as the major problem. They became so frustrating, that in the end the Committee was disbanded. In this workplace, issues that could not be resolved at the local level, were sent to the Committee. It is worth noting in passing, that the process of issue resolution alluded to earlier, in which power is deflected away from the Representative, seems to have occurred in this case. But he was more concerned with the nature of the Committee itself:

> 'they were a waste of everybody's time because the problems just went on and on and on and nothing ever seemed to get done. When you sort of stood up on the desk and demanded that something be done, "maybe". It was always a matter of finances.'

In this particular Committee, the Representative came up against another commonly cited obstacle, namely, the absence of any managerial members with the power to take financially consequential decisions. As the Representative in question said:

> '... I never once saw the executive director there or the director of finance. It was the health and safety officer, building and engineering ... but ... there was never anyone there who had handles to the purse strings.'

Alternatively, issues were passed from one Committee to another until finally they reached the board of management. This Committee was merely 'a token gesture'. And whilst the Representative realised Health and Safety issues would 'require a lot of negotiation', there was also astonishment at the amount of 'red tape', the length of time and the 'hassles' involved to actually get somewhere with any one issue.

This process of delaying issue resolution, was in the opinion of some Representatives and union officials to be partially explained as a consequence of the power relations of such Committees. For, it was pointed out, even though there maybe fifty percent representation for employees, these Committees still operate within the milieu of the broader power relations operative in the workplace. Thus, as one union official said:

> 'they get them all into a committee, you imagine in a ... clothing industry when you have got mostly ... migrant women. All of a sudden find themselves in a meeting with the bloody managing director, they are going to get done like a dinner, absolutely get done like a dinner ... They control what is going to be done, when it's going to be done, where, what, who is going to do it, how much it's going to cost and they just baffle them with bloody science ...'

The issue of ultimate managerial control was also said to lead to situations whereby the role of the Health and Safety Representative in the Committee is 'mainly confined to asking questions or raising marginal problems'. In the view of one union official, it was only in Committees where '... there is a good system of communication' that

Representatives could play quite a prominent role. The problems arising from managerial presence were dealt with by one fairly aggressive Representative, by only inviting the manager to such meetings when the Representatives chose to do so. He told us:

> '.. we did have the manager but we chased him out because ... a few of us were holding back on different things and we thought we'd speak out a bit louder.'

The power relations alluded to above in which feelings of frustration, intimidation, co-option and even flattery could be generated, were all cited as obstacles to effective participation. As one union official noted

> 'They are just so chuffed with the whole notion of being in a room drinking cups of tea with the boss on an equal basis and calling him by his first name, that they forget what they are there for. The employer knows what he is there for; he is there to do exactly what he is doing, but our reps aren't always wise to it.'

Some more confident Representatives it seems, were well aware of this dynamic, and were not so readily seduced by sitting down with management. One was critically aware of ultimate managerial control but went on to say '.. we're quite happy at the moment if they want to have their little "ego trip" and have another title to their name, they can go right ahead, as long as they do what we want.' When the process of issue resolution seemed to drag on endlessly, she utilised a tactic that she found quite helpful:

> 'We always make sure we've got our little yellow book, that says on section 2A, and this is an Act of Parliament that we're dealing with. We must say this at every meeting at least two or three times. This is law that we're dealing with here, and then they've just got to stop arguing.'

CHAPTER 6

Prosecution and the Courts

6.1 Project Data on Prosecution

The issue of prosecution has already been touched upon in Chapters 3 and 4 of the report. Therein, it emerged first of all, that this was a most unusual enforcement response both before and after the 1985 Act. From 237 factory accident files involving legal contraventions, only 46 prosecutions were generated. When broken down according to the relevant period, this figure represented no more than 21% of pre-1985 Act and 12% of post-Act responses (see Table 3.7, above). Factory files dealing with issues other than accidents led to only 6 prosecutions, involving 9 charges, all of them from the pre-Act era and representing a mere 2% of the enforcement responses to all such issues (and only 2.6% of the strongest enforcement action taken in this context (see Tables 3.17 and 3.18, above)). Only one non-factory contact file involved a prosecution (see 3.3 above) while none of the non-file contacts, factory or otherwise, ended in court. In other words, our samples of 3,290 factory premises, of 1000 non-factory workplaces and of recoverable documents pertaining to non-file contacts in four regions produced very few prosecutions indeed. Significantly, not a single case of prosecution for failure to comply with an Improvement or Prohibition Notice, nor any relating to alleged failure to comply with Provisional Improvement Notices were encountered. Anyone with even the most passing knowledge of the world of occupational health and safety enforcement would take some convincing that, with regard to the circumstances in which it was envisaged that prosecution would generally ensue, the Ministerial Guidelines referred to earlier were being followed very assiduously. Some of the Health and Safety Representatives whose views were reported in Chapter 5 might have similar difficulty!

Details of the prosecutions thrown up by our various samples can be reviewed quite briefly. Thus, the single non-factory prosecution involved inadequate guarding of a garbage compactor operated by a fast-food chain, the company being convicted and fined $750 and $250 respectively on two charges. As already indicated, the 6 prosecutions involving matters other than accidents all fell in the pre-1985 Act period; 8 of the 9 charges related to the guarding of machinery. Out of these 9 charges, 6 resulted in conviction and fine, two resulted in 'good behaviour bonds', while one final charge was dismissed. As far as penalties were concerned, three fines of $200, two of $400 and one of $1,500 were imposed. The 6 findings of guilt emanated from only those prosecutions, the employers in question being fined a total of $600, $800 and $1,500 respectively.

Turning to the main body of prosecutions thrown up by our samples, those involving factory accidents, the 46 prosecutions entailed 68 charges being laid in all, 63 in the pre-Act period and just 5 in the post-Act period (one recommended post-Act charge listed in Table 3.9, above, was not proceeded with). Once again, machinery guarding questions predominated, accounting for 53 or 84% of the pre-Act charges, and 4 of the 5 laid after the passage of the Act. The outcomes of these 68 charges are as shown in Table 6.1, where it can be seen that no post-Act informations resulted in conviction, although 50 or 79% of the pre-Act ones did.

TABLE 6.1

OUTCOME OF PROSECUTIONS INVOLVING FACTORY ACCIDENTS BY ACT

	OUTCOME				
	Dismissed	Withdrawn	Good Behaviour Bond	Convicted	Total
Pre-Act Informations	0	3	10	50	63
Post-Act Informations	2	0	3	0	5
TOTAL	2	3	13	50	68

The fines imposed in relation to the 50 charges resulting in conviction are shown in Table 6.2, penalties totalling $23,400 with the average fine being just $468. No less than 70% of the fines were of $500 or less. These penalties arose out of 35 of the 42 pre-1985 Act prosecutions involving factory accidents, and Table 6.3 shows the total fines imposed on the employers involved. Once again, over 50% of convicted employers paid a total of $500 or less by way of fine.

TABLE 6.2

FINES IMPOSED UPON CONVICTION FOR OFFENCES INVOLVING PRE-ACT FACTORY ACCIDENTS

Amount of Fine ($)	No	%	Total Amount
100	6	12.0	600
150	3	6.0	450
200	11	22.0	2200
250	4	8.0	1000
300	2	4.0	600
400	5	10.0	2000
500	4	8.0	2000
550	1	2.0	550
600	3	6.0	1800
750	2	4.0	1500
800	1	2.0	800
900	1	2.0	900
1000	4	8.0	4000
1500	2	4.0	3000
2000	1	2.0	2000
	50	100.0	23,400

TABLE 6.3

TOTAL FINES IMPOSED IN PRE-1985 ACT PROSECUTIONS INVOLVING FACTORY ACCIDENTS AnD RESULTING IN CONVICTION

Amount of Fine ($)	No	%	Total Amount
100	1	2.9	100
150	3	8.6	450
200	5	14.3	1000
250	1	2.9	250
300	2	5.7	600
400	3	8.6	1200
500	4	11.4	2000
600	4	11.4	2400
650	1	2.9	650
750	1	2.9	750
800	1	2.9	800
900	1	2.9	900
1000	1	2.9	1000
1200	1	2.9	1200
1400	1	2.9	1400
1500	2	5.7	3000
1700	1	2.9	1700
2000	2	5.7	4000
	35	100.4*	23,400

* Percentages rounded to one decimal place

Given the paucity of our sample data in relation to prosecutions, particularly in relation to the post-1985 Act period, one member of the team, Richard Johnstone, undertook a separate and much more extensive analysis of this question and of the use of the courts. This work was undertaken in conjunction with his Ph.D. research in that field, and the remainder of this chapter is therefore a preliminary summary of some of his major findings.

It begins by setting out the methodology used in this part of the research, and then gives a broad, statistical overview of the prosecutions conducted under the legislation. This is followed by an examination of the types of cases that have been prosecuted under the Industrial Safety, Health and Welfare Act 1981 (the pre-Act period from mid 1983 to mid 1986) and the Occupational Health and Safety Act 1985 (the post-Act period from late 1986 onward). There is then a discussion of the ways in which Magistrates have tended to view the legislation. The final part of the chapter analyses the way in which the courts have carried out their sentencing function under the legislation. It should be noted that, because of the inevitable restrictions of length, this chapter can only hope to give a fairly cursory view of the role of the courts in the enforcement of the legislation. Some of the cases that have been prosecuted during the period of the research have, however, been of such a momentous impact that they have been treated in some detail.

6.2 Methodology

There were many sources for this part of the chapter, apart from the traditional legal sources to be found in the law reports, and unreported transcripts of proceedings. First, the basic historical data relating to prosecutions in the courts prior to 1982 were extracted from the reports of the Department of Labour and the Department of Labour and Industry. Secondly, numerous methods were used to investigate the role of the courts under the 1981 and 1985 Acts. Eighty two prosecutions conducted in Magistrates' Courts were attended in person, and extensive notes of proceedings were recorded. The 'prosecution book' and prosecution 'face sheets' kept by the Department's Legal Branch were examined to gather basic information about each prosecution conducted during the period under study. This data formed the basis of the statistical analysis and tables found in the rest of this chapter. In addition, the data recorded during attendances at prosecutions was always supplemented by a perusal of the Inspector's file giving rise to the prosecution.

Thirdly, interviews, both formal and informal, were conducted with Magistrates, Prosecuting Officers, Inspectors, and other officers of the Department of Labour. Interviews with Inspectors, Prosecutors, and other Departmental officials were generally conducted in a fairly informal fashion during the course of the research, generally at the courts while waiting for the case to begin, while out visiting factories with Inspectors, or while working in the offices of the Department of Labour.

6.3 The use of Prosecution under Victorian Occupational Health and Safety Provisions Prior to 1982

The first Victorian legislation to envisage the prosecution of Occupational Health and Safety offences in the courts was the Factories and Shops Act 1885, which set out the basic approach to occupational health and safety in Victoria for the next 97 years. Although the Act was frequently amended,[1] its basic approach was to follow the traditional British approach of (i) setting down statutory standards (in the Act and in regulations made under the Act), (ii) enforcing these standards through a salaried Inspectorate, who would mainly advise and persuade employers to comply with the standards, with (iii) prosecution before the courts as a very last resort. The prosecution statistics indicated that prosecution was, indeed, rarely used.

From 1886 to 1899, for example, there were 1571 prosecutions under the Factories and Shops Act,[2] but only two for failing to guard machinery, and thirteen for diverse offences such as overcrowding, failure to report an accident, untidy factories, inadequate seating etc.

The position from 1900 to 1986, the end of the 'traditional' approach to regulating occupational health and safety, is summarised in Table 6.4.

TABLE 6.4

OCCUPATIONAL HEALTH AND SAFETY PROSECUTIONS 1900-1986

Period	Total Infos	OH&S Infos	% Total	Dismissed	Convictions	Average Fine (% of max.)
1900-1919	7730	172	2.2%	15	154	24%
1920-1939	10603	335	3.16%	29	276	11%
1940-1959	7816	318	4.07%	13	299	14%
1960-1979	16077	1228	7.6%	69	1079	16%
1980-1986	3318	970	29.2%	24	760	14%

Sources: Annual Reports 1886-1986

The table shows how relatively infrequent resort to prosecution for Occupational Health and Safety offences was prior to the advent of the Occupational Health and Safety Act 1985, both in absolute terms and in relation to the total number of prosecutions conducted by the Department. These prosecution statistics record the number of informations prosecuted, and it should be noted that many, if not most, cases involved more than one information, so that the figures expressed in terms of informations arguably overstate the number of defendants taken to court.

It should be noted that the maximum fine throughout the period has always been extremely low. The maximum fine for machinery offences in the 1885 Act was £10, and in 1982 the maximum fine was $2000.

During the period 1946 to 1982 there were thirty appeals against the Health and Safety provisions of the Factories and Shops Act and the Labour and Industry Act.[3] All but two of the appeals were lodged after 1960, and all were lodged by the Informant Inspector. Seven were against orders of Magistrates' Courts to adjourn proceedings without conviction

upon the defendant entering into a recognizance to be of good behaviour ('good behaviour bonds'). The other twenty three appeals were against decisions of Magistrates to dismiss informations. Three of the appeals were withdrawn or struck out before the hearing, and one was adjourned by the court sine die while the parties conferred upon the provisions of a suitable guard. Of the nineteen remaining cases, two were dismissed by the Industrial Appeals Court, and in a third case ten of the thirteen informations were dismissed, and one struck out. In the remaining sixteen successful appeals against the dismissal of an information, twelve resulted in the imposition of the minimum fine set out in the statute, and one in a 'good behaviour bond'. Of the six appeals against 'good behaviour bonds', three were unsuccessful, and of the others, two resulted in 'good behaviour bonds'.

These basic statistics suggest that while, to a certain extent the Industrial Appeals Court was prepared to rectify the worst decisions of the Magistracy, it was not prepared to set an example in the area of sentencing. This is a point that will be taken up in 6.6.1 below.

6.4 Prosecution Statistics under the Industrial Safety, Health and Welfare Act 1981 (ISHWA) and the Occupational Health and Safety Act 1985 (OHSA)

Table 6.5 analyses the types of prosecutions conducted by the Occupational Health and Safety Inspectorate, and focuses on the provisions most often used by the Inspectorate in court proceedings.

TABLE 6.5

Provision	ISHWA		OHSA		Total	
	No.	%	No.	%	No.	%
Machinery guarding	347	77%	146	67.6%	493	74.17%
Employers Gen Duty	12	2.6%	23	10.6%	35	5.26%
Manufacturers' etc duty	6	1.3%	0	-	6	.9%
Failure to Report Accident	39	8.5%	16	7.4%	55	8.27%
Spray Painting	6	1.3%	0	-	6	.9%
Asbestos	22	4.8%	0	-	22	3.3%
Lifting	2	0.4%	0	-	2	.3%
Tractor Regulations	2	0.4%	0	-	2	.3%
Contravene Improvement Notice	0	-	5	2.3%	5	.75%
Contravene Prohibition Notice	0	-	2	.9%	2	.3%
Exits etc	11	2.3%	0	-	11	1.65%
Employ Under Age Child on Machinery	0	-	3	1.4%	3	.45%
Confined Spaces Regulations	0	-	4	1.9%	4	.6%
Employee's General Duty	0	-	3	1.4%	3	.45%
Assault etc Inspector	0	-	9	4.2%	9	1.35%
Summary Offences Act	0	-	4	1.8%	4	.6%
Other Offences	2	0.4%	1	.5%	3	.45%
Total	449	100%	216	100%	665	100%

This table clearly shows how the Department's prosecution practice has focused very strongly on machinery guarding offences. This is quite consistent with the findings in 3.1, 3.4.1 and 4.5 above. Most of the employers' general duty provision prosecutions, and all the prosecutions of employees, manufacturers etc have also been concerned with machinery, with the consequence that the machinery guarding figure in Table 6.5 actually understates the number of prosecutions that have been brought for machinery related matters. The preoccupation of the Inspectorate with machinery guarding matters is easily

explained by the history of the legislation, with its focus on machinery guarding matters, and the engineering trade background of the majority of Inspectors. It is not clear, however, that the culture of the Inspectorate is changing in line with the broader scope of the provisions in the OHSA.

Table 6.6 sets out the basic data pertaining to prosecutions under the ISHWA and the OHSA. The table shows the number of informations prosecuted (665). The number of cases brought during this period was 410. The table is supplemented by Table 6.8, which indicates the level of fines imposed by the Magistracy where convictions have been recorded.

TABLE 6.6

OUTCOMES OF OCCUPATIONAL HEALTH AND SAFETY PROSECUTIONS 1983-1988

Year	Act[4]	Conv & Fined[5]	Dism[6]	GBB[7]	GBB*[8]	W/D[9]	S/O[10]	Adj[11]	Total
1983	ISHWA	66	-	10	3	6	-	-	85
1984	ISHWA	62	3	17	5	10	-	3	100
1985	ISHWA	111	-	10	11	14	-	3	149
1986	ISHWA	90	4	8	1	6	-	-	109
1986	OHSA	11	12	11	1	4	-	-	39
1987	ISHWA	-	-	2	-	-	-	-	2
1987	OHSA	56	2	14	11	14	-	2	99
1988	ISHWA	1	-	-	-	-	-	-	1
1988	OHSA	39	8	5	1	26	2	-	81
TOTAL	ISHWA	330	7	47	20	36	-	6	446
TOTAL	OHSA	106	22	30	13	44	2	2	229
GRAND TOTAL		436	29	77	33	80	2	8	665

This table tends to suggest that while the number of informations prosecuted rose during the early 1980s,[12] the number of prosecutions fell away quite noticeably with the advent of the OHSA. This is partly explained by the greater emphasis in the prosecution guidelines on the use of Notice procedures, but also suggests that the Inspectorate was

having difficulty in trying to adjust to the scope of the new Act. and the provisions that it contained. There were also, no doubt, technical reasons for prosecutions not being brought at various times, as the new regulations were introduced.

Most prosecutions, particularly those to do with machinery guarding, have been intitiated as the result of an 'accident' which resulted in an injury to an operator as the result of a failure to guard a dangerous machine. Overall, only 20% of all cases prosecuted under the ISHWA and the OHSA up until the end of 1988 were 'observation' breaches not involving an incident in which a worker was killed or injured. Most prosecutions, therefore, were 'reactive' in the sense that an 'accident' had already taken place, and was the 'trigger' for an investigation and prosecution.

Quite surprising is the fact that only 5 of the 410 prosecutions conducted under the ISHWA and the OSHA were brought as the result of a fatality. This amounts to an average of about one prosecution for a fatal industrial accident each year. The vast majority of cases prosecuted (over 60%) were concerned with amputations or lacerations to the fingers and hands of workers.

Most defendants (76%) were represented by legal counsel during prosecutions. An interesting aspect of this jurisdiction is that there are very few barristers who regularly defend occupational health and safety prosecutions. For example, approximately 190 different counsel appeared in the 410 cases heard under the ISHWA and the OHSA until the end of 1988. If you add the 58 defendants who conducted their own defences, it becomes clear that in each case the defence is carried out by persons who have very little experience in this area of the law.

TABLE 6.7

PLEAS ENTERED TO INFORMATIONS BROUGHT UNDER THE OCCUPATIONAL HEALTH AND SAFETY LEGISLATION

Plea	Number	Percentage
Guilty	229	34.5%
Not Guilty	246	36.8%
'Formal not guilty'	29	4.4%
No plea entered	142	21.4%
Missing data	19	2.9%
TOTAL	665	100%

As Table 6.7 shows, in about 246 of the 665 informations (37%), the defendant entered a plea of not guilty, although it should be noted that this figure gives an inflated picture of the extent of contested informations because in many instances a plea of 'not guilty' recorded by the Prosecutor in the prosecution file was actually only a 'formal' plea, and the defendant did not contest the evidence or the charges brought by the Department. Twelve per cent of informations were withdrawn. In many instances the Prosecutor had framed charges in the alternative, so that this 'plea bargaining' process merely reduced the overlap between offences. For example, it was common for separate informations to outline an offence under regulation 10 of the Occupational Health and Safety (Machinery) Regulations for a failure to 'provide' guarding for dangerous machinery, and an offence under regulation 11 for failing to 'maintain' the guarding thus provided. In the view of the Prosecutors, and of the courts, these are mutually exclusive offences - if a guard has not been 'provided', then the offence cannot be for failure to 'maintain', and a guard can only fail to be 'maintained' after it has been 'provided'. In some cases, however, the Prosecutor

withdrew charges in order to secure a guilty plea in circumstances where the Department's evidence was felt to be weak, and the Prosecutor wished to avoid the risk of losing the case for lack of evidence. In one case, for example, the key witness, the injured person, failed to appear at the prosecution, and the Prosecutor agreed, in exchange for a guilty plea, not to inform the court of the principle that in the case of a serious injury 'it was a rare case' for the defendant to be put onto a 'good behaviour bond' (see below). The Prosecutor was also reluctant to challenge material put into the defendant's plea in mitigation of sentence, because of a fear that the defendant would contest the charges.

6.5 An Analysis of Specific Types of Cases

This section of the report looks very briefly at some of the more important types of occupational health and safety prosecutions that have been conducted by the Department. The categories of cases that are examined include (i) prosecutions under the machinery guarding provisions; (ii) prosecutions under the employers' general duty provisions, and the meaning of 'practicable'; (iii) prosecutions of manufacturers, designers, installers etc.; (iv) prosecutions for the contravention of Improvement, Provisional Improvement, and Prohibition Notices; (v) prosecutions under the provisions relating to assaults etc. on Inspectors; and (vi) appeals.

6.5.1 Prosecutions under Machinery Guarding Provisions

Provisions requiring the guarding of machinery are to be found in s. 16 of the ISHWA, the Industrial Safety, Health and Welfare (Machinery) Regulations 1982, and the Occupational Health and Safety (Machinery) Regulations 1985. The law relating to these provisions has been fairly clearly settled by the Victorian Courts, particularly the Industrial Appeals Court, following the British cases.[13] The result is that these provisions impose a very strict liability on defendant occupiers or employers, and it is fairly rare that a prosecution under these provisions is dismissed.[14] Despite the strict liability nature of the

employer's duty in the machinery guarding provisions, and the paucity of the legal defences available, it was quite common for these prosecutions to be vigorously contested. The most common defence to be raised in the observed cases was the defence that the injured worker had been 'careless' or had 'disobeyed instructions', and that it was this carelessness or disobedience that had been the true cause of the accident. This is not a defence sanctioned by the occupational health and safety legislation, or by the courts,[15] but it is a very commonly held view that workplace illness and injury is caused by worker carelessness and disobedience. In many cases, defence counsel pursued this defence with considerable ruthlessness. In one case, in particular, a prosecution under regulation 10 of the Occupational Health and Safety (Machinery) Regulations, the worker, a middle aged woman of Italian origin, lost three fingers when they were caught in the unguarded 'nip point' of a 'stacking machine'. In a tough cross examination, defence counsel accused her of 'never listening' to instructions, of being 'flirtatious' at work, of being ignorant of the workings of the machine, of wearing gloves that were too big so that she did not have to remove her rings while she was working, of 'having something on her mind' while at work, of disobeying instructions, and of being 'stupid'. These allegations were submitted to have been proof that the worker had 'acted in conscious defiance of the principles of self preservation', one of the few exceptions to liability under the machinery guarding provisions.[16] Despite all this evidence, the Magistrate, quite correctly, found the charges proved against the defendant.

Other commonly used defences are that the accident was 'not foreseeable'; that even if there had been a guard, the accident would still have occurred; that the defendant had 'done all it could'; that the machine was not 'dangerous'; that the Inspectorate had inspected the machine on a prior occasion and had not ordered the machine to be guarded or modified; that the machine could not be operated with a guard; and that the

machine had been supplied without a guard, and therefore the employer had just assumed that it had complied with the law.

Invariably, however, the strict nature of the duty placed upon the occupier or employer ensured that most of these prosecutions were successful. Magistrates, while often having difficulty with the technicalities of the operation of the machinery, usually understood the nature of strict liability, and had no difficulty in getting to the heart of the issue of liability. The defences raised, however, were considered by Magistrates to be relevant to the sentencing process, as will be discussed later in this chapter (see 6.8.2).

6.5.2 Prosecutions under the Employer's General Duties

As Table 6.5 indicates, up until the end of 1988 there had only been 35 informations issued under the employers' general duty provisions in s. 11 of the ISHWA (9 informations) and s. 21(1) of the OSHA (26 informations). Of the prosecutions brought, all but three were in connection with dangerous machinery, and of these, one was withdrawn and the matter pursued under Health (Entry Into Confined Spaces) Regulations, one was dismissed,[17] and in one there was a conviction after there had been a guilty plea and three other s. 21 informations withdrawn. In March 1989 one further prosecution (three s. 21 informations), was brought for a non machinery matter, and a conviction was recorded in the County Court after a guilty plea was entered.[18]

The ensuing discussion will focus on the only two cases of real interest, the cases that were dismissed by the Magistrates' Courts.

In the first, Barnes v T & D Fortuna Cabinets Pty Ltd, prosecuted late in 1986, thirteen heavy blackwood veneered particle boards were leaning, just off the vertical, against a factory wall. The deceased was instructed to support, in a vertical position, twelve of the blackwood boards as the foreman tried to retrieve the board nearest to the factory wall. When all twelve of the boards were in a vertical position, the deceased lost control of the

sheets and five fell upon him and killed him by pinning him against an adjacent bench saw. The investigating Inspector recommended that the defendant company be prosecuted under s. 21(1) of the 1985 Act.[19] The acting Senior Inspector of Safety Enforcement did not consider that there should be a prosecution under s. 21(1). He favoured issuing Improvement Notices which gave the company a 'realistic' amount of time to comply. The matter would have ended there, had it not been for the coronial inquiry.

The Coroner found that the weight of the boards made them 'potentially dangerous' once they 'got out of the perpendicular', and that the stacking method was 'inherently dangerous.' He said that:[20]

> 'There is no doubt in my mind that ... negligence has played a very large part in the death of [the deceased] ... and I further find that the death ... was due to misadventure.'

As a result of this finding, a prosecution was initiated. At the hearing, witnesses for the defendant company asserted that the company had followed the normal method of stacking and removing boards in the factory. They also suggested that the only reason for the accident was the deceased's 'clumsiness', and that at the time of the accident he had 'seemed more edgy' and was not giving sufficient attention to the task. He had split up with his girlfriend, and a close friend had died. In a 'no case' submission, defence counsel argued, inter alia, that:

> 'As far as was practicable this method [of stacking the board] was in accordance with normal trade practice. If it should have been done in another manner at least the crown should lead evidence. It's not good enough just to say "oh well, one day the stack might fall on top of you."... Not one expert has been called, except an inspector who was merely giving details of his observations.'

The Magistrate found that the defendant's evidence indicated that the practice of moving the timber had been a long standing practice of the industry. Evidence in cross

examination elicited that Inspectors had inspected the premises up to five times a year and that there had been no evidence of any comment or complaint about the practice in question.

There was a general lack of room for storage on the defendant's premises. Twelve months before the accident the company had applied to the local council for permission to build new racks with a 'foolproof' method of moving but the council had prevented the installation of these new racks for thirteen months.

The Magistrate stated that on the evidence he did not believe that he could say how the accident occurred. The Coroner's report was, quite properly, not raised before the court. It was possible that the deceased had some sort of attack, blackout or migraine, necessitating a sharp scream prior to the timber falling upon him. There had been no warning to the foreman that there was any imminent danger to the deceased.

Taking into the definition of 'practicable' in s. 4 of the 1985 Act, the court was satisfied that the company had taken all the necessary care and that the defendant had no case to answer.

The case clearly demonstrated the need for expert evidence in cases alleging a breach of the general duty. Unlike cases of specific breaches where the legislation contains the criteria against which the defendant will be judged, in cases involving the general duty, those criteria, being the circumstances that are said to constitute the breach, had to be presented as part of the expert evidence if prosecutions are to succeed.

In this case the Coroner's brief was not obtained until the day of the hearing. The Coroner's brief contained material, in particular the evidence of the work attitude and medical condition of the deceased, which played an important part in the final result. After the case, the Prosecutor recommended that 'the Coroner's brief should form part of the

material upon which the decision to prosecute is made.' Ever since that case, Legal Branch have followed that practice.

All parties concerned seemed to have great difficulty with the generality of s. 21 and the meaning of 'practicable'. The Magistrate clearly interpreted 'practicable' in the light of industry practice, and the obstacles placed upon the defendant by the local council undermined the argument that the company should have taken earlier steps to install a new storage system. He presumably decided that the local council had made the new storage system 'impracticable' at the time of the accident. The parties also seemed to have difficulty in dealing with issues raised by the storage system, which, unlike moving machinery, is 'passive', and where all the activity is undertaken by the human actors. This enabled the court to attach great significance to the actions of the deceased, and attribute to him responsibility for causing the accident.

It is a pity that the Department did not take this decision to the Supreme Court for Review. It raised very important issues about 'industry practice', the significance of prior inspections by Inspectors which fail to recommend changes to a system of work, and issues relating to 'careless' workers. The Magistrate's decision was highly questionable, and there is no reason why the Department would not have succeeded in a properly argued case.[21]

The second major case was Chugg v Pacific Dunlop Limited, which arose out of the events in the defendant's (Pacific Dunlop) factory which resulted in the death of an apprentice employee. The deceased was working on one of the defendant's Banbury mills. The rubber and other substances to be mixed in the mill were moved along a weighing conveyor to a hopper door, through which they were to enter the mill and be compressed by a vertical ram into the mixing area of the mill. At the bottom of the mill mixing area was a discharge door, which operated by sliding open. In the machine's automatic mode

automatic circuitry was engaged and the machine followed a fixed sequence of events. In its manual mode there were separate controls available to enable each of the hopper door, the ram and the discharge door, to be operated pneumatically.

On 26 October modifications were carried out on the electrical circuitry of the mill. Prior to 26 October, the discharge door, when opened, would slide open until it hit a limit switch which set the pneumatic circuitry in motion to ensure that the hopper door was opened or, if it was already open, remained open. Anyone opening the discharge door would not expect the hopper door to shut. After the modification of 26 October, the relationship between the discharge door and the hopper door was reversed, so that when the discharge door opened it would hit the limit switch which would then operate to close the hopper door with a considerable degree of force. There was a nine second delay between the time that the discharge door lever was pulled to open the discharge door and the slammimg shut of the hopper door.

The deceased was killed when he put his head in the hopper door while the discharge door was open, and the hopper door closed unexpectedly.

The Inspector laid two Magistrate Court informations against the defendant company for offences against the Occupational Health and Safety Act 1985 (Vic). One of the informations alleged a contravention of s. 21 of the 1985 Act. In specifying the basis of the offence the information followed the words in ss. 21(2)(a) and (e). It then outlined two sets of 'Particulars', clearly couched in terms of the provisions in ss. 21(2)(a) and (e) respectively.

At first instance the Magistrate ruled that the information infringed the rule against duplicity which requires that every information be for one offence only. This ruling was reviewed and upheld by the Victorian Supreme Court.[22] Fullagar J. held that ss.21 (1) and 21(2) create a large number of offences each consisting of some identifiable act or

omission which in all the circumstances constitutes a failure to comply with a general duty of care laid down by s.21(1). Section 21(2) created no offence which was independent of s.21(1) but merely indicated 'some of the things which constitute a contravention, not of itself, but of s. (1)'. The statutory duty in ss. 21(1) and (2) was 'the same as or substantially the same as' the duty of care owed by the employer to the employee under the common law tort of negligence. The court concluded that as it was clear that 'at least two offences' had been included in the information, it was bad for duplicity.

It is doubtful whether this decision is correct.[23] As it stands, the decision has serious consequences. The logic of the court's conclusion is that each 'illustration' in s. 21(2) stands on its own as a discrete and independent instance of a contravention of s. 21(1), and cannot be combined with another 'illustration' in s. 21(2) to give rise to an offence under ss. 21(1) and 47. But what if the inadequate guarding or the failure to provide information or supervision on their own were not sufficiently serious to result in a contravention of s. 21(1), but together resulted in a lethal hazard to employees? Surely that would be a single offence involving elements of ss. 21(2)(a) and (e). This decision in Chugg would not allow such an approach.

It should also be noted that the reasoning in the case is confined to prosecutions under s. 47 of the 1985 Act, and does not have an impact on the use of Improvement and Prohibition Notices (ss. 43 and 44). It is not, therefore, possible for a person issued with such a Notice to appeal against the Notice to the Industrial Relations Commission of Victoria under s. 46 of the 1985 Act on the basis that there is more than one offence specified in the Notice.

The Pacific Dunlop prosecution recommenced before the original Magistrate and proceeded under six new informations which had been drafted pursuant to Fullagar J's judgment, together with an original information (the 'seventh information') alleging an

offence pursuant to regulation 10 of the Occupational Health and Safety (Machinery) Regulations.

The gist of the prosecution case was as follows. After the electrical modification of 26 October 1985 the machine was tested in its automatic mode, but not in its manual mode. Such a test would have discovered the new workings of the doors. No plans of the electrical modifications were shown to the deceased's supervisor, and no acceptable formal system existed in the company to communicate modifications to other workers. The deceased was requested to perform maintenance work on the pneumatics, and was informed of the electrical modifications of 26 October, but was not told of the nature, effect or extent of the modifications. He was just told that he should be careful, and to 'play it by ear.' The deceased had been accustomed for the four years of his apprenticeship to the unmodified operation of the machine. The prosecution alleged that the warnings given by the supervisor were an inadequate substitute for proper guarding or supervision. It could be expected that the deceased would test the operation of the mill after the pneumatic modifications were carried out, although the supervisor asserted that the testing should have been done under supervision.

All witnesses conceded that the area around the hopper door was extremely dangerous because of easy accessibility, and that it was not guarded at all at the time of the accident. This was the essence of the first and second informations (which were couched in terms of s. 21(2)(a)) and the seventh information. Further, the defendant was alleged to have had breached its obligations under ss 21(1) and (2)(e) of the 1985 Act by failing to ensure that either circuit drawings or information about the changes were made available to the deceased before he carried out the modifications he was requested to do, or by failing to inform the deceased about the effects of the modifications carried out on 26 October. These issues were the subject of the third and fourth informations.

In addition, the prosecution alleged that it was inadequate supervision to leave an apprentice to work on his own when nobody in the defendant company knew exactly what the effects of the modifications of 26 October would be. This was the basis of the fifth information, which was framed in terms of s. 21(2)(e).

The sixth information (s 21(2)(a)) was based on the allegation that the force used to close the hopper door (ninety pounds per square inch) was excessive, and that a lesser force (say thirty pounds per square inch) would have been adequate to perform the functions of the hopper door, and would also have enabled a person who had caught her or his hand or any other part of the body caught in the machine to free herself or himself far more easily.

The court accepted the defendant's submissions that the burden of proving a contravention of s. 21(1), particularly the issues relating to 'practicability', lay with the informant. It held that 'the Occupational Health and Safety Act, being a penal provision, must be strictly construed'.

The court dismissed the first six informations relating to the s. 21(1) offences, and found the seventh information, the regulation 10 offence, proved.

The Magistrate held that the leading English cases on machinery guarding offences[24] 'clearly show that an employer is entitled to rely in his defence that the consequences were not reasonably foreseeable.' He did not advert to the meaning of 'reasonably foreseeable' in this context.

In relation to the first information, the Magistrate found that the deceased was an intelligent and skilled person; that he was quite conversant with the maintenance work he was required to perform; that he did not follow his supervisor's instructions not to test the machine; that the defendant could not have foreseen the malfunction of the hopper door because of the modifications carried out on the 26 October; and that the carrying out of

the maintenance work did not involve the deceased placing his body in the trapping space. In the opinion of the Magistrate, the information had not been proved.

In relation to the second information, the court found that the electrical modifications carried out on 26 October had an unforeseeable consequence; and if the deceased had turned off the electrical system there would not have been any danger. The information was, therefore, dismissed.

In relation to the third information, the Magistrate held that the informant's contention that the provision of up to date circuit drawings would have avoided the danger could not be sustained on the evidence. 'The evidence was that it would have been difficult to discover the danger from the circuit drawings. The only witness who said that it was easy to discover the danger, by studying the circuit drawings, was [the prosecution's expert witness, the consulting risk engineer]. In that regard I prefer the evidence of ... the electrical supervisor, who was of the view that the circuit drawings would not have indicated the danger.' The third information was, therefore, dismissed.

The Magistrate also dismissed the fourth information, which alleged that the deceased had not been informed of the modifications to the mill. This was on the basis that 'the deceased's supervisor [had] informed the court that he was aware of the modifications and that he had told the deceased to be careful and to play it by ear.'

In relation to the fifth information, alleging that deceased was allowed to work with inadequate supervision, the Magistrate dismissed the information on the basis that the evidence disclosed that the deceased was an intelligent and skilled worker, and had only two months to go to complete his apprenticeship. In the opinion of the court, 'such a skilled person... would not need constant supervision.' The information was, therefore, dismissed.

The sixth information, pertaining to the door closing pressure applied to the hopper door was also dismissed. The court found that no evidence had been led as to the manufacturer's specification of the pressures to be applied to the hopper door. The informant's consulting risk engineer in cross examination admitted that his view that ninety pounds per square inch was excessive was speculative. The other two expert witnesses had testified that fifty pounds per square inch was not excessive.

The seventh information, the offence under regulation 10 of the Occupational Health and Safety (Machinery) Regulations was held to be proved. The hopper door was dangerous, and 'once it is established that a part of the machinery is dangerous, then the duty on the defendant is absolute, provided it was feasible to provide guards.' This was undoubtedly correct.

The matter went to the Supreme Court for review. A majority of the Full Court of the Victorian Supreme Court[25] upheld the Magistrate's decision.

The majority first dealt with the issue of who had the onus of proving 'practicability' under the OHSA. It held that despite the decisions in the House of Lords[26] and the New South Wales Court of Appeal[27] that the onus of proof of negating practicability in provisions similar to s. 21(1) lay with the employer, the Victorian provision differed sufficiently from these provisions, and the onus of proving practicable in s. 21(1) lay with the prosecution. The majority then went on to hold that having 'witheld from leading any evidence in relation to this essential element of the offence charged, the informant failed to discharge the onus of proof. For these reasons we would discharge the informant's order nisi, regardless of any error made by the Magistrate in his further reasons for dismissing the informations...' This was a quite extraordinary decision as there was easily sufficient evidence led by the informant on the issue of the practicability of guarding the Banbury Mill, and there was some evidence at least on all the other informations except perhaps the information

pertaining to the closing pressures applied to the hopper door. The majority upheld the Magistrate's decision to convict the defendant on the regulation 10 charge.

In his dissenting judgment, Ormiston J agreed that the onus of proving 'practicability' lay with the informant. He then dealt with the issue of reasonable foreseeability as a test for liability under s 21 of the Act. The Magistrate had relied heavily on the notion of the 'unforeseeability' of the events on the day in question, particularly the malfunction of the machine, and the deceased's actions in placing himself within the machine. Ormiston J noted that the Magistrate had relied on two authorities on the meaning of the word 'dangerous'[28] in order to pose a test as to what might excuse an employer from failing to provide and maintain, so far as practicable, a workplace that was safe and without risks to health. He also noted the magistrate's surprising conclusion that the hopper door was in fact 'dangerous' for the purposes of the regulation 10 offence, but that, using the same test, the consequences of the modifications to the electrical circuitry were 'unforeseeable'. If the hopper door was a dangerous part of the mill, it should have followed that there was a hazard or risk of a relevant kind.

All members of the court stated that the issue of practicability was to be determined objectively.[29] Ormiston J indicated that he thought that it was not useful to 'imply a defence based on showing that harmful consequences were not reasonably foreseeable', and that it was 'positively misleading in that it imposes a test not described in the legislation and one which might be misunderstood as referring to the employer's own imperfect capacity to foresee those consequences.'

Ormiston J therefore found that the Magistrate failed to apply the appropriate tests as to the liability under s. 21. The test of reasonable foreseeability provides no useful test of what is 'practicable' within the meaning of the 1985 Act. He also held that there was sufficient evidence placed before the court by the informant to discharge the burden of

proving practicability, at least in relation to the issue of guarding in the first two informations. With respect, his approach is to be preferred over that of the majority, although it is arguable that the approach of all the judges to the questions of onus of proof is wrong. The High Court will hear an appeal against the Supreme Court's decision some time next year.

6.5.3 The prosecution of Manufacturers, Installers, Suppliers etc

One of the more important recommendations of the Robens Report was the recognition that occupational health and safety legislation should implement 'the generally accepted position that the first step in the promotion of health and safety at work is to ensure, so far as may be practicable, that plant, machinery and materials are so designed and constructed as to be intrinsically safe in use.'[30] To this end the ISHWA[31] and the OHSA[32] both enacted provisions placing duties of care on the manufacturers, designers etc of plant, equipment and substances used at the workplace.

As Table 6.5 shows, these provisions have not been strongly enforced in the courts by the Inspectorate.

The most important case under these provisions thus far arose in Herless Pty Ltd v Barnes[33], where the Industrial Relations Commission of Victoria considered an appeal against a conviction under of s. 13(1)(a) of the Industrial Safety, Health and Welfare Act, which required a designer, manufacturer, importer or supplier to ensure, so far as was reasonably practicable, that an article designed or constructed for use in a workplace was safe and without risks to health when properly used. The offences were in relation to a lockseamer machine which was sold to a purchaser without any guarding.

The Department led evidence that the machine had been delivered to the purchaser without any guarding, and without a manual or any instructions as to how the machine should be used. The managing Director of the appellant company, two of its employees

(all of whom claimed a great deal of experience with lockseamer machines) and the purchaser (in cross examination), gave evidence that (i) they had never seen a lockseamer machine that had been guarded, (ii) that they had never heard of an injury on such a machine, (iii) that they did not believe that an injury could take place on the machine because its rollers moved slowly, (iv) that virtually identical machines were used unguarded in Great Britain, the United States, Japan and the rest of Australia, and (v) that the machine was not dangerous if 'properly used'.

Garlick AP upheld the appeal and quashed the conviction. He commented that the lack of evidence about injuries caused on the machines may not of itself relevant to a decision as to whether or not the machine was safe, 'but for a machine which has been around in thousands for more than a quarter of a century, the suppliers and users have been fortunate indeed if the machine is not safe and no injuries have become known to the Department.'[34] There was no evidence before the Commission as to why the machine was unsafe. 'Any notion that all unguarded rollers are automatically unsafe may not be easy to sustain, but in this case [the prosecutor's] argument is not assisted by one of his own witnesses stating that when properly used the machine was safe. [The purchaser] appeared to know how to operate the machine, but provision of a manual of instruction by [the appellant] would be a sensible action'.[35]

It seems as if the Commission attached a lot of weight to the purchaser's statement that the machine was safe if properly used. The prosecution case did not try to counter this evidence by leading any evidence of its own as to what was a proper use of the machine, and indeed the investigation by the Department did not cover the issue. In addition, the Commission construed the words 'when properly used' very narrowly, and made no attempt to take into account dangers that might arise out of the machine by an operator who had been careful but who might make an inevitable 'mistake' due to fatigue

or distracting work conditions, or might, through a reflex action, bring her or his hands near the nip point in order to assist with the feeding of material into the machine. As the cases on the meaning of 'dangerous' show,[36] courts have been happy to require employers to guard against activities of employees which do not, strictly speaking, fall within the exact instructions given to the employee as to how to perform the job. To a large measure the Commission was able to do this because the use of the words 'when properly used' in s.13 incorporates into the legislation the time honoured defence of employers that employees cannot be protected unless they work strictly within the scope of their employment instructions. But the Commission could easily have construed the provision in the light of the cases on the meaning of 'dangerous'.

The case also illustrates the problems inherent in prosecutions where there has been no actual injury, and where the prosecution is unable to counter assertions that there have been no injuries on similar machines for a long period of time.

The case confirms the fears that have been expressed[37] in relation to the narrowness of s. 24 of the OHSA, which purports to impose a general duty of care upon manufacturers, designers, suppliers, installers etc. Section 24 qualifies all the duties in the section with the words 'when properly used', and the decision in Herless indicates how narrow the scope of the section is as a result of the use of that phrase.

6.5.4 Prosecutions for Failing to Comply With Improvement or Prohibition Notices

A key element of the OHSA is the powers given to Occupational Health and Safety Inspectors, under ss. 43 and 44, to issue Improvement and Prohibition Notices.[38] The 1985 Act has gone further than the Robens Report and has given properly elected worker Health and Safety Representatives the power to issue Provisional Improvement Notices.[39] Failure to comply with an Improvement Notice, a Prohibition Notice or a Provisional Improvement Notice is an offence against the 1985 Act.[40]

For a long time the Inspectorate did not prosecute employers for failing to comply with the Notice provisions. The main reason for this appeared to be a misinterpretation of the legal requirements for a successful prosecution for failure to comply with a Notice. Sections 43(3) and 44(3) clearly indicate that the 1985 Act is contravened if a person who has been issued with a Notice, and who does not appeal against the notice to the Industrial Relations Commission, does not comply with the Notice. All that would need to be shown was that the Notice was issued, there was no appeal within the specified time and that there was no compliance with the Notice.

Yet for a long period of time, key personnel in the Regional Services Division of the Department believed that there was an added requirement for a successful prosecution, namely that the prosecution should be able to prove that the Notice was properly issued. In other words, if an Improvement Notice was issued which specified that the basis of the Notice was a contravention of s.21(1) of the 1985 Act, the Prosecutor would have to be able to lead evidence in court of the practicability of compliance with the section. Similarly, if a Prohibition Notice had been contravened, the Prosecutor would have to be able to prove that there was 'an immediate risk'. What was being confused was the need to ensure that there was evidence of 'practicability' or of an 'immediate risk' when a Notice was issued in order to be able to defend an appeal against the Notice to the Industrial Relations Commission.

If there had been no appeal, however, this evidence was not necessary. For example, there is clear English authority that the issue of the practicability of compliance with an Improvement or Prohibition Notice is not an issue that can be raised by a defendant during a prosecution for failure to comply with a Notice. In Deary v Mansion Hide Upholstery Ltd[41] it was held that since the British Act gives the defendant a right to appeal against the Notice,[42] it is at this point that the issue of practicability of compliance

arises. If the defendant fails to take advantage of this right of appeal, it cannot raise practicability as a defence to a prosecution for failure to comply with a Notice even though the impracticability of the measures required to remedy the hazard may invalidate the alleged breach of the duty upon which the Notice is based.

The matter was exacerbated during the first year of the 1985 Act when there was some doubt as to the validity of the regulations made under the 1985 Act. As a result, Inspectors were instructed to specify that s. 21(1) of the 1985 Act had been contravened when they issued Improvement Notices. This immediately raised the issue of 'practicability'.

The first prosecutions for contravention of a Notice were taken in 1987. The first two prosecutions were for contraventions of Prohibition Notices placed on butcher's mincing machines. In both cases there were alternative charges, one under s. 44(3) of the 1985 Act for contravening a Prohibition Notice, and the other under regulation 40 of the Occupational Health and Safety (Machinery) Regulations. In the first, the regulation 40 charge was withdrawn, and in the second the s 44(3) charge was withdrawn - it appeared as if the department had no policy as to which informations should be prosecuted in these cases. In both prosecutions the charges were proved, but the informations adjourned without conviction. As Table 6.4 shows, very few other prosecutions for contraventions of Notices were brought up until the end of 1988 (five informations in two cases).

6.5.5 Prosecutions for Assaulting or Hindering etc an Inspector

The very first prosecution under the OHSA pertained to an alleged assault of an Inspector under the 1985 Act. It was alleged that an inspector was assaulted with a pitchfork while attempting to issue the defendant with an Improvement Notice. The defendant and the company of which the defendant was a director were served with a total of ten informations. Six of the informations pointed to offences under s. 42 of the 1985 Act. There were four further charges under the Summary Offences Act, two alleging an

assault of an Inspector[43] and two alleging an assault on the Inspector with a weapon or instrument.[44]

The Magistrate dismissed all the charges. He was strongly critical of 'the *manner* in which the investigation [for the breach report] was conducted without properly going into the allegations which the defendant was making in this case' about the provocative behaviour of the inspector. It 'was a non-professional inquiry and left a lot to be desired.'

The Magistrate then worked through the facts, and commented that the Inspector had properly decided to issue an Improvement Notice. While accepting that the Inspector had been told to serve the Notice personally, he noted that the Inspector decided 'to do the other form of service', and approached the defendant:

> 'to serve the document without an explanation as to what the document meant. [The Inspector] lacked an understanding in how to serve a document of this type, and having been told by [the defendant] that he was not accepting service because he was too busy, [the Inspector] persisted... In view of [the defendant's] attitude, [the Inspector] would have been well advised to have moved away and effected service by post or other authorised means... When asked to leave, the Inspector stood his ground.'

The Magistrate accepted that:

> '[the Inspector's] attendance and attitude and manner were sufficient provocation for the amount of force used against him ... As to the actions of [the defendant], I fail to see why he was not more courteous to the Inspector who considered his office and work as important as [the defendant] considered his business on the day... Both sides contributed to an incident that should not have happened.'

The Magistrate found that the charges of assault, hindering, impeding and opposing were not made out. His decision was puzzling in that it relied solely upon the Inspector's 'provocation' of the defendant. The Inspector was performing a task authorised by the OHSA. It is difficult to see how an employer can ignore an Inspector while on the premises, and refuse to take a Notice that has been issued, without hindering or impeding the Inspector. These are absolute offences, and there appears to be no defence in the

1985 Act. Nobody denied that the defendant did touch the Inspector with the pitchfork, and did order him off the premises. These, in themselves would constitute offences unless the defendant had a defence to rely on. The defendant clearly resented the interruption to the work process, but it was an interruption sanctioned by law. The Inspector's alleged 'provocation' was simply to stand his ground in order to exercise the powers given to him under the 1985 Act.

The Magistrate was overly critical of the manner in which the Notice was served on the defendant. If the Inspectorate were to follow the Magistrate's advice about serving Notices, their work would be slowed down quite considerably. He also placed too much emphasis on the deficiencies in the conduct of the officers of the Department of Labour after the incident. These had no bearing upon whether the incident itself constituted an assault. The Magistrate seemed to consider that the Department's conduct did, however, reflect upon the credibility of its witnesses, and this would have ben a key factor in the final outcome.

It is also clear that there were a number of deficiencies in the prosecution's case. The Prosecutor had to conduct the case on his own for a day and a half in extremely difficult circumstances, without an instructor, while the defendant was represented by counsel and two instructing solicitors. The Prosecutor decided not to call evidence from the doctor who examined the Inspector, and did not call evidence from the investigating policeman. In addition, he did not ask the Supervising Inspector for his observations of the Inspector's condition after the incident. While it is true that this evidence would have not been conclusive, and may have been based on hearsay, it would have at least provided some corroboration of the Inspector's story.

6.5.6 Appeals

There were seven appeals to the Industrial Relations Commission from the decisions of Magistrates under ISHWA. One of these was abandoned by the appellant and was struck out. Of the others, five were appeals by the defendant, and one of these resulted in the dismissal of the charges.[45] In one case the informant appealed on the basis that the fine imposed was inadequate, given that the defendant had nine prior convictions, and the commission increased the fine from $150 to $500.[46] In two others the informant appealed against the imposition of a 'good behaviour bond' in a matter where worker had lost fingers on unguarded machinery, and in each case the Commission recorded a conviction and imposed 'the lowest penalty', a fine of $200.[47] In one case the defendant appealed against its conviction and fine under a s. 16 offence, and the conviction was upheld, but the fine reduced from $800 to $400.[48] One other appeal by the informant against the dismissal of charges by a Magistrate is still pending.

There was one appeal to the County court by a defendant against a penalty ($5000 fine) imposed by a Magistrate under OHSA. The court dismissed the appeal. It should be noted that under the OHSA there is no avenue of appeal for the prosecution against a decision of a Magistrate, either on an issue of liability or penalty. The only avenue available to the prosecution is to have the decision of the Magistrate reviewed for an error in law by the Supreme Court.

6.6 Magistrates' Views of the Legislation

Thirteen Magistrates, men of differing levels of experience, were interviewed to discover their views about the occupational health and safety legislation, and their approach to issues of liability and sentencing under that legislation. The following table indicates the number of cases that they had heard under each of the OHSA and the ISHWA as at 31

December 1988, the number of years at the time of the interview since their appointments as Magistrates, and the region in which they were located at the time of the interview.

TABLE 6.7

PROFILE OF INTERVIEWED MAGISTRATES

Magistrate	Region	Experience (years)	ISHWA cases	OHSA cases
1	Sandringham	10	6	2
2	Sandringham	11	15	7
3	Sandringham	7	3	8
4	Heidelberg	11	3	2
5	Heidelberg	2	-	3
6	Geelong	5	4	4
7	City/Geelong	2	3	1
8	Geelong	8	-	4
9	City	10	36	-
10	Broadmeadows	12	12	2
11	City	15	10	1
12	Moe	2	6	-
13	Moe	7	-	1

Not one Magistrate, in interviews, was prepared to state unequivocally that persons convicted under the legislation were 'criminals'. A fairly typical response was given by one Magistrate[49] who scoffed at the notion that offenders under occupational health and safety legislation were criminals, saying that he saw it as 'a quasi criminal jurisdiction', similar to road traffic offences. He thought an employer should not be heavily penalised where the employer 'takes every possible precaution, is safety conscious, and then the employee of his own volition gets himself into the circumstances.' Another Magistrate[50] viewed occupational health and safety offences more as 'social offences rather than criminal offences,' and did not regard offenders 'as criminals unless of course they are blatant'. He tended not to take prosecutions as seriously as he might when they are brought so far

after the event that 'all the heat has gone out of it, and the problem has been rectified. The chances are that the employer is more aware, and there does not seem to be much point in putting a crushing penalty on them'.

Other Magistrates seemed to say that the criminality of the behaviour varied with the circumstances, depending on whether the offence resulted from an 'innocent oversight' on the one hand, or negligence or wilful repetition on the other hand. One said that he did not consider such offenders to be:

> 'criminals in the strict sense, particularly for their first offence. However, if someone keeps coming back for offences of that nature I think they move themselves [into a different category]. ... You can have an employer whose attitude, perhaps morally, verges on criminal negligence as far as the employees are concerned. If these people come back a second time the courts would think of them as criminals that happen to be employers, rather than just straight employers.'

Another Magistrate[51] believed that offenders were not really criminals, but rather were 'people who were negligent of their responsibilities rather than people who were indulging in criminal type considerations.' One[52] said that he did not treat occupational health and safety offences similarly to criminal law offences which required the element of mens rea. Where mens rea is required, offences could be regarded as criminal offences. Nevertheless, he regarded these offences as 'serious' and would rarely give a bond, unless there 'was no mens rea involved.'

Other Magistrates drew similar distinctions. One[53] noted that though the offence was one of strict liability, there was 'demonstrably a difference in culpability between the person who takes reasonable precautions to meet all things foreseeable and attempts to do the right thing, and someone that simply doesn't care or who is on notice, even worse, and does nothing.' Other Magistrates were uneasy about the fact that occupational health and safety offences were strict liability. Strict liability 'leaves very little scope for someone who,

in effect, has done everything that can be expected of him, but still something goes wrong...'[54] All the Magistrates agreed that the penalty imposed upon the defendant would actually take into account all the matters relating to culpability which were excluded by the strict liability provisions.

Most Magistrates believed that it was not difficult to 'adjust' to the issues involved in occupational health and safety prosecutions. One[55] suggested that 'you develop an ability to switch off from one set of circumstances and switch on to another after a period of time as a case of necessity because you are dealing with that many cases every day.' He commented that Magistrates worked in 'a mountain goat jurisdiction' in which 'you are jumping from crevice to crevice all day long.' Magistrates, he suggested, are used to working like that, and do not find it difficult to have to switch to unusual jurisdictions, such as the occupational health and safety jurisdiction. His views were echoed, in less colourful vein, by the majority of Magistrates interviewed.

Some Magistrates, however, thought otherwise. One[56] commented that:

> 'you are doing all sorts of things, one after the other, and then the next thing that comes up is on the industrial list, so you slip into industrial gear - and you don't really do that many of them - so you are not really very comfortable with them, in the sense that you do, say, traffic cases, dozens a day, and burglaries, virtually dozens a day - whereas industrial cases you would do, on average, one every six months even - sometimes even longer than that in between periods. That stops you from building up an expertise .... If you can, you rely on counsel, but sometimes, unfortunately, I get the feeling that counsel is so wrapped up with their own side of the story, so that they are not particularly dispassionate about things, and that sort of motivates you against relying too heavily on them.'

Another[57] candidly admitted that 'to put it colloquially we have to fly by the seat of our pants to a large extent.' These Magistrates typically found that they had to rely heavily on the Prosecutor and the defence counsel, particularly for the law, because 'nobody can keep up to date with everything.'[58]

What these responses tend to show is that Magistrates are not predisposed to consider occupational health and safety offences as 'normal crime', but rather as offences which are at a low level of criminality. Factors which contribute largely to this view are the absolute or strict liability of occupational health and safety offences, the fact that Magistrates generally consider employers to be highly responsible members of society, and the small number of Occupational Health and Safety offences which appear amongst Magistrates' daily fare.

6.7 Sentencing

> 'Sentencing is the punch-line in the criminal justice system. It is at this point that the law is seen to have its impact. The sentencing stage provides the most tangible, public demonstration that the criminal law is not just a declaratory moral code, but is a set of rules which are to be enforced by punishment. The whole apparutus of investigation, prosecution and trial is in many respects simply a prelude to the punishment of the guilty.'[59]

This part of the report looks at the way that the courts have carried out the sentencing function under the occupational health and safety legislation.

6.7.1 The Division of Sentencing Authority in Victorian Occupational Health and Safety Legislation

The division of sentencing authority for Occupational Health and Safety offences in Victoria is between the legislature, and the judiciary. Neither has been forthcoming as to the principles of sentencing that apply to occupational health and safety offences. Apart from the sentencing provisions in the Penalties and Sentences Act 1986, which apply to all offences in Victoria, the only guidance to sentencers in the ISHWA and the OHSA have been the maximum, and in some instances, the minimum penalties. The ISHWA set out the maximum penalty as $2000 for all offences except for the offence of failing to report an accident ($1000) and the disclosure of confidential information by an inspector ($5000). Under the OHSA the maximum penalty for an offence was $25000 for a corporation, and

$5000 for an individual, unless an offence under the Act (as opposed to the regulations) was heard in the Magistrates Court (instead of the County Court), in which case the maximum penalty was $10000 for a corporation, and $2500 for an individual.[60] Certain serious offences (e.g contravention of a prohibition notice, discrimination against an employee as a result of the employee exercising rights under the 1985 Act, assaulting or obstructing an Inspector and the repitition of offences) attracted a minimum fine of $5000 for a corporation, and $1000 for an individual, and maximum fines of $50 000 for a corporation, and $10000 for an individual.[61]

Even in the serious offences, the courts can award 'good behaviour bonds', because the 1985 Act does not preclude the use of the provisions of part 9 of the Penalty and Sentences Act 1986 (Vic).

In contrast with the developments in relation to the liability of employers and occupiers under the machinery guarding provisions, the courts have spent very little time developing the relevant principles of sentencing offenders against the legislation. The courts have always taken into account in sentencing factors which they cannot take into account in determining whether an offence has been committed. This is not surprising. What is surprising is that the courts have spent so little time and effort in discussing and developing relevant guidelines principles of sentencing.

The only principle enunciated by the courts was in Curtis v Email Limited[62] where Dethridge J indicated that he thought that, having regard to the purpose of the machinery guarding provision in s.174 of the Labour and Industry Act to prevent so far as possible death or serious injury, it would be a rare case where it would be 'expedient' to adjourn a matter without conviction, particularly where the breach of the section gave rise to severe injury to the employee. The court could infer a failure by the Magistrate properly to exercise a sentencing discretion if the result was unreasonable or plainly unjust, even if the

nature of the error was not discoverable. In Curtis the court had suggested that a badly bruised arm was a severe injury. In Dickman v F. C. Wright[63] Leckie J undermined this principle by suggesting that in relation to penalty, the degree of seriousness of the injury was not the measure of the penalty. In an unreported passage he suggested that what was important was the seriousness of the circumstances of the offence itself. In Kingston v Henry B Smith[64] he said that in rehearings where the matter was 'within the competence of the Magistrate' and the offence was not a serious one, the court would be 'somewhat reluctant to upset the discretion exercised by the Magistrate'.

In Tucker v Mappin[65] Marshall P, without referring to Curtis v Email, reasserted the principle that, in relation to the strict liability dangerous machinery offences, 'a bond is not appropriate, particularly where a serious injury is involved.' This, then, is the only sentencing guideline that is available to assist Magistrates in the exercise of their sentencing discretion under the strict liability guarding provisions of the Occupational Health and Safety legislation. All this case law, however, has taken place in the Industrial Appeals Court and the Industrial Relations Commission, and therefore can easily be overridden by the County Court or Supreme Court, and strictly speaking, may no longer bind Magistrates.

As a result, there are virtually no sentencing guidelines in relation to Occupational Health and Safety offences. Whereas a Magistrates' court, in determining whether the charges had been made out under the machinery guarding provisions, could not take into account the alleged 'carelessness' of the injured worker, the fact that an Inspector had 'passed' the accident machine before the accident, the fact that the guarding on the accident machine had conformed to the standards common in the industry, and the fact that there had been no previous accidents on the defendant's premises, when it came to sentencing, the court could take into account all these factors, and anything else the defence counsel wished to serve up.

A very broad sentencing discretion is, therefore, left to Victorian courts, particularly Magistrates, in sentencing offenders against the occupational health and safety legislation. This discretion principally relates to whether or not the defendant should be fined, and if so, the amount of the fine. The courts, and defence counsel, have made full use of this broad discretion.

6.7.2 The Penalties Imposed by The Courts

Table 6.5 summarises the outcomes of prosecutions between 1983 and 1988 under the ISHWA and the OHSA. The table shows the number of informations prosecuted, the number of informations that resulted in a conviction and a fine, the number of informations in which the charges were proved, but the information adjourned without conviction on a 'good behaviour bond' with or without a payment into the court box, the number of informations dismissed, the number of informations withdrawn, and the number of informations struck out. What the table omits is the average fine imposed where a conviction was recorded, and the average fine expressed as a percentage of the maximum fine. These statistics are provided in Table 6.8. It should be noted that Table 6.8 indicates the average fine where a conviction was recorded. The table does not show the average fine for all informations where the charges were proved against the defendant, because, as Table 6.5 shows, in many of those cases a conviction was not recorded and the defendant was put on a 'good behaviour bond.'

TABLE 6.8

THE FINES IMPOSED WHERE A CONVICTION WAS RECORDED: 1983-1988

Year	Act	Average Fine	Percentage of Maximum Fine
1983	ISHWA	$294.32	14%
1984	ISHWA	$367.58	19%
1985	ISHWA	$426.04	22%
1986	ISHWA	$402.56	21%
1986	OHSA	$1455	10%
1987	OHSA	$969.45	7%
1988	ISHWA[66]	$500	25%
1988	OHSA	$2046	9%

Table 6.5 shows (above) that in just over 20% of cases where magistrates found the charges to be proved by the prosecution, they were prepared to find that a 'good behaviour bond' was 'appropriate', even where a serious injury was involved. In other words, there seemed to be many 'rare' cases where it was 'expedient' to put the defendant on to a 'good behaviour bond'.

When the prosecutions under the OHSA are considered, the number of cases in which the charges were proved and the defendant placed on a 'good behaviour bond' was over 40%. Table 6.8 shows that in cases where a conviction was recorded, the actual fine imposed by the court was extremely low. The fines imposed under ISHWA, were the maximum fine was $2000, averaged at just over $400, a paltry amount by any standards. Although the size of fines increased under OHSA, they more than halved when considered as a percentage of the maximum. This suggests that the higher penalties under the 1985 Act actually led Magistrates to record fewer convictions, and impose fewer, and lower, fines.

6.7.3 The Range of Sentencing Factors Raised by Defendants

In order to exercise the sentencing discretion in a proper manner, the court must have access to the facts relating to the nature and circumstances of the offence of which the defendant has been found guilty,[67] and, secondly, facts relating to the defendant. These latter facts may relate to the defendant's prior criminal record, and, in the case of natural persons at least, the defendant's character, personality, and social, medical and psychological history.[68] The sentencing court may also need to be informed about the prevalence of the particular offence, sentences imposed in the past for the same or similar offences, and the services available to be used as part of the sentence.[69] These facts can come before the court either in evidence during the hearing to determine guilt or innocence, during the addresses in relation to penalty of the defence counsel and the Prosecutor, or can be solicited by the court during the hearing.

Defence counsel's objective is to obtain for the defendant the least punitive measure available for the offence. Counsel must draw the court's attention to any factors which may weigh in the defendant's favour. This may be done through informal submissions from the bar table, or by adducing evidence. Submissions should be supportable with admissible evidence. Factors may include the circumstances of the commission of the offence; and events since the commission of the offence, events, circumstances, and problems surrounding the commission of the offence, family history, employment history, medical history, future prospects, and prior criminal history.[70]

Counsel may also bring matters to the attention of the court during examination in chief of defence witnesses, and during the cross examination of the witnesses for the prosecution. For example, defence counsel is usually able to get a number of mitigating factors before the court by cross examining the informant Inspector. Occasionally on a plea of guilty counsel will lead evidence from witness designed solely mitigate the penalty.

This evidence on oath obviously carries more weight than a submission from the bar table which usually consists of a series of assertions without proof.

The matters most frequently raised by counsel as mitigating factors are the fact that the contravention has been remedied before the matter came to court; the 'carelessness' or 'disobedience' of the worker which led to the 'accident' which gave rise to the prosecution; the 'good safety record' of the defendant; the fact that the 'accident' was 'unforseeable', the assertion that the accident was a 'one off' incident, that the defendant had 'done all it could' to remove the hazard, or that the defendant had complied with 'industry practice'; the fact that the defendant was concerned about the welfare of its workers, people in general, or had looked after the injured person after the accident; the fact that Inspectors had visited the premises earlier and had indicated that the machine or process in question was not a threat to the health and safety of employees; the good co-operation and/or attitude of the defendant; and the fact that the defendant has good health and safety policies, practices and/or procedures. These are all factors which are not relevant to the issue of whether the charges are made out against the defendant, but which have a large role to play in the sentencing of defendants.[71]

Some of the factors raised by counsel are extremely misleading and are not always clarified by the Prosecutor. For example, counsel not infrequently informs the court that the defendant has an occupational health and safety committee, of which employees are members but does not indicate whether this is as a result of a request by an elected Health and Safety Representative exercising her or his right under s. 31(1)(c) of the OHSA. If a request is made in this manner, the employer is obliged to set up a committee. In none of the observed cases did the Prosecutor take up this issue.

Similarly, defence counsel invariably urges the court to be lenient, citing the defendant's long and unblemished good safety record. On a few occasions the court has

acceded to this argument despite evidence given to the court of the defendant being previously issued with a large number of survey requirements. In one case, for example, the defendant had been asked to attend to about one hundred safety requirements two years prior to the accident. At the time of the prosecution, the company still had to comply with thirty of these requirements. The court did not consider this to be a blemish on the company's safety record, and in fact, the company was able to rely on the fact that it had this 'guarding program' and 'list of priorities' to convince the court that it deserved to be put on a 'good behaviour bond.'

Defence counsel frequently uses the opportunity to cross examine the informant Inspector to bring evidence before the court of the defendant's good safety record, concern for the health and safety of its workers, accident history, excellent co-operation with the Inspectorate, guarding at the rest of the premises, the state of the guarding since the accident, and, where the issue relates to adjustments made to guarding, that the guarding itself is good. In one case defence counsel expressly informed the court that he had 'used the Inspector to demonstrate to the court that the court came in the lower scale of blameworthiness'.

Sometimes the evidence is extremely flattering to the defendant because the Inspector is not in the position to say otherwise. In many cases, for example, the informant Inspector had investigated an accident outside his normal area. He was therefore unable to comment on the defendant's prior safety record. In one case the informant Inspector noted in his accident investigation report that '[a]s I have recently been allocated to this district I am unfamiliar with the company's previous history.' During defence counsel's cross examination of the informant Inspector the following exchange took place:

Counsel: At all times the company was co-operative?
Inspector: Yes
Counsel: This company takes its workers' health and safety very seriously?
Inspector: Yes

Counsel: It does very well in health and safety matters?
Inspector: Yes
Counsel: The company is building a new building and manufacturing process in liaison with the inspectorate?
Inspector: I believe so
Counsel: You have had many dealings with the production manager, Mr X?
Inspector: Yes
Counsel: He is always co-operative in relation to health and safety matters?
Inspector: Yes
Counsel: You have had no previous problems with the company?
Inspector: No
Counsel: Safety instructions are given to employees, and the company has a safety committee?
Inspector: Yes
Counsel: Soon after the accident the company reported it to the Department?
Inspector: The following day
Counsel: All recommended guarding has been carried out?
Inspector: Yes
Counsel: This effectively prevented a recurrence of the accident?
Inspector: Yes
Counsel: Were you happy with the speed of rectification?
Inspector: Yes
Counsel: Z, the previous inspector - he was always pleased with the company?
Inspector: I don't dispute.

In some cases a failure of the Inspectorate to revisit the accident premises to check on the state of the guarding of the machinery has jeopardised the prosecution's ability to challenge the defendant's submission that the machine has been remedied since the accident.

Interesting issues about corporate personality arise where the defendant is a large corporation with a number of business premises. In one of the observed cases, the company had at least five prior convictions. It argued that all the previous offences related to different plants operating under different management teams. There had been no prior convictions relating to the plant the subject of the immediate prosecution. While the Magistrate did not refer to this argument in his reasons for sentence, the low fine of $600.00 suggested that it must have had some impact.

In another case the defendant company tried to explain away a prior conviction by arguing that it related to a different plant (which had since been shut down) and a different management team. It was suggested that 'a new corporate entity has come before the court', and should not be punished for the sins of its predecessor. The Magistrate made no comment about this argument, but did refer to the prior conviction in his reason for sentence. This suggests that it was not an argument that he found compelling. In a third case defence counsel tried to distinguish a prior conviction by arguing that since the prior conviction an entirely new management team had charge of the defendant's premises. The Magistrate did not refer to this argument in his reasons for sentence.

In the same case defence counsel tried to use the reasonably large size of the company to make a number of points, some of them contradictory, in mitigation of penalty. On the one hand the huge size of the defendant company had to be taken into account when looking at the defendant's safety record and the number of requirements issued to the defendant in a previous survey. Given the size of the defendant company, there were relatively few accidents and requirements. On the other hand the company was small in the sense that it was able pay attention to the needs of its workforce, unlike foreign companies.

The manner in which the prosecution case is presented can also obviously affect the facts relevant to sentencing which are placed before the court. Where the defendant pleads not guilty and fully contests the charges alleged, the prosecution's evidence will inevitably place before the court the full facts surrounding the commission of the offence by the defendant. Where, however, there is a guilty plea, and the prosecution resorts to a summary from the bar table, the full circumstances of the offence very rarely come before the court, particularly where the offence is one of strict liability. If, for example, the defendant pleads guilty to a strict liability offence of failing to guard dangerous machinery,

the Prosecutor very rarely indicates to the court whether or not the injured person was properly trained or instructed in the use of the machine, as this is not strictly relevant to the offence alleged. The summary can also understate the extent of the accident by failing to indicate to the court that the injured person was extremely fortunate not to be killed. In some cases it is clear that the facts placed before the court for the purposes of sentencing have been negotiated by defence counsel and the Prosecutor, who have exercised a tight reign on the facts that the Magistrate can consider. In one case under the OHSA, where a plea of guilty was entered by the defendent, the whole case took eight minutes, as the Prosecutor briefly outlined the facts of the accident and the Inspector's investigation, and noted that the machine had subsequently been guarded. Defence counsel drew the court's attention to a few matters, and the Magistrate awarded a lowish fine of S1000.00. Defence counsel made no attempt to ask for a 'good behaviour bond', presumably having been briefed on the relevant authorities by the Prosecutor before the hearing.

The summary can often be extremely brief, particularly where the prosecution is anxious that the defendant plead guilty to avoid having to engage in a long process of proving the prosecution's case. A 1986 case under the ISHWA, for example, involved a very brief summary from the bar table as a consequence of the Prosecutor being careful not to antagonise defence counsel into a protracted argument about the facts of the case.

The Prosecutor's passivity, whether voluntary or involuntary,[72] can give the defence a free hand in tailoring its plea in mitigation and can severely distort the facts coming before the court. For example, in a case quoted earlier in this chapter, the defendant company had failed to comply with any of a whole series of requirements issued by the Inspectorate ten months prior to the infringements leading to the prosecution. The accident the subject of the prosecution was the second within ten months on the machine, and would have been prevented if the requirements had been carried out. After making a very

brief reference to the defendant's 'unsatisfactory history of guarding' in his summary from the bar table, the Prosecutor made no further reference to the previous requirements or their relationship with the accident in question, and allowed defence counsel to tell the court that the defendant had 'been regularly inspected' by the Inspectorate and there 'had been no offences against the legislation', that the offence was merely technical (presumably in the sense that it was a strict liability offence involving no mens rea), that the relevant machines had been guarded immediately after the accident, and that the company 'assiduously complies with the regulations'. As a consequence, the Magistrate imposed a small fine of $150 for each of the two offences, commenting that 'the company took great care and had been in business for a number of years with no charges'.

As indicated earlier in this chapter, a common point raised in the defendant's plea in mitigation is the defendant's good safety record. It is very rare for the prosecution to try to rebut these assertions. It is certainly true that some Prosecutors feel that their hands are tied by their position as Prosecutor and feel unable to take up these issues. It is also true, however, that even if they wished question the assertion, they would find it very difficult to do so. The prosecution procedures do not include an investigation of the number of work related injuries, illnesses or deaths at the defendants premises, and hard facts about the defendant's safety record. They also do not ensure that there is good data available on factors like, previous requirements or notices placed on the defendant, the defendant's compliance with these matters and the defendent's attitude to safety and its co-operation with the Department.

6.8 The Courts and Sentencing

6.8.1 An Example: Simsmetal Ltd

The prosecution of Simsmetal Ltd, the first, and so far only, occupational health and safety prosecution to be conducted in the County Court, provides a good illustration of the

manner in which courts exercise their sentencing discretion in occupational health and safety cases. The company pleaded guilty to three offences under s. 21(1) of the OHSA. The charges arose out of an incident in which one of the furnaces at the company's secondary aluminium smelter in Brooklyn exploded, killing 4 workers, and severely injuring another 7 (see also 4.4 above). The explosion was brought about by the addition, in the course of the smelting process, of a quantity of sodium nitrate instead of potassium chloride, an accepted, and safe, fluxing agent. The sodium nitrate had originally been destined for another premises, but had been diverted to the company's premises, and stored in an old shed where, according to the court, by 'evil chance' excess potassium chloride had also been stored. On that day a new manager was to replace the old manager of the premises, and both were away when the sodium nitrate was delivered. The old manager was aware that a substance had been delivered, but did not know what it was. According to the court, an 'intervention of malevolent chance' took place when a forklift driver transported sodium nitrate instead of sodium chloride to the scene of the smelting.

The court took into account a number of matters in arriving at the final penalty. The factors adverse to the company were: the 4 deaths and the serious injury to 7 other workers; the 'significant' breach of the standard of care set out in the legislation; the failure of those who knew of the presence at the premises of the sodium nitrate to make any enquiries as to its properties, whether or not it was dangerous, and where it should be stored; and the failure to test, identify and note on a register all chemicals entering the premises and the failure to label the chemical in an appropriate manner (systems which were implemented after the explosion). According to the court the mitigating factors were: the fact that the company pleaded guilty; the lack of prior convictions under occupational health and safety legislation during the previous twenty five years; the company's

'commendable history of introducing and implementing safety procedures at its plants'; and the swift reaction of the company to the disaster, both in terms of remedial action and co-operation with the Department of Labour.

The court accepted the proposition that 'maximum penalties were traditionally reserved for the worst offending; that is to say, for those whose conduct had in the past attracted prior convictions and punishment, and who were still offending, nonetheless.' The Prosecutor put before the court the results of 4 previous prosecutions against other companies under the 1985 Act which had arisen out of workplace fatalities. The court decided that, in the absence of the facts in these cases, they did not give much guidance to the court. It did note, however, that the task of sentencing in this case was not 'made any easier by reason of the fact that it is a corporation' which had to be sentenced.

> 'From the time corporations were vested by law with the status of legal personae, difficulties have been experienced in satisfactorily fitting them into the scheme of things, more especially in relation to criminal law and punishment. Anomolies and illogicalities tend to proliferate in the world of the artificial. ... [C]an the deterrent aspect of punishment operate as it is meant to in respect of an entity which has ... "neither a body to be kicked, nor a soul to be damned", and may not the punishment being inflicted realistically bear more upon those who are not responsible for the crime, that is to say the shareholders, than the culpable servants and agents of the corporation? It seems in the end ... that the aspect of deterrence, even if thought to be in this context somewhat artificial, is the one as likely as any to promote and enhance the reason d'etre for the legislation...'

The court fined the company $15 000, out of a maximum of $25 000, for each offence.

What is striking about the Simsmetal case is the way in which the court was happy to accept that the explosion took place as a result of a series of co-incidences ('evil chance' and 'malevolent chance'), and not as the result of deficient procedures which enabled the events which did take place to occur. Courts tend to focus on notions of individual responsibility and look at linear causation, rather than seeing the running of a

business as management by carefully developed procedures. The other notable feature is the easy acceptance of the company's 'good record', both by the court, and by the Prosecutor. There was no evidence led as to the company's record other than its lack of prior convictions. For example there was no evidence of previous requirements issued on the company by the Inspectorate, or the quality of its safety procedures, or previous work related injury or disease suffered by its employees. There was also no attempt to consider what the lack of prior convictions actually signified, given the Department of Labour's low prosecution rate.

6.8.2 Magistrates' Approaches to Sentencing Occupational Health and Safety Offenders

Given the broad discretion given to the Magistracy, Magistrates' views about occupational health and safety and the 'culpability' of employers for work hazards are extremely important.

During interviews, most Magistrates revealed that they had substantially the same approach to their sentencing function. All of them suggested that it was not possible to look at sentencing in abstract terms, and that in deciding on an appropriate sentence, a Magistrate had to consider all the circumstances of the case. 'One has to look at the individual facts... look to the person, to any other known sentencing factors, capacity to pay, remorse, the likelihood of repetition, general welfare of the community, protection of the community, deterrence to a degree.'[73] One Magistrate[74] was of the view that there were:

> 'no rules of thumb. If there is no rationale of the penalty in the statute all you can do ... is to have a look and to see how much the penalty is, and then think about what sort of act has been involved, what are the circumstances, and what does it merit. With experience, you tend to get a gut reaction. ...You have got no guidelines except experience, and what you are presented with....With the large penalties, you seldom get to them. You are always thinking to yourself "are there worse circumstances than this that might prevail". Sometimes when the penalties have not been upgraded, and

> are totally inadequate or in my view are totally inadequate, I might impose a maximum.'

Most Magistrates generally indicated that they did not have an overriding philosophy of sentencing. Those that did mention an underlying philosophy tended to refer to deterrence.

One[75] commented that:

> 'it is an individual sentencing thing, and its just the idea I have of the Magistrates courts - a court of first instance, the court where everyone deserves one chance. With this [Occupational Health and Safety] legislation they don't get the chance - there are not many bonds. ... It really depends on the case. ... But I have no overall view [of sentencing philosophy]. If this were a court that was constantly publicised then I would have a look at those sorts of principles, but as they are not I just look at each case, and say to myself "I will deter you, I will rehabilitate you, I will fix you up"...'

Almost all Magistrates[76] indicated that they were guided by the maximum penalty when they decided on the appropriate penalty. 'You have to judge the penalty on the maximum penalty which indicates what Parliament intended in a very bad case. You work down from there and go on the facts of the particular case.... The maximum penalty is certainly for the worst offence. With the run of the mill offence, you must still be looking at half the penalty at times, if you are going to have a yardstick, and you might well work down from it.'[77]

> Many Magistrates admitted that the infrequency of occupational health and safety prosecutions made sentencing difficult. 'If you are dealing with offences that came up often, like traffic offences which came up half a dozen times a day, because of the attention given to these offences by the media, it is not difficult to form a view as to "what the community demand in terms of maintaining a standard", and it is easy to show differences in penalties in these cases.' 'But where you have only one or two prosecutions a year, where the maximum penalty is only $2000, where do place that offender in the order of things? ... Is there anything achieved by fining them? You fine them $1000, and it is a mere drop in the ocean.'[78]

Magistrates were also asked which factors were the most important factors in sentencing occupational health and safety offenders. A fairly typical response[79] indicated that the following factors would be important:

> 'if the fault that caused the problem has not been rectified, .. the significance of the problem - if it is going to chew somebody up and spit them out, or the seriousness of it, ... and their record. Depending on the facts, circumstances, seriousness and so on, something will stand out and you say "my god, this should be a high penalty."'

One Magistrate[80] summed up the views of most of the others by noting that 'the degree of irresponsibility' is the most important element in sentencing. 'The more irresponsible the act, the greater the penalty is going to be. .. But you have to look at all the factors - it is hard to identify the factors in the abstract.'

Magistrates tended to agree that certain other factors were very important in deciding the ultimate sentences. All Magistrates indicated that the defendant's good safety record would be an important factor in reducing sentences. As one would expect, some Magistrates[81] indicated that defendants who had offended two or three times before would be liable for very high penalties, and some Magistrates[82] even indicated that if there was provision for imprisonment, individual defendants could be sent to prison, or at least would be put on a 'fairly strong' community based order.[83]

Another factor that was important was 'the circumstances of the offence'.[84] 'If it has been a quite deliberate and blatant breach and they just clearly fail to carry out their obligations under the Act or regulations', the penalty imposed was likely to be fairly high. 'If it is more in the nature of an oversight, and they have generally complied with the Act, with no priors, and have been operating for a few years, then I think their position is good for a bond.'[85]

Some factors were considered to be very strong indicators that the defendant should receive a very low penalty, even a 'good behaviour bond'. The employer's 'good record', presumably meaning that the employer had no, or very few, previous work related illnesses or injuries, was an important factor in persuading most Magistrates that a minimum penalty, even a good behaviour bond, was appropriate.[86] 'The courts have to give some credit to people who do the right thing.'[87] One Magistrate[88] said that, to him, the behaviour of the defendant before and after the offence was very important. Had the defendant done *all* it could before coming to court? The behaviour before the offence was also important - 'just to make sure that they haven't got sorry after the event. You get a lot of factories that have done the job for thirty years, and suddenly something goes wrong. They should be able to call in their thirty years.'

Conversely, many Magistrates commented that if there had been many previous accidents at the premises, then the court 'would take the present infringement more seriously.' One Magistrate[89] commented that 'a company with a good health and safety record is entitled to credit for that. But if there are one, two or three convictions, I feel no mercy whatsoever.'

Many Magistrates indicated that any indication that a defendant had tried to avoid their occupational health and safety responsibilities in order to make a bit of money would result in a large fine.

Magistrates generally agreed that they had to take into account the defendant's means, as this was required by the Penalties and Sentences Act, although it was extremely rare, in the observed cases, for the court to refer to the defendant's means when imposing a penalty.

Another issue which Magistrates said mitigated the penalty was a prior indication from the Inspectorate, or 'from any other quarter'[90] that the machine was safe, and then an

accident took place on the machine. This usually would not exonerate the employer from liability, but it could reduce the penalty.[91] One Magistrate[92] angrily remarked that it was 'all very well charging up on your white charger after the event and saying that you should have done that ... because if you ask when was the last time an Inspector was there, you find that the answer was about eight months before. The obvious question is why the Inspector did not point it out...'

On the other hand, 'if someone has previously been warned about this conduct, obviously you are going to come down heavier on them.'[93]

Some Magistrates indicated that they were not happy convicting employers for occupational health and safety offences where 'no one can perceive any fault in the system... I don't think that person ought to be punished. We all learn with hindsight.'[94]

One of the problems that arises from bringing prosecutions when there has been an accident is that the court will focus on the nature of the injury or disease, rather than the nature of the breach of the legislation. Another point of focus is the behaviour of the injured person. In other words, the attention of the court is diverted from the nature of the employer's contravention of the legislation, and focuses on issues that are only marginal to the actual offence, but which can serve to divert the court from the culpability of the employer.

The most significant factor that Magistrates referred to in their discussions of occupational health and safety offences, and especially in relation to sentencing, was the 'carelessness' of the injured worker, and situations where workers had disregarded instructions from the employer. As noted earlier, this is also one of the most common factors raised by defendant in mitigation of penalty. Magistrates generally indicated that this factor would reduce the penalty imposed on the employer, and also tended to indicate

that occupational health and safety offences were not 'crimes.' Magistrates views of the relative culpability of the parties tended to be reflected in the penalty imposed.

For example, when asked why it was that penalties for occupational health and safety offences had been consistently low, one Magistrate suggested that

> 'very often an employer comes along who has been charged, but there has been a degree of employee's culpability as well and quite often the department says "here is a man who has been attempting to do the right thing, but really the employee was a dill, or the employee took off the guard, knowing the ramifications, the employee knew that they should have switched off the machine before they took off the guard". I think the courts have tended to take that into account and that could be the major reason for the low penalty. I probably have had charges where the employer has been quite culpable and I hope I have penalised the employer accordingly, but in most instances I find there is some degree of culpability on the part of the employee as well.'

Some Magistrates are very quick to draw the conclusion that the actions of the injured worker contributed to the accident. In one case under the OHSA the defendant pleaded guilty to an offence of failing to provide a guard to a power press. The Prosecutor gave a summary from the bar table which included the injured person's statement in the accident investigation report that he was operating the press when he 'must have operated the foot pedal while [his] finger was under the die.' There was no further mention of the circumstances of the accident. At the end of the summary the Magistrate commented that 'it may have been that the foolhardiness of the operator contributed to the accident.' The machine had been completely unguarded. In a later call the Magistrate asked the informant Inspector how alert the operator would have to have been to have noticed that the guard on the machine was not operating properly. The Inspector indicated that it was quite possible to operate the machine without realising it was not properly guarded. The implication of the Magistrate's question, however, was that if the operator should have noticed the fault, the defendant company may have had reduced culpability. In yet a later

case the same Magistrate, after listening to the prosecutor's summary of the accident which indicated that a bench saw had not been guarded at all at the time of the accident, asked the defendant's representative whether this was a case where the injured person's 'familiarity with the machine had bred contempt'. There had been no evidence before the court that could have suggested in any way that the injured person had contributed to the accident. In fact, the accident had occurred on the injured person's first day with the defendant company!

In one case the Magistrate expressly stated that he did not think that the injured person had contributed towards the accident. He did, however, indicate his general view of occupational health and safety offences with the following words:

> 'The legislation is strict liability, and there are reasons for this - otherwise many of the cases coming before the court would be without substance, because of the rank stupidity of the injured worker.'

In another case the Magistrate said:

> 'The regulations are there to be obeyed, and there was an offence. The law has to be obeyed. But we have to understand the situation. People forget that the machine has to be able to operate. We have to balance the need for machinery to operate with the need for safety and for guarding. It is about time some people realised this. Here we have a "familiarity breeds contempt situation". I take these factors into account in determining the penalty.'

These comments all show the way in which Magistrates conduct their sentencing function without any consideration of the fact that it is employers who have control over the work process, and that individual employees, who have to work with hazards, have very little control over the process.

Some Magistrates show antipathy to the legislation and the Inspectorate, and sympathise with the defendant. In one case in 1987, heard in Orbost, the defendant had tried to show that the injured worker had disobeyed his instructions and had put his hand

in a dangerous area without switching off the bench saw. After considering the evidence he commented:

> 'I have a great deal of sympathy for [the defendant], but when I look at the words of the information, I have to find the charge proved.'

When notified by the Prosecutor of the defendant's eighteen prior convictions for occupational health and safety offences, the magistrate commented that he assumed 'that that number of prior convictions would be common for a sawmill owner.' At the end of his plea in mitigation, defence counsel submitted that 'it is unfortunate that the defendant is under a lot of scrutiny by the Department.' The following interchange then took place:

Magistrate: It seems ridiculous to have an accident, then an inspection by the Department, followed by an order to guard the machine.

Counsel: It would be nice to see an order before an accident for a change. (He sits down quickly, as the prosecutor rises to his feet.[95])

Magistrate: It is no criticism of [the Inspector], but these things just can't be foreseen, and are very unfortunate.... In a prosecution such as this I wonder what we achieve. If [the defendant] could have foreseen the accident, he would have prevented it. He fixes up the problem, and then twelve months later he is prosecuted and comes to court. I won't award a crushing fine.

The Magistrate was true to his word, awarding a $200 fine, despite the fact that the machine was not guarded, the injured worker had had three fingers amputated, and the defendant had 18 prior convictions for failing to guard machinery.

Magistrates were asked if they found it easy to increase their penalties in line with the increase in the maximum penalties in the legislation. One perceptively noted that he did not

> 'find it easy, especially in corporate matters, adjusting to that level of thinking any way. I think that, while Magistrates are paid a great deal more than perhaps the majority of workers in the community, they are not people accustomed to thinking in terms of corporate finance, and what might seem to be a very large fine to them might be virtually meaningless to the

> directorship of a company. In that respect I find all corporate penalties very, very difficult. In the case of an individual you can come away, I may be wrong, with a perception of how you have affected that person, but with a corporation I might impose a fine and leave the court room not really knowing whether the directors are laughing at the leniency of it or struggling for the next three years.'[96]

All Magistrates were asked about the circumstances in which they would put defendants on to 'good behaviour bonds.' A common response[97] listed the following factors as likely to result in the imposition of a good behaviour bond: 'where it is more of a technical offence, they have done just about all they could have done to avoid the offence being committed, and they have perhaps taken steps to make sure it doesn't happen again, ... a good safety record over a number of years, no prior offences... and where the accident is the result of a mere oversight.'

Another Magistrate[98] indicated that, despite the decisions in Curtis v Email and Tucker v Mappin, there were still circumstances in which he would put defendants on a 'good behaviour bond', and these included 'a long history of no offences, safety conscious, regular safety procedures being related to the workers, and the gravity of the offence. ...I think you would, however, be in difficulties no matter what previous good record the defendant had enjoyed if you gave a good behaviour bond where a person had lost a finger or limb or something like that.' But he suggested that the view if the Industrial Relations Commission that there should be no 'good behaviour bond' if there was a serious injury was 'strange to reconcile because on the one hand it may well have been the employee's fault. The fellow has taken every precaution and he has gone off on a frolic of his own, stuck his finger in and chopped it off.'

Another Magistrate[99] indicated that he 'gave very few bonds in relation to these offences, unless there is no mens rea. Another important factor was if the worker had

largely contributed to the accident.' He thought that 'bonds' could be effectively used against first offenders if there

> 'are a few little problems around the factory that need to be addressed. If you place someone on a bond for twelve months, and ordered a payment into the court box, one would assume that something is going to be done. I think that that might have the desired result of getting everything back in order, onto an even keel, without punishing the people too harshly. I don't see a good behaviour bond as just letting someone off.'

It appears from these interviews that Magistrates tend to share a conservative view on the kinds of factors which are relevant to reduce the penalties imposed on defendant employers. In a jurisdiction where few prosecutions take place, Magistrates tend to place great store on the fact that defendants have no or few convictions for occupational health and safety offences, and are susceptible to arguments that 'accidents' are difficult to prevent, or are caused by employees. Employers and employees are treated as 'equals', with little attention paid to the disparities in bargaining position and control in the workplace. This tendency is exacerbated by the manner in which the evidence led in most prosecutions focuses on the 'accident' that gave rise to the prosecution. In many cases, the 'accident' and the offence become synonomous in the eyes of the court and this enables Magistrates to focus on factors extraneous to the actual offence such as the behaviour of the injured worker, and the 'foreseeability' of the 'accident'. Another important factor which results in lower penalties is the emphasis which Magistrates place on notions of the defendant's mens rea in sentencing. No employer 'intends' to injure employees, and it would be surprising if this was the case! The 'culpability' or 'irresponsibility' lies in more complex factors which Magistrates, in their 'mountain goat jurisdiction' tend to ignore. There is also little evidence of Magistrates taking into careful consideration the financial position of defendants.

6.9 Conclusion

This chapter has attempted to illustrate the manner in which the courts deal with prosecutions under the occupational health and safety legislation in Victoria. The prosecution statistics show that not many prosecutions are dismissed by the courts, a factor which is attributable largely to the fact that the liability of defendants under the legislation is strict, with very little scope for a successful defence.

What is revealing, however, is that, despite the fact that prosecution is not common, and that supposedly only the 'strong' cases are prosecuted, there is a relatively high proportion of 'good behaviour bonds' awarded to defendants once charges have been proved against them. This is particularly so for prosecutions under the 1985 Act. To a large extent this is explained by reference to Magistrates views of the 'criminality' of offenders under the legislation - as indicated in 6.6, Magistrates are reluctant to see offenders against the legislations as 'criminal'. The large scope given to defence counsel to mitigate penalty, and the extent to which Magistrates are prepared to accept the factors commonly raised by defence council in mitigation, explains the high number of 'good behaviour bonds'.

These factors also tend to explain why, even when there is a conviction, the fine imposed is relatively low. Even though Magistrates claim to impose fines after reference to the maximum penalty, it seems fairly clear that they are looking for some indication of outstanding 'blameworthiness' before they will impose high fines. It is a rare case where defence counsel is unable to construct a plea in mitigation which does not strike a chord with the magistracy's virtually commonly held view that offenders against the occupational health and safety legislation are not 'criminals', but rather individuals and corporations which have, through their own oversight and worker 'carelessness', been found to have contravened the occupational health and safety legislation.

NOTES

1. It became the Labour and Industry Act in 1953.

2. Unless otherwise indicated, all prosecution data used in this section are drawn from the Annual Reports of the Chief Inspector of Factories and Shops, the Department of Labour and the Department of Labour and Industry.

3. This data was obtained from the Industrial Appeals Court's Register Book, and we are grateful for the kind co-operation of Mr Alf Dowling, Deputy Registrar of the Industrial Relations Commission of Victoria, and formerly Registrar of the Industrial Appeals Court, for unfettered access to the register.

4. This column denotes the statute under which the prosecution was conducted.

5. This column indicates the number of prosecutions where the outcome was a conviction and a fine. The level of fines is indicated in Table 6.8.

6. This records the number of informations that were dismissed by the courts.

7. This indicates the number of informations that were proved by the prosecution, but resulted in the Magistrate adjourning the information without recording a conviction, and placing the defendant upon a 'good behaviour bond.'

8. This differs from the previous column in that the court also ordered the defendant to make a payment into the court box.

9. This indicates the number of informations that were withdrawn by the Prosecutor.

10. This indicates the number of cases that were struck out by the court.

11. The number of cases adjourned by the court sine die without the merits of the case being considered.

12. In 1978 100 dangerous machinery and failure to report informations were prosecuted, and the prosecution rate peaked in 1982 when 170 such informations were prosecuted.

13. See, for example, Mitchell v North British Rubber Limited (1945) S.C. (J.C.) 69; Smithwick v National Coal Board [1950] 2 K.B. 335; Dixon CJ in Dunlop Rubber (Aust) Limited v Buckley (1952) 87 C.L.R. 313; Dickman v Consolidated Meat Holdings Limited (1974) 16 AILR 519; See Dickman v Overseas Corporation (Australia) Limited, Industrial Appeals Court 6/8/1976, unreported; Tucker v Dunlop Australia Limited (1978) 20 AILR 310; Kingston v Omicron Pty Ltd (1970) 25 IIB 1670; Flanagan v Reed Paper Products Limited (1972) 14 AILR 202; 27 IIB 799; and Crennan v Carborundam Pty. Ltd. (1968) AILR 222; 23 IIB 966; Tucker v Sperry Rand

Pty Ltd (1969) 11 AILR 403; 24 IIB 1442 and 1665; Waters v Flexible Drives Pty Ltd (1970) 12 AILR 195 and Bell v Flexible Drives Pty Ltd (1970) 12 AILR 195; Bouronicous v Nylex Corporation Limited [1975] V.R. 120. The High Court will be examining these principles in 1990 in the Chugg v Pacific Dunlop appeal.

14. On the other hand, in the area of sentencing, the courts have barely set down any principles to guide the exercise by Magistrates of their sentencing discretion, and the principles that have been formulated are too vague for consistent application. This is discussed in section 6.7.1.

15. See, for example, Mitchell v North British Rubber Limited (1945) S.C. (J.C.) 69; Smithwick v National Coal Board [1950] 2 K.B. 335; Dixon CJ in Dunlop Rubber (Aust) Limited v Buckley (1952) 87 C.L.R. 313.

16. Bouronicous v Nylex Corporation Limited [1975] V.R. 120

17. See Barnes v Fortuna Cabinets (below).

18. See the discussion of the Simsmetal case (6.8.1 below).

19. In particular section 21(2)(b).

20. In the Matter of an Inquest Touching the Death of Gabrielle Lovisotto, 14 April 1986, Transcript p 69.

21. The Prosecutor originally assigned to the prosecution on the day found himself unable to conduct the prosecution. Another prosecutor was assigned the brief on the day of the hearing, and had to read the file on the way to court.

22. Chugg v Pacific Dunlop Ltd (No 1)[1988] VR 411.

23. The court's reasoning is a little too glib, focusing as it does on the similarity between s. 21 and s. 107 of the Companies Act 1958 (Vic) which was held by the Full Victorian Supreme Court in Byrne v Baker [1964] V.R. 443 (F.C.) to introduce 'one aspect of the concept of negligence' in relation to the duties of a company director. The court in Byrne reasoned that 'this concept of negligence has reference to identifiable acts or ommissions, not to any general characterisation of the conduct of [an employer] over a selected period'. A better approach would have been to distinguish Byrne and hold that the particulars of the offence in Chugg clearly indicated a specific incident comprising two omissions which together were alleged to be in contravention of s.21(1). See, for example, Byrne v Garrison [1965] VR 523 where this approach was taken. This view is supported by the expressed intent of s.21(2), which prefaces the paragraphs (a) to (e) with the words '[w]ithout in any way limiting the generality of sub-section (1)...' This surely indicates that s.21(1) can be contravened by facts which do not fit within s.21(2). Logic suggests that there can also be a single contravention of s.21(1) arising out of a combination of 'illustrations' specified in s.21(2).

24. Mitchell v North British Rubber Limited (1945) S.C. (J.C.) 69; Smithwick v National Coal Board [1950] 2 K.B. 335.

25. Chugg v Pacific Dunlop Limited (no 2) Supreme Court of the Supreme Court of Victoria, (Kaye, Beach and Ormiston JJ) 5 May 1989.

26. Nimmo v Alexander Cowan and Sons Ltd. (1968) A.C. 107 and Regina v Hunt [1987] A.C. 352.

27. Kingshott v Goodyear Tyre and Rubber Co Australia Ltd (No 2) (1987) 8 N.S.W.L R. 707.

28. Mitchell v North British Rubber Co Ltd (1945) S.C. (J.C.) 69 at 73 and Smithwick v National Coal Board (1950) 2 K.B. 335 at 351.

29. See the judgment of Kaye and Beach JJ at 16, and Ormiston J at 34.

30. Report of the Committee on Safety and Health at Work 1970-1972 (H.M.S.O., London, 1972) para 346.

31. Ss. 13 and 15.

32. S. 24.

33. Industrial Relations Commission of Victoria in Court Session (Garlick AP) Case No 12/1986, 26 September 1986.

34. Decision p 3.

35. Ibid 3-4.

36. See, for example, Mitchell v North British Rubber Limited (1945) S.C. (J.C.) 69; Smithwick v National Coal Board [1950] 2 K.B. 335; Dixon CJ in Dunlop Rubber (Aust) Limited v Buckley (1952) 87 C.L.R. 313.

37. See, for example, Creighton, W.B., Understanding Occupational Health and Safety Law in Victoria, CCH, Melbourne, 1986, para 649 and the references cited therein.

38. See chapter 1.

39. Ss. 33-35.

40. Ss. 43(3), 44(3) and 33(3).

41. [1983] I.R.L.R.195.

42. See ss. 46 and 35 of the Occupational Health and Safety Act.

43. S. 23.

44. S. 24.

45. See the discussion of Herless Pty Ltd v Barnes at 6.5.3 above.

46. Tucker v Dunlop Olympic Limited (1983) 25 AILR 538.

47. Tucker v Mappin, Industrial Relations Commission of Victoria in Court Session (Marshall P), 21 November 1983; Tucker v Rubber Manufacturers (Vic) Pty Ltd Industrial Relations Commission of Victoria in Court Session (Marshall P), 23 January 1984.

48. Automold Plastics Pty Ltd v Manning, Industrial Relations Commission of Victoria in Court Session (Garlick AP), 20 February 1987.

49. Mag 2.

50. Mag 13.

51. Mag 8.

52. Mag 6.

53. Mag 7.

54. Mag 1.

55. Mag 2.

56. Mag 10.

57. Mag 4.

58. Mag 1.

59. Sallman, P.A. and Willis, J., Criminal Justice in Australia (Oxford University Press, Melbourne, 1984) 157.

60. This curious anomoly is the result of s. 69 of the Magistrates Court Act 1971.

61. But see s. 69(6) of the Magistrates' Court Act 1971 for the penalties applicable when these prosecutions are heard summarily by a magistrate.

62. (1970) 12 AILR 194.

63. (1977) 19 AILR 48.

64. (1977) 19 AILR 119.

65. Industrial Relations Commission of Victoria in Court Session (Marshall P), 21 November 1983.

66. One prosecution only.

67. Fox, R.G. and Freiberg A., Sentencing: State and Federal Law in Victoria, Oxford University Press, Melbourne, 1985, 2.301-2.309.

68. Ibid 2.301; 2.310-2.327.

69. Ibid 2.328- 2.336.

70. Hampel. G. 'Concepts, Preparation and Presentation of Pleas', (1978) L.I.J. 99.

71. See the comments of magistrates in 6.8 below.

72. The law does not give the prosecutor a free hand in the sentencing process, and limits the role of the prosecutor to drawing the attention of the court to the relevant principles of sentencing. The prosecutor may conduct fair testing of the evidence led and the submissions made by defence counsel in mitigation of penalty. The prosecutor must make all her or his submissions as to sentence in a fair and even handed manner, and may not, as an adversary, press the court for a heavier sentence. See generally Fox, R.G and Freiberg, A., 'Silence is not golden: the function of Prosecutors in sentencing in Victoria' (1987) 61 Law Institute Journal 554.

73. Mag 11.

74. Mag 8.

75. Mag 9.

76. Mag 13.

77. Mag 10.

78. Mag 1, mag 2, mag 3, mag 4, and mag 5.

79. Mag 1.

80. Mag 12.

81. For example, mag 1.

82. Mag 1.

83. Mag 1.

84. See, for example, mag 4.

85. Mag 4.

86. All magistrates agreed strongly on this factor.

87. Mag 1.

88. Mag 5.

89. Mag 10.

90. Mag 3.

91. See mag 2.

92. Mag 13.

93. Mag 3.

94. Mag 11.

95. After the case the Prosecutor commented that he was going to tell the court that the Inspector would not be able to see a guarding infringement of this nature (the bottom guard of a bench saw) if he walked through a factory, because he wouldn't be aware of the problems of removing saw dust from the factory.

96. Mag 7.

97. Mag 1. Mag 7 indicated that he would take a similar view.

98. Mag 2.

99. Mag 6. A similar comment was made by magistrate 13.

CHAPTER 7

The Role of the Industrial Relations Commission

In 4.6 of this Report, the use of Improvement and Prohibition Notices was considered, and in 6.5.4 there was a discussion of prosecutions for contravention of those Notices. Another aspect of the use of the Notice procedures is the jurisdiction of the Industrial Relations Commission of Victoria to hear and determine appeals against Improvement and Prohibition Notices. Although the Industrial Relations Commission was not specifically included on the Project's brief, it is clear that the operations of this body play a vital part in the occupational health and safety regime in Victoria. For this reason Breen Creighton, one of the original chief investigators, undertook an analysis of the operation of the Commission.

7.1 The Legislative Context

7.1.1 The Industrial Relations Commission of Victoria

The Industrial Relations Commission of Victoria (for purposes of this chapter, 'the Commission') was established by virtue of s.4 of the Industrial Relations Act 1979. It consists of a President;[1] such Deputy Presidents as may be appointed from time to time, and 'as many Commissioners as are necessary for the administration of this Act'.

The Commission may be constituted in four ways:

(i) in Court Session. For these purposes the Commission is comprised of the President or a legally qualified Deputy President sitting alone.

(ii) in Full Session. For these purposes the Commission is comprised of at least three members, of whom at least one must be the President, or a Deputy President.

(iii) a Deputy President sitting alone.

(iv) a Commissioner sitting alone.[2]

Section 10(2)(b) authorises the President to direct a Deputy President, a Commissioner, the Registrar or a Deputy Registrar 'to carry out an investigation that may be required in relation to a matter being heard and determined by the Commission, and to report back to the Commission.'

The principal powers of the Commission are set out at ss.11, 12, 12A and 12B of the 1979 Act. Basically, they consist of an appellate and review function in relation to the activities of Conciliation and Arbitration Boards as constituted under Part III of the Act. However, the Commission also has a significant original jurisdiction - notably in relation to industrial matters which have been referred to it by the Minister, a Conciliation and Arbitration Board or the chairman of a Board under s.11(1)(e).[3]

Section 15(1) of the Act stipulates that the Commission 'shall in every case be guided by the real justice of the matter without regard to legal forms and solemnities'. Furthermore, s.15(2) requires it to 'direct itself by the best evidence it can procure or which is laid before it'. It is irrelevant whether this evidence is 'such as the law would require or admit in other cases'. In other words, the legislature has directed that the Commission should operate in as informal a manner as is compatible with the need to do justice as between the parties, and in order to achieve that objective it is given a very broadly defined power to obtain evidence. It is also given a wide discretion as to whether parties appearing before it should be represented by a lawyer or other paid agent.[4]

7.1.2 Jurisdiction of the Commission Under the OHSA

The OHSA confers jurisdiction upon the Commission in respect of five specific issues:

(i) disputes as to entitlement to wages in relation to Health and Safety stoppages under s.26[5]

(ii) disputes as to access to workplaces for persons assisting Health and Safety Representatives;[6]

(iii) claims for the disqualification of Health and Safety Representatives;[7]

(iv) appeals against Inspectors' exercise of their power under s.39(1)(g) to take possession of any 'plant or thing' for purposes of examination or testing, or for use as evidence;[8] and

(v) appeals in relation to Improvement and Prohibition Notices.[9]

It is also possible that the Commission could be designated as an appellate body for purposes of regulations made under s.59 of the 1985 Act, although this does not appear to have been done during the relevant period.[10]

The jurisdiction relating to the disqualification of Health and Safety Representatives and appeals concerning Improvement and Prohibition Notices is expressly vested in the Commission in Full Session. The jurisdiction relating to applications for payment under s.26(6); access to premises for assistants to Health and Safety Representatives, and appeals against the seizure of plant or things are simply vested in 'the Industrial Relations Commission'. Section 32(4) does, however, direct the President to refer an application under s.32(3) to a Commissioner 'who shall determine the matter as soon as practicable.'

7.1.3. The Choice of the Commission as a Review Body

The decision to invest the Commission with an appellate jurisdiction under the OHSA appears to have been based on considerations of practicability rather than principle. It is clearly necessary that employers and other relevant parties should have access to some form of review mechanism in relation to matters such as the issue of an Improvement Notice or claims to payment of wages in the event of a s.26 work stoppage. For both practical and equitable reasons, such a review should be fast, inexpensive and flexible. This seems to rule out review by means of formal appeal to the County or Supreme Courts. On the other hand, it seemed inherently unlikely that the legislation would generate a sufficient volume of review applications to merit the creation of a separate tribunal.

The Industrial Relations Commission had obvious attractions as an alternative. It was under a statutory duty to deal with issues without regard to 'legal forms and solemnities'. Many of the review issues which could be expected to arise under the 1985 Act would have a distinctly 'industrial' character, notably applications under s.26(7) and appeals against Improvement or Prohibition Notices which originated in the issue of Provisional Improvement Notices by Health and Safety Representatives. It is also significant that similar issues under the British Health and Safety at Work Act 1974 are dealt with by the industrial tribunals[11], and that they appear to have absorbed this additional jurisdiction without undue difficulty.

7.2 The Commission's Exercise of Jurisdiction: 1 October 1985 - 30 September 1988

7.2.1 General

During the period under review the Commission dealt with a total of 36 cases under the OHSA.[12] For ease of reference these cases have been numbered in sequence, according to the date of lodgment with the Registrar. A list of the full names of all 36 cases is attached as an Appendix to this Chapter.

Table 7.1 below classifies these cases by reference to the provision of the 1985 Act on the basis of which the application was lodged. Predictably perhaps, a clear majority of cases (22 out of 36) consisted of appeals against the issue of Improvement Notices. Of the other cases, 10 related to prohibition notices; 2 to disputed entitlements under s.26(6); one to an assistant for a Health and Safety Representative, and one to the disqualification of a Health and Safety Representative. There were no appeals against 'seizures' under s.40(4).

Table 7.1

EXERCISE OF THE COMMISSION'S JURISDICTION BY PROVISION OF THE ACT

1985 - 1988

Section	Number of Cases
Sec 26(7)	2
Sec 32(3)	1
Sec 36	1
Sec 40(4)	-
Sec 46 (Improvement Notice)	22
Sec 46 (Prohibition Notice)	10
	36

7.2.2 Improvement Notices

We have not been able to obtain details as to the content of all Notices which were subject to appeal. The most common issue appears to have been guarding of machinery,[13] followed by dust extraction and/or ventilation.[14] Other issues included:

- the provision of facilities for Health and Safety Representatives;[15]
- inadequate or obstructed means of access or egress;[16]
- inadequate sanitary facilities;[17]

- over-crowded office accommodation;[18]
- heat stress;[19]
- storage of hazardous chemicals.[20]

The fact that so many of the early cases related to the guarding of machinery appears to be consistent with our other findings to the effect that the Inspectorate was still over-inclined to view Health and Safety issues in terms of machinery guarding (see 6.4). The preponderence of other issues in later cases suggests that more recently the Inspectorate may have adopted a less restricted view of the effect of the legislation in general, and of the role of Notices in particular.

Table 7.2 below shows that in half of the Improvement Notice cases, the Notices were cancelled. However this figure must be treated with great caution. Section 46(2) of the 1985 Act permits the Commission to affirm, vary or cancel a notice. It does not make any specific reference to dismissal of an appeal (although presumably that is implicit in affirmation or variation of a notice), or to permit the withdrawal of an appeal. This appears to have generated a certain amount of confusion in the minds of both the Commission and Departmental representatives. This is reflected in the fact that in a number of cases the Commission formally cancelled a Notice where it had either been complied with[21] or the parties had agreed upon an alternative means of performance.[22] In only 4 instances[23] were Notices cancelled on their merits (or the lack thereof), and these were all cases where the Department clearly felt that the Notice ought not have been issued in the first place.

Table 7.2

OUTCOMES OF APPEALS RELATING TO IMPROVEMENT NOTICES
1985 - 1988

Outcome	Number of Cases
Affirmed	1
Affirmed as Matter of Form	4
Varied	2
Cancelled	4*
Cancelled as Matter of Form	7
Withdrawn	4
	22

*In three of the instances of cancellation the Notices which were the subject of the appeal are known to have been preceded by a Provisional Improvement Notice.

The Commission adopted a rather different approach to Notices where there had already been compliance in Case No.4. In this instance the Commission affirmed the Notice, but gave the appellant leave to withdraw its appeal. The same thing appears to have happened in a number of other cases.[24] We consider this to be a more satisfactory approach than formal cancellation. This is because cancellation - even as a pure matter of form - carries a connotation that perhaps the Notice ought not have been issued in the first place. As indicated, this was very rarely the case in practice.

7.2.3 Prohibition Notices

Table 7.3 below shows that in 6 of the 10 cases involving appeals against Prohibition Notices the appeals were withdrawn. In 3 of these cases the withdrawal was on condition that the Notice would be rescinded. In cases no. 27 and 28 the Notices were also rescinded on the appellants' giving certain undertakings as to future conduct. We are not aware of the basis upon which the Notice was cancelled in Case No. 12.

Table 7.3

OUTCOMES OF APPEALS RELATING TO PROHIBITION NOTICES

Outcome	Number of Cases
Affirmed	-
Affirmed as Matter of Form	-
Varied	1
Cancelled	-
Cancelled as Matter of Form	3
Withdrawn	6
	10

*In three of the cases where the appeal was withdrawn, this was done on the undertaking that the notices would be rescinded.

In no case was the issue of the Notice preceeded by a stop work direction by a Health and Safety Representative under s.26(2). However it does appear that the notice in Case No.22 was issued as a result of representation from a Representative.[25]

Case No.22 is the only one which proceeded to a full hearing. It is also the only case in which there was a successful application for interim relief.[26] The case occupied all or part of 11 sitting days. The Notice was eventually affirmed, as varied in the course of the proceedings.

We note that 6 of the 10 appeals against Prohibition Notices were lodged in the last 12 months of the relevant period. This contrasts with only one such appeal in the first twelve month period, and 3 in the second. This apparent increased preparedness to appeal may reflect nothing more than an increasingly 'militant' stance on the part of employers in general. It might also be indicative of the fact that the Inspectorate had been making more frequent and/or imaginative use of the Notice technique.

7.2.4 The Section 26 Cases

Case No. 13 involved an attempt by an employer to withhold wages from a number of employees who had stopped work in accordance with a direction under s.26(2) of the 1985 Act - the issue of the direction having been occasioned by a breakdown in the emergency communications system at the work-site. After a hearing which occupied all or part of 6 sitting days, the Commission determined that the employees concerned were entitled to be paid for the period of the stoppage. The employer then appealed to the Commission in Court Session, which upheld the previous decision of the Commission.

In Case No.26 the operator of an abbotoir argued that it was entitled to refuse to pay wages to workers who had stopped work in accordance with a s.26(2) direction because the machinery in question had not posed any threat to the safety of the workers concerned. Eventually, the employer conceded the union's claim without the matter proceeding to a full hearing.

In both cases an Inspector had determined that 'there was reasonable cause for employees to be concerned for their Health and Safety for purposes of s.26(6)(b), but in neither case had they issued a Prohibition Notice.

7.3 The Procedures of the Commission

7.3.1 Representation

As noted above, s.14(1) of the Industrial Relations Act gives the Commission a broad discretion in relation to the right of parties to be represented by a lawyer or paid agent:

> 'Any person or association appearing before the Commission may be represented by an employee of that person or a member, officer or employee of that association or an association of which that person is a member but no person or association may be represented before the Commission by a barrister, by a solicitor, or by an agent appearing for fee or reward without the consent of the Commission or the other party or parties to the proceedings.'

On the other hand, all parties have the right to appear on their own behalf, and to be represented by an agent who does not appear for fee or reward, without the need to obtain the permission of the Commission.[27] Furthermore, the Minister may intervene in any proceedings before the Commission, and may appear personally, or be represented by a barrister, solicitor or agent.[28]

In industrial cases the Commission appears to adopt a fairly flexible approach to this issue. Where all parties consent, it appears invariably to permit representation by a lawyer or paid agent. Where one of the parties objects to the other(s) being so represented the Commission appears to be inclined to refuse permission where the issues before it are relatively straightforward, and where the party seeking to be represented is able adequately to put forward its case without outside assistance. Where a party cannot adequately represent itself, or where the issues are complex and/or of general significance, the Commission generally permits representation even in the face of the objections of another party.

In relation to Occupational Health and Safety cases the Department was almost invariably represnted by an officer from the legal branch. Occassionally, individual Inspectors appeared in relation to routine matters such as programming, or formal withdrawals of appeals.[29] In only one case does the Department appear to have 'briefed-out'.[30]

The appellants/applicants appeared on their own behalf in a substantial proportion of the cases which progressed as far as at least a preliminary hearing before the Commission.[31] We have no reason to suppose that the appellant/applicant in any of these cases was in any way disadvantaged by their decision (borne of choice or of necessity) not to seek legal representation.

This appears to be true even in the rather exceptional circumstances of case no.2. The appellant in this instance chose to be represented by one of its directors. This gentleman clearly had very little understanding of the nature of the proceedings in which his company was involved, and to have had even less appreciation of (or sympathy for) the objectives of the OHSA. These factors undoubtedly served to prolong the proceedings, and to generate a certain amount of confusion in the minds of all concerned. However the issue appears to have been resolved more or less satisfactorily in the end - and the appellant had his day in court.

In three cases[32] the appellants were represented by officials of an industrial association - at least one of whom was legally qualified.[33] An industrial association[34] was also actively involved in Case No.30, and indeed had lodged the initial application on behalf of the employer.

Trade unions and/or individual Health and Safety Representatives appeared or intervened in around a quarter of cases.[35] In two cases the unions appeared as applicants,[36] and in one they appeared on behalf of the respondent.[37]

In Cases Nos. 5 and 6 an official of the Federated Ironworkers Association (FIA) sought to appear on behalf of one of the Health and Safety Representatives who had been involved in the issue of a Provisional Improvement Notice which had formed the basis of the Notices under appeal. In Case No.1 the Departmental representative had indicated that he felt that Health and Safety Representatives did not have a right to be represented in such proceedings. He adopted a similar position in Case Nos 5 and 6. In the event, the FIA official was permitted to participate in discussions on programming, and the issue which found the basis of the appeal was subsequently resolved without the Commission having expressed any decided view on the representation issue.

In Case No.16, another case which originated in a Provisional Improvement Notice, an official of the relevant union was an active participant in proceedings before the Commission. On this occasion there was no discussion whatsoever of the official's right to appear. The same is true for Case No.22,[38] and for all subsequent cases where unions have tried to appear or intervene.[39]

Case No.13 was the only case where there was any attempt to challenge one of the parties' right to be represented by a lawyer or a paid agent. The union representative in this case seemed to feel that for the employer to be legally represented would be inconsistent with the need for such matters to be dealt with 'with the minimum of legal intervention.' After a somewhat desultory discussion, the Commission determined that:

> 'As much for the convenience of the Commission as either of the parties, I will give you leave to appear in this matter, but that, of course, is with the expectation that the appearance by a solicitor will not impede what one would hope would be a normal discussion process before a formal hearing.'[40]

In view of the strained relations between the employer and the union in this case the fact that the employer was represented by a 'neutral' may well have helped facilitate the eventual resolution of the dispute.

Overall, representation (legal or otherwise) does not appear to have given rise to any very serious problems during the period under review. We are, however, struck by the protracted nature of the proceedings in Cases Nos. 13, 22 and 30. Even allowing that the cases related to matters of principle which the applicants/appellants considered to be of considerable importance, and that all these cases involved matters which were (in effect) before the Commission for the first time, it is hard to see why they should, between them, have occupied all or part of 27 sitting days. The legal issues involved were fairly straightforward. The facts were not unduly complex. These were, however, 3 of only 9 cases where the appellants/applicants were represented by counsel.

We also feel bound to say that we are somewhat perplexed by the initial position adopted by the Department in relation to the representation of Health and Safety Representatives who had issued Provisional Improvement Notices. It is true that the 1985 Act does not expressly state that Representatives are entitled to intervene in proceedings before the Commission. But they demonstrably do have an interest in the matters at issue in such proceedings. They are the people who have identified the hazardous situation in the first place, and who have made the initial determination as to what should be done about it. Quite possibly the issue of a Provisional Improvement Notice was viewed as an alternative to some form of direct industrial action. In such circumstances both commonsense and common fairness suggest that they should be permitted to put their point-of-view to the Commission. We consider that the initial position adopted by the Department in relation to this matter was both short-sighted and inappropriate. We welcome the fact that there subsequently appears to have been a change of policy.

7.3.2 Onus of Proof

The jurisdiction of the Commission under the OHSA is primarily appellate in character. On normal legal principles it is for the appellant in such proceedings to establish that the decision under appeal was erroneous and should be reversed. This principle holds good irrespective of whether the appeal is on a point of law only, or is by way of rehearing. This suggests that in the case of an appeal against an Improvement or a Prohibition Notice under s.46 of the OHSA it would be for the appellant to establish that the Inspector who issued the Notice had erred - for example as to the nature and degree of hazard, or as to the existence of a contravention of the 1985 Act or regulations. It would then be for the respondent to seek to rebut the appellant's arguments.

The Department appears to have adopted a different view. In Case No.2 the Commission suggested that the Department ought to go first 'to try to show a bit of

common sense and realism' about the matter in hand.[41] In the peculiar circumstances of that case, this appears to have been an eminently sensible suggestion - and one in which the Department, quite properly, acquiesced.

The situation was much less clear in Case No.13. Here the applicant was seeking to establish that it did not need to pay wages to workers who had stopped work in accordance with a direction under s.26(2) of the OHSA. This 'direction' was subsequently endorsed by an Inspector who had determined that 'there was reasonable cause for employees to be concerned for their health and safety.' Where this happens the employee is, according to s.26(6), 'entitled' to be paid for the period of any stoppage. The employer is Case No.13 sought to challenge that entitlement. On the principles set out above, this suggests that it was for the employer to establish that 'there was not reasonable cause for employees to be concerned for their health and safety'. However counsel for the applicant sought to argue that since the Inspector's certificate was not the result of any arbitral or judicial determination of the matter it would be most unjust for the employer to carry the onus of proof.[42] In support of this argument he referred to the practice which had been adopted in relation to earlier cases concerning Improvement Notices.[43] The Departmental representative [Mr Nadenbausch] on the other hand argued:

> '... that it is established practice for this Commission and for other industrial tribunals for the notifier of a dispute or the applicant or, indeed, the appellant, if one regards these proceedings as in the nature of an appeal against decisions taken at an earlier stage under section 26 by any one of a number of parties, to proceed first.'[44]

When proceedings in the matter resumed some weeks later, Acting Commissioner Williams ruled that:

> '... failing there being agreement between the parties on the procedure of who is to go first, it is my intention that the inspectors, or those representing the inspectors, should go first. They should then be followed be those who may be supporting that position, and then are to be followed by the applicant. Naturally, the right of reply would be to the Inspectors, or those representing the Inspectors.'[45]

Unfortunately, the Commissioner did not articulate the reasons which had led him to this conclusion. However in his decision on the substantive issues before him, he did indicate that it was open for any party in future proceedings under s.26 to argue that a different procedure should be followed.[46]

The onus issue again loomed large in Case No.22, which like Case No.13, concerned the Portland Smelter Site. In this instance an Inspector had issued a Prohibition Notice relating to certain categories of work on elevated platforms. The employers upon whom the Notice had been served appealed, and also asked for interim relief on the basis of s.46(3)(b).[47]

Counsel for the appellant proceeded upon the assumption that on the substantive appeal 'the onus is on the inspector to convince the Commission that the notice was properly issued',[48] but conceded that the position was somewhat different in relation to the application for interim relief:

> 'What I had intended to do ... was simply to open the case for interim relief and make the allegation, if you like, that there was no evidence of circumstances justifying the issue of a Notice. It would then be, as we see it, the responsibility of my learned friend to call the Inspector to outline why the issue of the Notice was in his view justified, and we would then call rebuttal evidence in relation to that.'[49]

The representative of the Department [Mr Lindeman] agreed that it was for the appellant to lead in relation to interim relief, and also accepted that the Inspector 'should have the running of the inquiry into the circumstances of the notice.'[50] Interestingly, Commissioner Eggington expressed some reservations as to this second proposition:

> 'I note that the parties have agreed ... the Inspector will put his case, there will be a response by the appellant in this matter, and then there would be the usual right of reply. In the circumstances I will say no more about that than this, that it may wil be a different situation when a Prohibition Notice is issued from what has obtained in the past when the Commission has simply been dealing with Improvement Notices.'[51]

At a late stage in the proceedings Mr Lindeman endeavoured to refute any suggestion that the onus of proof rests upon the respondent in such matters:

> 'If anything I said led [the Commission] to the belief or the expectation that I was conceding to the proposition that the respondent accepted the onus of showing that every step of the Prohibition Notice should be *affirmed*, I certainly wish to attempt to correct that now by saying that there is, in my submission, nothing in the legislation which supports the proposition that the respondent does have that onus or ought to bear the onus. The appeal of the Prohibition Notice is an appeal. The mere fact that the respondent takes upon itself the role of being prepared to call the evidence in support of its Notice, in my submission, does not mean that by doing that the respondent accepts the onus on all of the evidence of proving that the Notice *ought* to be sustained.'[52]

When the Commissioner pointed out that 'it is a bit hard, if you agree to go first, to say that the onus of establishing the case does not rest upon you,'[53] Mr Lindeman replied:

> I wonder if it is useful to talk in terms of onus. It seems to me the whole exercise of the Commission in Full Session ultimately is to determine on all of the material before it whether or not the Prohibition Notice as issued ought to be alternatively affirmed, affirmed with modification or cancelled. I am wondering whether it is advisable or necessary to talk in terms of onus, and I wish to make the point that my friend has raised this point clearly and unequivocally as the first point of his summary of submissions, and to the extent it is raised and raised in the form it has been raised I want to indicate that, if anything I have said in these proceedings in the past is supportive of the proposition that I accepted on behalf of the respondent that we had that onus, I certainly want to indicate that is not the case. We certainly do not concede that there is any justification on any view of the legislation that the respondent does have that onus.[54]

In their decision, the Commission in Full Session observed that:

> 'Both the appellant and the Respondent asserted that the other party bore the onus of proof. They did not, however, present any detailed submissions on this joint, perhaps because the Respondent was prepared to assume it in this case. We do not make any conclusions about this issue except to say that if the onus falls on the Respondent if has been discharged.'[55]

In Cases Nos. 27 and 28[56] Mr Murphy for the Department indicated that 'we are not averse, despite the fact that this is effectively an appeal, to leading off if that is what you [the Commission] and the parties would want.'[57] Commissioner Neylon took a rather different view:

> 'As it is their [the appellants'] application they really have to lead the way, although I do not restrict you at this stage, Mr Murphy, if you wish either now or later to make reference to any points you have [already] raised.'[58]

The approach adopted by Commissioner Neylon in this matter appears to us to be the appropriate course. Sections 43 and 44 of the 1985 Act clearly invest the Inspectorate with discretionary powers. Section 46 gives the person to whom a Notice is issued the right to appeal against the Notice. Demonstrably, therefore, the onus of proof is upon the appellant. It may be that in certain circumstances, as in Case No.2, it would be appropriate for the Department to assume primary responsibility for the running of a case. Very occasionally, there may also be factual evidence which can most appropriately be introduced by the Department. However such situations should be very much the exception rather than the rule. In no circumstances should the Department, consciously or otherwise, permit the burden of proof to move away from the appellant/applicant.

We consider that the position put on behalf of the Department in Case No.22 is simply not tenable.[59] In an adverserial system of adjudication that must be an onus of proof, and it must rest upon (s)he who is making the allegations which constitute the subject-matter of the proceedings. Logically, therefore, that party must present her/his case, and the respondent must respond to it. Only in very exceptional circumstances is this onus reversed. There is nothing in the OHSA to indicate that Parliament intended to do any such thing in relation to any of the matters in respect of which the Commission has jurisdiction. It follows, as indicated earlier, that in a s.46 appeal, it is for the person who is appealing against a notice to present her/his case, and for the Department, on behalf of the Inspector(s) concerned, to rebut that case. In s.26 cases the onus is upon the employer who is seeking to challenge the prima facie entitlement to payment of wages which is established by s.26(6). In s.36 cases it rests upon the employer who is seeking the disqualification of an allegedly errant Health and Safety Representative.

It is only natural that the representatives of appellants should seek to shift the onus of proof onto another party if they possibly can. We find it extraordinary that the Department should actively cooperate with appellants in this exercise. We can only assume that this is indicates an exceedingly 'defensive' attitude adopted by the Department in general, and the Legal Branch in particular, to the application and interpretation of the 1985 Act.

7.3.3 The Procedures of the Commission

We suggested earlier[60] that a tribunal which was to exercise appellate and/or review functions under a measure such as OHSA needed to be fast, inexpensive and flexible. We also suggested that the Industrial Relations Commission had obvious attractions on all three grounds. It is now necessary to consider how it measured up to these criteria in practice.

The processing of some of the early cases which came before the Commission under OHSA could not be described as 'fast'. For example, Case No.1 was lodged with the Registry on 8 November 1985, was called on for mention on 8 December 1985 and the matter was disposed of on 10 April 1986. In Case No.2 the appeal was lodged on 10 February 1986, was called on for mention on 2 February 1986, and the Notices were cancelled on 13 October 1986. In Case No.13, which was the first to proceed to a full hearing, the application was lodged on 23 September 1986, the case was called on for mention on 20 October 1986, Commissioner Williams handed down his decision on 25 March 1987, and the President handed down his decision on the appeal on 30 July 1987.

This apparent tardiness can, to some extent, be attributed to factors which more largely outside the control of the Commission: (i) the commencement of OHSA coincided with a marked expansion in the work-load of the Commission;[61] (ii) the President was on leave due to illness for a lengthy period, thereby putting pressure on the resources of the

Commission,[62] and (iii) the rather inflexible provisions of the 1979 Act relating to the composition of the Commission, together with the fact that the appellate jurisdiction under s.46 of OHSA is vested in the Commission in Full Session.[63] In due course these difficulties were eased by: (a) the return to active service of the President; (b) the creation of a number of additional Deputy-Presidents and Commissioners[64] and (c) the development and refinement of a reference jurisdiction whereby individual Commissioners or (occasionally) Deputy Presidents,[65] are delegated to investigate matters which are before the Commission, and to report back to the Commission in Full Session.[66]

It cannot be assumed, however, that these delays necessarily caused great inconvenience to the parties. On the contrary, it seems clear that the principal purpose of most appeals against Improvement Notices was to secure more time to comply with the Notice, rather than to challenge the actual issue, or substance, of the Notice. Since lodging an appeal automatically suspends the operation of the Notice (s.46(3)(a)), the mere fact that the matter was before the Commission gave the appellant exactly what (s)he wanted - time.

Although lodging an appeal does not automatically suspend the operation of a Prohibition Notice (s.46(3)(b)), most appellants appear to have used the lodging of an appeal as a bargaining counter in negotiations with the Department. This is borne out by the large number of cases where the appeal was withdrawn or the Notice was cancelled as a matter of form.[67] Only in Case No.22 has an appeal against a Prohibition Notice proceeded to full hearing - and in that instance the Commission had already varied the operation of the Notice on an application for interim relief.

As noted earlier, the proceedings in Case No.13 were quite protracted. On the other hand the case did involve extensive legal argument - and was appealed to the Commission in Court Session. It is also significant that there was no on-going interruption

to normal working arrangements. In the other s.26 case (case No.26) the fact that the matter was before the Commission seems to have caused the parties to enter into more serious negotiations than had been the case hitherto.[68] The solitary s.32(3) application appears to have been a somewhat dilatory affair[69], but this appears to be largely attributable to the attitudes and behaviour of the parties.

We do note however that in some cases there appears to have been a lengthy delay between the conclusion of oral hearings and the handing down of a decision. In Case No.30 for example, the Commission resumed its decision on 20 June 1988, and handed down that decision on 20 September 1988. The delay in Case No.23 was even greater with hearings being completed on 14 June 1988 and the decision being handed down on 28 September 1988. We recognise that there was little urgency in relation to Case No.23, but a three month delay in deciding upon a sensitive matter such as the disqualification of a Health and Safety Representative does appear to be somewhat excessive.

Nevertheless, the fact remains that there is no real reason to suppose that the Commission has been unable or unwilling to deal with the OHSA matters with proper expedition. The fact is that speed rarely seemed to be of great significance. Where it was important - as in Cases Nos. 27 and 28 - the Commission showed that it was able to respond quickly and effectively.[70] For the rest, the Commission generally appears to have processed matters at a pace which reflected the needs and priorities of the parties.

Throughout the period under review the Commission appears to have exhibited a commendable degree of flexibility in its approach to the matters before it. There was a constant emphasis upon the need to adopt a commonsense approach to what were sometimes complex and sensitive issues. The reference technique appears to have been

particularly effective - both as a means of husbanding the resources of the Commission, and of dealing with the substantive issues.

We have no reason to suppose that any of the parties who were involved in OHSA matters before the Commission incurred any undue financial hardship as a result of that involvement. That is not to say that some of the cases did not involve a waste of time and money - but by and large such waste could not be attributed to excessive legalism, inflexibility etc. on the part of the Commission.

7.4 Conclusions

Overall, we consider that the decision to invest the Industrial Relations Commission with a review and appellate function under the OHSA has been fully vindicated.

The volume of litigation has been small. This confirms that it would have been neither necessary nor appropriate to have established a separate tribunal. At the same time, the new jurisdiction has not imposed an excessive strain upon the resources of the Commission - even though there does appear to have been some slight difficulties in this regard in the initial stages.

The Commission has dealt with the matters which have come before it in what appears to us to have been an entirely appropriate manner. It consistently adopted a commonsense approach to both the procedural and the substantive questions with which it was confronted. Some matters were not disposed of as quickly as might be the case in an ideal world - but as indicated, this appears almost invariably to have reflected the needs and priorities of the parties, rather than any dilatoriness on the part of the Commission.

We have been less impressed by the performance of the Department in relation to the Commission. Errors and technical hitches abound; for example in Case No.13 the Department was not represented at the first hearing for mention because the notification was received by the relevant officers on the day after the hearing,[71] whilst in Case No.17

the matters which formed the subject-matter of an Improvement Notice were resolved by agreement on 3 February 1987, but the Legal Branch did not formally hear of this until June of the same year. Too often Departmental representatives appear to have been ill-prepared, and/or to have had only a very limited understanding of the issues with which they were dealing. Far too often they appear to have been unaware of either the content[72] or the philosophical basis of the legislative framework constituted by the 1985 Act. The inept and internally inconsistent approach to the onus of proof issue is a particularly clear illustration of this lack of understanding. The wholly inadequate use of decisions under the Health and Safety at Work Act 1974 (UK) is another.

Given that OHSA is closely modelled upon the Act of 1974, it seems reasonable to suppose that decisions under that legislation would be of relevance and assistance in interpreting the Victorian provisions. However it has to be said that the use of such material before the Commission left a great deal to be desired. Cases were cited which had little or no bearing upon the matter in hand.[73] Even where relevant authority was cited, there was little or no attempt systematically to use that authority to support the Department's position.[74] We also find it surprising that a Departmental representative should cite authority without being aware of the nature, composition, or status of the court or tribunal from which that authority emanates.[75] Of course some of these matters are fairly trivial in nature. But they are inherently unlikely to create a favourable impression with the Commission. Regrettably, they also appear to epitomise the Department's approach to dealing with Occupational Health and Safety matters before the Commission.

Appendix:

Cases Dealt with by the Victorian Industrial Relations Commission: 1 September 1985 - 31 August 1988

Case No.	Name
1.	Commonwealth Aircraft Corporation Ltd v. Scanlon.
2.	ACKO Pty. Ltd. v. Chick
3.	Canberra Press Nominees Pty. Ltd. v. Impey
4.	David Linacre Pty. Ltd. v. Revell
5.	Baines Harding Construction and Roofing Pty. Ltd. v. Goyen
6.	Projeng Pty. Ltd. v. Goyen
7.	James McEwan Pty. Ltd. v. Manning
8.	McKellar Renown Press Pty. Ltd. v. Hudson
9.	Leighton Contractors Pty. Ltd. v. Brack
10.	S.E. Dickins Pty. Ltd. v. Thomas
11.	Wattyl (Victoria) (A Division of Wattyl Australia Pty. Ltd.) v. Impey
12.	Master Builders Association of Victoria on behalf of L.U. Simon Builders Pty. Ltd. v. Keady
13.	Re Bechtel Australia Pty. Ltd. and ors.
14.	SECV v. G.B. Simmons
15.	Amcast Foundry Pty. Ltd. v. Brack
16.	Ministry of Police and Emergency Services v. Thomas
17.	Petersville Milk Products, a Division of Petersville Ltd. v Chugg
18.	AAE Scaffolds Pty. Ltd v [Anon]
19.	Zaven Pty. Ltd. v. Green
20.	Re Carlton and United Breweries

21. Nino's Auto Service Pty. Ltd. v. Barnes

22. ANI Engineering, a Division of ANI Corporation Ltd. v. Bolton

23. Drywear Clothing Company Pty. Ltd v. Arnott

24. Bechtel Australia Pty. Ltd. v. Bolton

25. LJ Bilston & Sons Pty. Ltd. v. Arnott

26. Australasian Meat Industry Employees Union v. Camperdown Meat Exporters

27. Intermodal, an Activity of Mayne Nickless Pty. Ltd. v. Winn

28. Australian paper Manufacturers, a Member of Amcor Limited Group v. Winn

29. Ministry of Education v. [Anon]

30. Clifford Meat Exports Pty. Ltd. v. Manovic

31. Mushroom Machinery Pty. Ltd. v. Arnott

32. Hunters Products Group Ltd. v. Kianidis

33. Burns v. Taylor

34. Glen and Palmer v. Taylor

35. Heka Pty. Ltd. v. Smith

36. Phosphate Co-Operative Company of Australia Limited v. Barnes

NOTES

1. Throughout the relevant period, the President was Mr K.D. Marshall. However he was on leave of absence for much of this time. In his absence, Mr R.J. Garlick acted as President.

2. Sections 10(1), (1A) and (1B).

3. By virtue of s.11(2), the President may delegate the power to deal with such referred matters to a Deputy President or Commissioner sitting alone.

4. Section 14(1). See further section 7.3.1, post.

5. Section 26(7).

6. Sections 32(3) and (4).

7. Section 36.

8. Section 40(4) and (5)

9. Section 46

10. The Commission in Court Session had an appellate jurisdiction in relation to prosecutions in the magistrates' courts under the ISHWA 1981, but not under the OHSA 1985 (see s.12(a) of the 1979 Act). This jurisdiction was vested in the Commission as successor to the former Industrial Appeals Court. Its exercise falls outside the scope of this part of the study.

11. These are tripartite bodies which sit in most large towns. They consist of a legally qualified chairman (who sit on either a full-time or a part-time basis) and two lay members. One of the lay members is drawn from an employee panel, and the other from an employer panel. There is a right of appeal on point of law to the (tri-partite) Employment Appeal Tribunal, and from there to the Court of Appeal (Inner House of the Court of Session in Scotland) and to the House of Lords.

12. This figure is based upon lodgments with, and files established by, the Registrar. It should be appreciated that some cases involved a number of different issues. In particular several of the 'Notice' cases pertained to a number of different Notices which had been served upon the appellant at around the same time (for example, Case No.4 related to 5 Notices out of a total of 17 which had been served upon the appellant over a two-week period). The appellant in Case No.3 challenged two Improvement Notices. The Registrar established a separate file for each notice. We have treated these applications as one case.

13. See for example Cases Nos. 2,3,4 [part], 11,20 and 25.

14. See for example Cases Nos. 4 [part], 15, 16 and 36.

15. Case No.1.

16. Case No.4.

17. Case No.5.

18. Case No.16.

19. Case No.17.

20. Case No.32.

21. Cases Nos. 2, 3 and 11.

22. Cases Nos. 1 16 and 17.

23. Cases Nos. 5, 6, 15 and 29.

24. Cases Nos. 10, 21 and 25.

25. Case No. 22, Transcript, 5 August 1987, p.139.

26. Interim relief was refused in Case No.17. The issue does not appear to have been raised in any of the other cases.

27. Section 14(3).

28. Section 14A.

29. See for example Case No.15.

30. In the appeal proceedings in Case No.8.

31. See for example Cases Nos. 2, 11, 16, 21, 27 [initially], 21 and 31.

32. Cases Nos. 12, 11 and 23.

33. Mr DJ Smith from the Australian Chamber of Manufactures appeared in both Cases Nos. 11 and 23. In Case No. 12 the appellant was represented by two officials from the Master Builders Association of Victoria.

34. The State Chamber of Commerce and Industry.

35. Cases Nos. 5, 6, 13, 16, 20, 22, 23, 26 and 30.

36. Cases Nos. 20 and 26.

37. Case No.30. The Victorian Trades Hall Council also appeared as an intervenor in this case.

38. One of the officials who appeared in this case was the official whose right to appear had been questioned by the Department in Cases Nos. 5 and 6.

39. There was some discussion in Case No.1 as to whether representatives of two employer organisations should be permitted to appear as intervenors - Transcript, 11 March 1986, p.4. The subject-matter of the appeal was resolved by agreement, so that the Commission did not need to make a ruling on the matter. Representatives of employer organisations have appeared in subsequent cases on the same basis as representatives of individual unions and the Victorian Trades Hall Council - see for example Case No.30.

40. Case No.26, Transcript, 11 September 1987, page 2.

41. Case No.2, Transcript, 26 February 1986 page 3.

42. Case No.13, Transcript, 5 November 1986, pages 6-10 and 13-14.

43. Presumably Case Nos. 2, 5 and 6.

44. Case No. 13, Transcript, 2 October 1986, p.12. For the response of counsel for the employer see ibid, p.13.

45. Case No.13, Transcript, 18 November 1986, p.19.

46. Case No.13, Transcript, 25 March 1987, p.75. Also p.14 of the Decision of the same date.

47. Another appeal relating to the same matter (Case No.24) was withdrawn when the Department agreed to rescind the Notices as they applied to the appellants in that case.

48. Case No.22, Transcript, 27 July 1987, p.20.

49. Ibid.

50. Ibid., p.21.

51. Ibid., p.28

52. Case No. 22, Transcript, 18 August 1987, p.354.

53. Ibid.

54. Ibid., pp.354-355.

55. Decision, 12 November 1987, para.9.7.

56. These cases concerned Prohibition Notices which had been served upon two different employers in relation to the same hazard. The proceedings in Case No.27 started first, but eventually the two matters were joined.

57. Cases Nos. 27 and 28, Transcript, 20 November 1987, p.20.

58. Ibid., p.21.

59. See para 3.2.9, supra.

60. See section 7.1.3 of this report.

61. For example, the emergence of a significant unfair dismissals jurisdiction, and an apparent 'juridification' of the industrial relations system in Victoria.

62. See note 1, supra. Whilst he was Acting President, Mr Garlick played an important role in the early development of the health and safety jurisdiction.

63. See section 7.1.2 supra.

64. This last was achieved by re-styling chairmen of Conciliation and Arbitration Boards as Commissioners, and also by a number of new appointments.

65. As in the early stages of Case No.22 and in Case No.23 (both, Deputy President Lawrence).

66. Section 10(2)(b)

67. See Table 7.3, and section 7.2.3.

68. The union claim related to time which was lost in early March 1987. The application was lodged with the Registrar on 27 August 1987, came on for mention on 11 September 1987 and was resolved on 28 September 1987.

69. Application lodged 24 February 1987, mention 3 March 1987 and application to withdraw 31 December 1987.

70. In Case No.27 the Prohibition Notice was issued on 2 November 1987, and the appeal was lodged on 5 November. The Commission began hearings (at the workplace) on 11 November. The matter was resolved by agreement during the lunch adjournment on 20 November 1987.

71. Transcript, 5 November 1986, p.5.

72. See for example the highly misleading description of the circumstances in which a Prohibition Notice can/should be issued in Case No.31 - Transcript, 16 February 1988, p.3.

73. Indeed in Case No.22 the Departmental representative admitted as much - Transcript, 29 July 1987, p.123.

74. See for example Case No.22, Transcript, 29 July 1987 pp.120/121-128 and Case No.23, Transcript, 10 May 1988, pp.174-75.

75. See for example Case No.23, Transcript, 10 May 1988, pp.155/156-195 and 171-173. We also note that in Case No.22 the Departmental representative contrived, in the space of three pages of manuscript, to attribute the dicta upon which he was relying to the wrong judge; disclose that he had not made available copies of a previous decision of the Commission upon which he wished to rely, and to own that he did not know in which series of reports a particular case was reported -

Transcript, 12 August 1987, pp.295-297. (On this third issue see also Case No.23, Transcript, 10 May 1988, p.161).

CHAPTER 8

Summary, Conclusions and Recommendations

In this project we have attempted to assess the workings of Victoria's new Occupational Health and Safety Act 1985 in the earliest years of its operation after 1985, and to compare this with the system which had preceded it, in many respects substantially unaltered for about a century. The project's sub-title, 'An Assessment of Law in Transition' was carefully chosen to convey the fact that we were not embarked upon any quantitative effectiveness study, nor upon one where, given the time-frame involved, any complete metamorphosis might reasonably be expected to have taken place. At the same time, however, it was hoped that by mapping general trends, charting progress in various respects and eliciting responses from the main participants in the new system, the project might make a useful contribution by identifying unforeseen obstacles confronting implementation of the new legislation. It is in that vein, one of constructive criticism, that any adverse comments or conclusions contained in the chapter are offered. On the other side of the coin, we should state quite categorically that, in our view, the 1985 Act has the potential to effect very positive changes in the field of Occupational Health and Safety in this state. It is our hope that the conclusions drawn and the recommendations offered in this chapter will materially help in producing this result.

Many of our views about the operation of the 1985 Act have already been aired in a policy discussion paper 'The Occupational Health and Safety Act 1985: Some Preliminary Policy Issues' which was prepared for a seminar held with Department of Labour officials in November 1988. We thus entertain the small, if still immodest hope that the research has already had some beneficial effects. Moreover, we have been explicitly and quite fairly asked to underline the fact that a substantial number of changes have been instituted by

the Department since the cut-off point for this project's data collection process and the 1988 seminar. Where possible, reference will be made to these changes at appropriate points in this chapter, although at the time of writing, a departmental report which apparently would enable us to do this in systematic fashion is still unavailable. Readers of this report should therefore consider the contents of this chapter alongside a forthcoming departmental status report entitled, 'Occupational Health and Safety Status Report' (Department of Labour, 1989a), as well as in the light of Annual Reports for 1987/88 and 1988/89 (Department of Labour, 1988).

8.1 Summary

The methods, both quantitative and qualitative, which were used in the course of this research were set out in some detail in Chapter 1 of the Report. This summary will therefore restrict itself to the project's substantive results upon which our conclusions and recommendations are based.

8.1.1. Patterns of Contact

In Chapter 2, quantitative data pertaining to patterns of contact between the enforcement agency and its clientele were examined. This analysis principally found that:

(1) The number of registered files generated by a sample of 3,290 factory premises between January 1980 and September 1988 was surprisingly low, totalling 692*. Of these 562 emanated from the pre 1985 Act period, while 130 came from the three year period following introduction of the Act.

(2) As far as factories were concerned, accident files constituted the most significant single file category in both periods, 54% and 41% respectively, though the latter figure represents a considerable reduction in the extent of this preponderance (Table 2.2).

(3) The roughly calculated rate at which factory premises generated registered files seemed to be low and dropping, coming to around 30 per 1000 per annum prior to the 1985 Act and 13 per 1000 per annum thereafter.
The most pronounced drop was in the rate of factory accident file generation, falling from 16 per 1000 per annum in the pre 1985 Act period to around 5 per 1000 per annum in the three years following. The reduction in the non-accident factory file rate was from around 14 to 8 (2.1 above).

*Excludes registration files

(4) When adjustment was made for missing files etc., 644 factory files were left as available for analysis, 547 pertaining to the pre 1985 Act era and 97 to the post-Act period under study. In this context non-accident files took a slight lead over accident files in the post-Act period.

(5) The proportion of factory accident files generated by premises employing fewer than 50 persons increased substantially in the increasingly data driven period after the 1985 Act (from about 36% to over 50%). Conversely, non-accident factory files pertaining to such premises decreased by nearly 10% in the same period, while the smallest category, employing less than 10 persons, dropped from around 41% of the total to about 17%.

(6) Our sample of 1000 non factory premises generated very few registered files. Restricted legislative applicability renders this finding relatively insignificant in relation to the pre 1985 Act period, but not so with regard to the post-Act one. Only 22 such files were generated between October 1985 and September 1988, representing a rate per 1000 per annum of 7.3, or slightly more than half the rate for factory premises. Much the same relationship was maintained when accident and non-accident files were distinguished (see 2.2 above). Given the preponderance of non-factory workplaces in Victoria, the extension of the effective operation of the 1985 Act to such premises, at least as measured by file generation, would appear to have been slow. Possible reasons for this tardiness included unease about situations not covered by explicit regulations, the slow emergence of such regulations and codes of practice after 1985, reluctance to invoke general duty of care provisions, a traditional prioritisation of machine guarding issues and a degree of timidity with regard to the public sector.

(7) Although it was not possible to trace non-file contacts for our sample of factory and non-factory premises, the project team went to some lengths to recover quantitative date in relation to such contents. The methods employed are described in Chapter 1 of the Report, and the results outlined in Chapter 2. These data have to be treated with some caution because of the circumstances under which they were obtained (see 2.3 above), just one example of the informational problems confronting both the research team and the Department. This qualification notwithstanding, however, the data on non-file contacts produced some interesting results:

: Requirements arising out of routine visits, hazard control investigations and non-file generating complaints all showed a marked preponderance of factory, as opposed to non-factory, issues in both periods (Tables 2.14, 2.15, and 2.16, above).

: Documents retrieved from four Regional Offices pertaining to disputed Provisional Improvement Notices and Work Cessations, though once again subject to methodological qualifications, are nonetheless highly

supportive of the view that the granting of the powers in question to Health and Safety Representatives has not resulted in profligate utilisation. In all, we uncovered only 30 cases of disputed Work Cessations and 64 cases of disputed Provisional Improvement Notices from the four Regions in question (Table 2.17, above). Moreover, for the alleged faults, computerised data on the INSPIRE system support the same conclusion (2.3.2 above).

: The distribution of Work Cessation and Provisional Improvement Notice disputes was markedly different for factory and non-factory premises. Whereas 73% of the former related to factories, only 29% of PIN disputes involved premises of this kind (2.3.2 above).

: The data discussed in Chapter 2 again reveals a glaring information deficiency since it shows that neither the departmental data base, nor the quantitative side of the project can tell us anything about the extent to which Work Cessations, or more importantly Provisional Improvement Notices were voluntarily complied with or not by employers.

8.1.2. Patterns of Enforcement

Chapter 3 of the Report was primarily devoted to charting the Department's response to the issues which had been discovered in the course of the contacts mapped out in the previous chapter. Taking the latter question first, the results were fairly predictable.

(1) Investigated factory accidents were predominantly concerned with machinery guarding questions. Despite all the current emphasis on hazards other than those associated with machinery, the post 1985 factory accidents which were investigated actually showed an increase from 88% to 93% of such cases (Table 3.1). Concomitantly, and excluding fatalities, the pattern of injuries involved in investigated accidents was heavily dominated by the finger, hand and arm injuries to be expected from such a preoccupation, despite a slight drop from 86% to 78% in such injuries across the two periods (Table 3.2). In both periods, the questions raised by factory accidents, not surprisingly, were dominated by machinery issues, getting on for three-quarters of all issues raised in both (Table 3.3).

(2) An overwhelming percentage of investigated factory accidents uncovered legal contraventions in both periods, 67% and 73% respectively (Table 3.4). Again, and not surprisingly given what has already been said, over three quarters of the issues involved in both periods concerned machinery (Table 3.5). As shown in Table 3.6, the nature of the incidents or process involved in factory accidents was also dominated by machinery; indeed, injury producing accidents which were investigated during the period covered by the research showed, not a reorientation to broader occupational health and safety issues, but an even greater concentration on machinery issues in the

post 1985 Act period. Investigated injury incidents involving machinery actually increased from 92% to 97% across the two periods (Table 3.6).

(3) To a lesser but still significant extent, non-accident factory files were also dominated by the machinery issue which constituted the largest single series of issue blocs in both periods, 43% and 37% respectively (Table 3.15). Significantly, fewer files were generated by issues such as ergonomics or manual handling, and of all industrial factory non-accident issues dealt with, approximately two-thirds were to do with machinery guarding in both periods (Table 3.16). Given the importance of self-regulation in the new system, it is also germane to note that only <u>one</u> non-accident factory file was initiated explicitly because of failure to comply with a Provisional Improvement Notice, though two other 'complaints' probably also fell in this category.

(4) As already noted, very few non-factory files were generated by our sample of 1000 non-factory premises. Of the 5 out of 11 accident files of this kind which were available for analysis, all were associated with machinery (3.3 above). Of the remaining 9 available non-accident in this category files, two emanated form the pre 1985 Act period and arose out of employer requests for advice. The 7 post-Act files falling in this category involved asbestos issues.

(5) When the focus shifts to <u>non-file</u> contact, an interesting pattern emerges. 'Routine requirements' and Hazard control' issues continue to be dominated by machinery questions (Tables 3.20 and 3.24), while non-file complaint issues, those obviously most explicitly generated externally, produced a quite different pattern. Indeed, in the latter context, machinery guarding issues crashed to no more than 15% and 18% of the matters complained of (Table 3.22). Clearly, whatever the objective truth of the matter may be, there seems to be the possibility of a clear gap between the concerns which preoccupy inspectors and those which motivate workers and others to complain, the latter appearing to be less tunnel-visioned towards the issue of machinery.

(6) Disputes and Provisional Improvement Notices and Work Cessations were the other two matters most likely to involve the Inspectors in a formal capacity. With reference to the former, in the case of both factories and non-factories, around two-thirds of the requests for intervention came from management. Notable, and in contrast to the point made at 8.1.2(3), above however, is the fact that 11 out of 16 contacts initiated by Health and Safety Representatives involved claims that Improvement Notices, provisional or otherwise, were not being complied with (Table 3.26). As far as Work Cessation is concerned, about half of the attendances by the Inspectorate were clearly triggered by management in both periods, though it should be noted that in a substantial number of cases the source of initiation was not clear (Table 3.28).

(7) Enforcement in relation to factory accidents followed a historically quite predictable pattern. Only around 21% of pre 1985 Act accidents involving contravention resulted in prosecution, while that figure was almost halved in the three years following the 1985 Act. The alternative strategies so typical of this area of law-enforcement can be seen in Table 3.7. Some doubts can

also be raised with regard to adherence to Ministerial Guidelines on the question of prosecution according to severity of injury (Table 3.8). Interestingly, and despite the small numbers involved in the post-Act period, around two-thirds of prosecutions involved machine guarding issues in both periods.

(8) When attention is turned to non-accident factory files, the pattern of response is again very heavily weighted to the non-penal end of the enforcement continuum. In the period prior to the 1985 Act's implementation, nearly 80% of enforcement responses amounted to nothing more than verbal or written notification of requirements; prosecutions, warnings and threats of prosecution only came to 7% of the total enforcement response in this period. In the post-Act period, while Improvement Notices and, to a lesser extent, Prohibition Notices made their debut, verbal requirements, written requirements and the subtle use of s.40(2) of the Act as a kind of 'Claytons Notice' still totalled around 46% of the enforcement response. Prosecutions (of which there were none among our sample), warnings and threats of prosecution still only came to around 6% of the response (Table 3.17). This pattern is broadly borne out by the figures for the strongest enforcement outcome taken among what could be multiple responses to one issue or bloc of issues (Table 3.18).

(9) Non-factory premises, as described in 3.3 above, generated minimal file contact and, accordingly, little by way of enforcement response. Of 5 accident files available for analysis, 4 were adjudged to involve contraventions. Two of these resulted in verbal requirements, one in a Prohibition Notice - appropriately enough imposed upon a person - while the single prosecution involved a food-chain, obviously outside the public sector. Nine non-factory files generated by matters other than accidents included two from the pre 1985 Act period and 7 from the period after 1985. Leaving aside the pre-Act files, both of which arose from employer request, the other 7 all involved asbestos issues. Observations or approval for removal of the material accounted for two of these, while the other 4 instances in which the outcome was clear involved written requirements.

(10) Non-file contacts generated a similarly less than robust enforcement response. In the pre-Act period, 91% of non-file routine requirements were dealt with verbally, this approach still accounting for over three-quarters of enforcement responses in the post-Act period. Improvement and Prohibition Notices accounted for only 12% and 5% respectively of the enforcement response (Table 3.21). So too with complaints, 100% of these in our sample were dealt with verbally before the 1985 Act, while 62% still attracted this reaction thereafter. Improvement Notices were only used in 12% of such cases (Table 3.23). Hazard controls exhibited the same pattern: 78% and 69% involving verbal requirements, Improvement and Prohibition Notices only being used in 16% and 3% of the cases respectively (Table 3.25).

(11) Enforcement responses in situations involving disputes over Provisional Improvement Notices and Work Cessations exhibited a similar pattern. Provisional Improvement Notices disputes resulted in verbal negotiations in 30% of the cases and in Improvement Notices in only 25% of the disputes attended. Section 40(2) again raises its head, accounting for 19% of the

outcomes. As far as disputes over Work Cessation are concerned, 60% were dealt with by verbal negotiation, 13% by the s.40(2) strategy, and only 7% and 3% by Improvement Notices and Prohibition Notices respectively (Table 3.30).

(12) Investigation of the reasoning behind the adoption of enforcement strategies revealed a predictable pattern in which general safety record, general standard of machine guarding and the timeliness of positive employer response appeared to be key factors, along with factual statements with regard to breaches etc. and, in the post 1985 Act period, some degree of attention to the existence or otherwise of Health and Safety Representatives and Committees at the premises in question.

8.1.3. The Inspectorate in Transition

As a result of extensive interviewing and participant observation it was possible to construct a profile of the Inspectorate, its changing nature and functions during the transitional period (Chapter 4). The findings from this part of the research confirmed many of those contained in other parts of the Report and raised some new issues in their own right. The principal results are summarised below:

(1) Information

Ever since the nineteenth century revolution in social statistics made sound information the sine qua non of good governance, no department of government has ever been able to perform better than its information base will permit. And here, the unequivocal finding of this report is that the Department of Labour has been labouring under the most acute difficulties since 1985. From the old regime it inherited an information system appropriate, at best, to the 1940's or 1950's rather than to the penultimate decade of the 20th Century. Moreover, attempts to rectify this situation during the period covered by the project met with only very gradual success. Indeed, the introduction of the EIR and subsequently the INSPIRE computerised systems ran into difficulties which left the Department's information base suspect to the extent of allegedly substantial unreliability as late as March, 1989.

Having experienced the frustration associated with attempting to extract data from the old system, the research team has every sympathy with the Department's problems in this context. This said, however, the Department was also in some respects its own worst enemy. In introducing a computerised system of data recording, the Department should have been mindful of the likely reaction from its own field staff. This, we have concluded, it substantially was not. Thus, the more than slightly unnerving implications for staff long practised in more traditional methods of retaining

information, the potential for the new systems to be seen as 'deskilling', and their likely perception as devices for surveillance of Inspectors with their own long-standing sense of craft skill and professional discretion, seem to have been badly underestimated. Instead of starting with the Inspectors, and working with them to devise a system which they would see as a useful aid in the performance of their duties, as something which could enhance their skills, and as a system which was quite unashamedly introducing a perfectly justifiable element of accountability, it seems that the Department initially 'handed down' the new systems in a way which could only breed distrust and lack of cooperation. As seen in Chapter 4, the mistake played no small part in creating a major crisis of morale within the Department. Moreover, the infelicitous timing of another otherwise good idea, regionalisation, did not help since it entailed a relative loss of central control, direction and leadership just when it was most needed in this crucial context of information systems.

(2) Morale

As maintained in Chapter 4 of the Report, the research team does not resile from the claim that during the period covered by this research, a major crisis in morale emerged or was generated among the field staff (and some of the central staff) of the Department of Labour. In the same chapter, a number of reasons for this crisis were discussed at some length. These included:

: The perceived 'deskilling' and surveillance implications of the new information, data-driven systems already mentioned.

: The effects of regionalisation which to a substantial degree cut the umbilical cord between field staff and the centre from which the new vision and policies were emanating.

: The destruction of a familiar, comfortable and long-standing sense of vertical hierarchy.

: The effective 'diaspora' which overtook new staff, dispersing them to regions where they lost contact with one another, forfeited any sense of central direction, and, in the nature of things, were therefore vulnerable to the power of more conventional enforcement ideologies.

: The selection of staff lacking the trade/craft background of the older Inspectors.

: Discrimination in the Department of Labour's own equal opportunity oriented workplace against women and staff from ethnic minorities.

However strong the denials of a crisis of morale by senior departmental officials, the members of the research team who had most first-hand contact with the Department of Labour staff would be dishonest if they pretended to be persuaded by these denials. Indeed, to do so would be to engage in an act of betrayal of those who not only admitted to their own sense of involvement in such a crisis, but even pleaded with us to take the message back to Melbourne. The integrity of commitment to objective research does

not permit such betrayal. Involving both new and older staff, the depressed morale which we encountered in many instances was so acute that to claim a reversal of the situation in the period since, say the end of 1988, would be to claim a turn-around of conspicuous and almost unprecedented success. Doubtless such claims will be made; no less certainly, we will remain sceptical.

(3) Regionalisation

Although nearly everyone appeared to approve of this development in principle, problems arising out of its operationalisation were also almost universally perceived. In particular, and as already seen, just at the time when line control was most crucial in carrying personnel along in terms of new philosophies, modified roles and unfamiliar information systems, it appears substantially to have been lost. This not only had a profound and adverse effect upon morale, as already indicated, but also on the development and implementation of coordinated policy as devised by the central authorities. 'Ten separate Departments of Labour' was the kind of frequently used phrase to voice fears that different policies might be pursued in different parts of the state. It was even feared that prosecutions could founder on the grounds of regional inconsistency. Other perceived disadvantages stemming from regionalisation included the effects of opting for Regional Managers with management skills rather than necessarily with expertise in the area of Occupational Health and Safety. On the one hand, this bred resentment among at least some Inspectors; on the other, it left some of the policy makers with an uneasy feeling that the Managers were being 'captured' by the Inspectors, particularly those of the older generation. Thus regionalisation, timed and carried out in the way that it was, seems to have created considerable potential for dissension both in the Regions, themselves, and at the centre. Indeed, in the latter category, there was even talk in terms of 'territorial imperatives', and a feeling on the part of some that, through the existence of Regional Services as the policy conduit, the power of the Regions had even penetrated Head Office, itself. It was also noted in Chapter 4, however, that since the conclusion of the research, steps have apparently been taken to rectify the adverse effects of regionalisation which have been summarised here.

(4) The Pattern of Inspection

This part of the research also cast additional light on the statistical patterns outlined in Chapter 2. There, it will be recalled that, in particular, the post 1985 Act period saw an increase in factory accident files pertaining to smaller premises, but reduction in the production of non-accident files pertaining to such premises. Part of the explanation for this phenomenon may lie in the almost universal opinion expressed by Inspectors to the effect that they were now, not only doing fewer visits, but also paying much less routine attention to the smaller workplaces. Various explanations were offered for this, including shortage of resources, time spent on targetted programmes, the burden of new information systems and, most common of all, the amount of

time being taken up by Health and Safety Representatives in the larger unionised workplaces (see 4.4 above).

The possibility of smaller workplaces missing out in this way was discussed at some length. The family metaphor in relation to such premises was dismissed as inappropriate (4.4 above) and it was suggested that a plausible case could be advanced for expecting fewer Accident Compensation Commission claims for relatively minor injuries, e.g. soft tissue injuries, from such workplaces. More serious injuries would be less likely to escape the net, however, thereby possibly accounting for the anomaly of increased accident investigation at small factories, accompanied by the generation of fewer non-accident files. Some overseas evidence exists to support the contention that smaller workplaces may indeed be more dangerous as far as major injuries are concerned, while evidencing apparently lower accident rates in terms of more minor injuries. In general, concern was expressed that in the pursuit of a data-driven, economically effective system of inspection and investigation, the small workplaces in which the majority of Victorians are employed should not be neglected. It was also noted, however, that some officials were aware of this drawback to the data-driven approach, as they were to the fact that, being historically driven, it also does little by way of proactive direction in fields such as health and hazardous substances.

Finally in this context of inspection patterns, it should be noted that there is the question of all the non-factory premises covered by the 1985 Act. As seen in Chapter 2, these premises generated very few contacts indeed, and this finding was confirmed by the qualitative data in Chapter 4. It was emphasised, however, that this did not mean a complete lack of activity outside the factory sector. The public sector, in particular, seems to have been particularly assiduous in the matter of Provisional Improvement Notices, apparently making more demands upon the time of Inspectors than any other non-factory area of employment.

(5) <u>The Inspection Process in Transition</u>

Chapter 4.5 examined a number of changes which a very traditional Inspectorate, self-confident in its own professional way of doing things, had to confront in the years immediately after passage of the 1985 Act. The problem of morale has, of course, already been dealt with, but it should be said here that the spate of changes to be covered here cannot but have been somewhat unsettling, particularly for those who had been in post for a considerable time. This said, it is gratifying to report that Inspectors, on the whole, did not reject changes out of hand, responses to most of them being mixed to the point, at worst, of being ambivalent.

The response to having to deal with Health and Safety Representatives, to recognise their powers and to abandon a system based on managerial prerogative was of this kind. Initially, at best some of the Inspectors were slow to draw the Representatives into inspection processes, and certainly many were sceptical about their training and technical competence. There was also concern that they might bring industrial relations issues into the

occupational health and safety arena, a category conflation which for some extraordinary reason, many Inspectors still seem to regard as inappropriate. On the other hand, however, most Inspectors saw the Health and Safety Representative system as being crucial to the success of the legislation, but perceived the current deficiencies in that system as being one of the main current problems (i.e. not enough workplaces with Representatives and too much of their time being taken up by workplaces which did have Representatives). In the main too, the Inspectors seemed to be extremely sympathetic to the possibly invidious role occupied by the Representatives and even recognised that some might be subject to various forms of intimidation. This part of chapter 4.5 should, however, be read in conjunction with the views expressed by Health and Safety Representatives themselves, as outlined in Chapter 5.

Reactions to most other changes were similarly mixed. Hence some felt they had always played the role of adviser, some felt they could switch roles between adviser and Inspector quite easily, while other seemed to feel that it detracted from their enforcement capacity. So too with multi-skilling, another of the changes which had to be confronted. Some felt they already were multi-skilled to a sufficient degree, others that multi-skilling to the extent of knowing when to call in the expert was a good idea, and still others that it would detract from their established expertise. Many expressed concern about the need for training in areas with which they were unfamiliar. There was even some cynicism as to what might really lie behind the move to create a multi-skilled Inspectorate (see 4.5).

The move to a data driven system and the use of targetted programmes also received a mixed reaction, though few dismissed either out of hand. Similarly the increasing emphasis a risk management was a waste of time for some, while, more commonly we encountered uneasiness about the mixing of enforcement and consultative roles which such an approach might entail (see 4.5).

The biggest and most difficult change of all for the longer serving members of the Department, however, was the introduction of a regime which might challenge a culture of enforcement based primarily upon expertise in the area of machinery. As the statistics have shown, the Inspectors were very slow to move away from this traditional emphasis, and in Chpater 4.5 their uneasiness in this context was very apparent. In particular, lack of expertise in the field of health was of great concern, as was the prospect of taking enforcement action in areas where, unlike machine guarding, there were no specific regulations. In this respect, the infamous s.21, with its general duty of care, was an anathema to most since it potentially drew them into areas where they could not either fall back on regulations or feel confident about their own professional expertise.

(6) Enforcement in Transition

The qualitative data outlined in Chapter 4 also covered the various enforcement strategies open to Inspectors and their attitude towards their

utilisation. Under this heading, first of all, we included attendance at disputes over Provisional Improvement Notices and Work Cessations, and actions taken thereon. In the first of these contexts, while estimates varied, the vast majority of responses seemed to be that most Provisional Improvement Notices were justified, the action taken being to affirm them, though frequently with modification. The most commonly cited reason for the latter course of action was allowance of inadequate time for compliance in the original Notice (see 4.6). (It cannot be repeated too often that we have no official information about Provisional Improvement Notices which are not disputed).

The Inspectors who were interviewed confirmed the view that resort to Work Cessations was very rare. Again, most took the view that they were usually justified, while inevitably there were occasional suggestions of their use for industrial relations purposes.

Prohibition Notices appear to have presented few problems for the Inspectors, although they did not resort to them very often. Improvement Notices were, however, quite another matter. Use of these as the first line of enforcement response was hotly resisted, for a number of reasons outlined in Chapter 4.6. Spurious use of s.40 (2) of the 1985 Act was resorted to as an alternative, and after a protracted battle, some formal recognition to its deployment as an enforcement response was given. In the policy seminar held in 1988, we supported such a move in a limited way, not least for its capacity to restore some sense of discretionary skill to Inspectors, and we will return to this point in our recommendations.

Inspectors, traditionally, have not been quick to prosecute, and the data in Chapter 4 confirms that most of those to whom we spoke were no exception. A number did, however, express frustration that those cases which they did put up for prosecution were not getting past Regional Managers or an unduly cautious legal branch. Most of all, concern was expressed about the difficulty of prosecuting under s.21 with no back-up from regulations, a scenario in which Inspectors envisaged themselves in court confronted by experts as to practicability, or under cross examination as to the economic dimensions of that concept.

The issue of prosecution was dealt with at greater length in Chapter 6 which is summarised at 8.1.5 below. Here, however, we should record that a number of Inspectors expressed support for use of the Crimes Act and charges of manslaughter in particularly serious accident cases. In this they were taking one side in what has become something of a public controversy. While sympathising with the objectives of those involved, two of the research team have come to the conclusion that its proposal is self defeating and would further decriminalise occupational health and safety offences in general. Instead we have proposed a new offence under the 1985 Act, itself, that of causing death by violation of the Occupational Health & Safety Act. Alternatively, the Act itself should include an offence of industrial homicide. A paper outlining the arguments in this respect is attached as Appendix 2 (Carson & Johnstone, 1988).

8.1.4 Self-Regulation

Chapter 5 of the Report examined the operation of the 1985 Act from the vantage point of those at the workplace. A disappointing though possibly understandably poor response rate to a questionnaire sent to 900 employers, left us with results which were somewhat sparse, and any conclusions to be drawn about the view from that side of the fence have therefore to be treated with the very greatest caution. From the other side, however, a high response rate and an extensive program of interviewing permitted a very full picture to be painted of the activities and impressions of Health and Safety Representatives and union officials. Based on these data, and using interview and other employer data where appropriate, Cathy Henenberg took responsibility for writing an account of the view from the workplace. The main conclusions are set out below:

(1) Health and Safety Representatives were heavily concentrated in larger workplaces. This pattern was apparent in both the survey of Representatives and of employers, though the latter is subject to the caveats entered above. Interviews with a number of smaller employers confirmed that they mostly saw little need for the formal consultative and participative processes provided by the Act in their workplaces.

(2) With one or two exceptions, we have encountered no suggestions that Health and Safety Representatives have abused the powers given to them under the Act. If anything, the evidence suggests that Heath and Safety Representatives have in fact been reluctant to exercise their powers. The worst fears of the Act's original opponents have not therefore been confirmed.

(3) Only 11 of the Health and Safety Representatives surveyed during the course of the research said they had issued Provisional Improvement Notices, though this figure obviously increased dramatically with experience and time in office. Even so, less than a third of the more experienced Representatives had used this power. There were numerous reports of reluctance, diffidence and even fear on the part of Representatives in issuing such notices (see 5.2.1) because among other things it was seen as 'confrontationalist', and could lead to adverse consequences for the Representative.

(4) In contrast, 23% of Representatives claimed to have ordered a 'cease work' on one or more occasions, under s. 26(2) of the 1985 Act. Of the 'more experienced' Representatives, 50% claimed to have utilised this right (see Table 5.4). It is likely that these figures include 'black bans' rather than 'work cessations' under the 1985 Act, evidencing some confusion between action

taken under the Act, and long-established approaches to specific hazards. Once again, however, it should be noted that most Inspectors regarded the Work Cessations in which they were involved as being justified, and that even with the inflated figures due to confusion with bans, the dire consequences predicted by some during the debate over the Act have not eventuated. Some Union officials, it should also be noted, suggested that the Inspectors were not consistent in the manner in which they resolved disputes or relations to Work Cessation' orders.

(5) In relation to the other powers exercisable by Health and Safety Representatives under the 1985 Act, our findings can be summarised more briefly:

: Only 20% of Representatives interviewed had utilised the right to accompany an Inspector during the Inspector's visit to the workplace, although 58% of the 'more experienced' group of representatives had exercised the right (see Table 5.5). Some Representatives suggested that Inspectors had not automatically contacted the Representatives when entering the workplace, as required under the Act, and there were strong indications that Inspectors were experiencing difficulty in adjusting to a regime which did not accord the same degree of salience to managerial prerogative.

: Just over 36% of Representatives made use of the right to request information from their employers pertaining to occupational health and safety issues (75% of the 'more experienced' Representatives - see Table 5.6). Many Representatives suggested that the response of employers was far from satisfactory, perhaps an indication, once again, that the Act's encroachment into traditional areas of managerial prerogative was not all that welcome or easily achieved.

: Neither the right to be present at an interview between an employer and employee, nor between an Inspector and an employee were extensively used; among even our more experienced respondents only 46% and 37% had experienced these rights respectively (Tables 5.8 and 5.9). The right to call for outside assistance was more commonly used, however, 18% of the less experienced and 67% of the more experienced representatives having used it (Table 5.10). More specifically, and probably reflecting some confusion as to what constitutes 'outside help', 31% of Representatives had sought help from their Trade Union and 15% from the Department of Labour (Tables 5.11 and 5.12). The latter figure sits rather strangely alongside the data contained in Chapter 4, where it was suggested that a great deal of Inspectors' time was being taken up by Health and Safety Representatives. Notably, however, 50% of the more experienced group had called in the Department, a finding which bodes ill for hopes that as time goes on and experience increases the volume of demand upon the Department of Labour's time will decrease. Union back-up was also reported to be sometimes difficult to come by and generally on the wane because of other industrial relations preoccupations.

: Finding the time to perform the role of Health and Safety Representative was reported to be difficult (5.2.8). Not surprisingly therefore, a substantial proportion of both inexperienced and more experienced Representatives had utilised the right to time off with pay, 49% and 87% respectively (Table 5.13). With reference to time off for training, recourse to the rights enshrined in the Act was even higher, coming to 84% and 100% for the two groups in question. Interestingly, 100% of non-union group had also exercised this right (Table 5.14). By and large, no difficulties in exercising these rights had been encountered. Inevitably, some Representatives encountered difficulty in obtaining adequate facilities for the performance of their roles, but on the whole, they do not appear to have been reticent about demanding their rights in this respect.

: The right to inspect the workplace was widely exercised and appears to have posed few problems. One of the cases where problems did arise exemplified another issue which recurred throughout the Report, namely, management difficulties in accepting intrusion into what has traditionally been the terrain of their prerogative (5.2.9).

: Health and Safety Representatives engaged extensively in the negotiation procedures envisaged under the 1985 Act (Table 5.17). Further training in negotiating skills was, interestingly enough, raised by a large percentage of a small follow-up sample of Representatives. The implication, once again, is non confrontational. Language and literacy problems cropped up as important issues. The dominance of the Anglophone among Representatives and management could well severely compromise the empowering potentialities of the Act vis à vis other ethnic groups, and even within the Anglophone group problems of literacy were noted (5.2.10). Another problem associated with negotiation is the not uncommonly reported tendency for issues to be diverted into Health and Safety Committees where they drag on for long periods.

(6) Not unexpectedly, the accounts given by Health and Safety Representatives of the degree of support received from the Inspectorate diverged somewhat from the Inspector's own account which, it will be recalled, showed them to be aware of and sensitive to the problems faced by the Representatives (See 4.5 above). Praise for assistance in the matter of Designated Work Groups was universal, but the response to the Department's support in other areas was much more varied. Inconsistency was claimed to have reduced confidence, and more generally, there was grave disquiet about the Inspectors' handling of disputes, particularly those pertaining to Provisional Improvement Notices. The tendency to advise, arbitrate and negotiate rather than to back up Representatives by playing the enforcement card (eg by issuing Notices) more forcefully, was noted by many respondents. Misgivings about the greater emphasis on the Inspectors' advisory role under the new system were not uncommon, while the lack of any prosecutions for failure to comply with Provisional Improvement Notices stands out as an almost

symbolic representation of lack of support for the part being played by Health and Safety Representatives in the workplace. In general, the Inspectorate was seen to have resiled somewhat from its enforcement role (5.2.11).

(7) Again not surprisingly, reports of the stress involved in the role of Health and Safety Representative were not uncommon. Included among the factors cited as being conducive to such stress were, a feeling of being 'fobbed off' by management, a lack of knowledge and training on the part of supervisors [illegible] to appreciate the importance of the Occupational Health and Safety issue at the very top levels of management, the inevitable concerns about managerial prerogative and, perhaps more than anything else, the way in which management was frequently inclined to use the Representative as a surrogate means of 'policing' the workforce. Taken together, these factors may play no small part in what we were told was a high rate of turn-over among Representatives.

(8) On the issue of Health and Safety Committees over 70% of our respondent Representatives reported the existence of such a committee at their workplace. Some 38% of these Committees had been established at the request of Representatives under the 1985 Act. Bearing in mind the qualifications surrounding the response rate to the employer questionnaire, and not least the plausible hypothesis that those most favourably disposed towards current Occupational Health and Safety developments would comprise the majority of respondents, it is interesting to note that only 32% had Committees in place at the time of the survey. Reverting to a familiar theme of this Report, it was also the case that both the Representative and Employer surveys showed such Committees to be heavily concentrated in the larger workplaces (Tables 5.18 and 5.19).

(9) This size differential was further reflected in the more detailed employer responses, the vast majority of them expressing a positive view on the role of such Committees. But while some 27% of the smaller employers shared this view in principle, most of them saw such a system as being inappropriate for their particular premises.

(10) While questionnaire responses to a question about the value of Health and Safety Committees were overwhelmingly positive, interview data nonetheless raised some doubts about such Committees in practice. In particular, they were seen by several respondents as a means of diverting issues away from processes which could eventuate in Provisional Improvement Notices, as a way, deliberate or otherwise, of procrastinating and as bureaucratic structures which all too easily got 'bogged down' in day to day issues rather than dealing with major policy questions. Lack of involvement of anyone from the management side with power to take financially consequential decisions was singled out as a frequent defect, while it was also pointed out that 50% of the membership of such committees being Health and Safety Representatives still did not detract from the fact that the 50% were still working within the framework of power relations pertaining to the workplace. In some cases this allegedly meant undue management control of things like agendas; in others it could entail worker representatives experiencing feelings ranging from intimidation to flattery. Considerable self-confidence was required to 'lay

down the law' in these circumstances, something which, impressionistically, we found came more easily to women Representatives than to men.

8.1.5 Prosecution and the Courts

Chapter 6 of the Report set out, first of all, data on the above subjects derived from the main body of the project, itself. Prosecution was shown to be a very minor part of the enforcement response in relation to contraventions committed by sampled premises. Only 46 prosecutions emanated from 237 factory accidents involving contraventions: non-accident factory files produced only 6 prosecutions; only one non-factory contact file involved court action, while none of our non-file contacts, factory or otherwise, generated this enforcement response. Not a single case of prosecution for failure to comply with an Improvement Notice, Prohibition Notice or, significantly, a Provisional Improvement Notice was thrown up by our sample of 3,290 factory premises, 1000 non-factory premises, and of retrievable documents pertaining to non-file contacts in four Regions. This result should be interpreted, moreover, within the context of Ministerial Guidelines specifying all three situations as ones in which prosecution, as a general rule, would take place. Details of prosecutions taken against premises included in our various samples are given in 6.1, above.

Because of the sparseness of our data with regard to prosecution, especially in the post-Act period, a more detailed analysis was undertaken by Richard Johnstone as part of his Ph.D programme. The main, though preliminary results of his study are summarised below.

(1) The prosecution of occupational health and safety offenders in the courts has been infrequently resorted to by the inspectorate since 1885. The level of fines imposed by the Magistracy prior to the ISHWA was consistently low.

(2) An analysis of prosecutions taken under ISHWA and the OHSA (see Table 6.5) shows how the Inspectorate has conducted most of its prosecutions under the machinery guarding provisions (74%) and many prosecutions under other provisions have also been concerned with dangerous machinery. While the number of prosecutions conducted by the Department rose in the first half of the decade, this momentum was not maintained with the advent of the

OHSA, and there was a decline in the number of prosecutions conducted in 1987 and 1988 (see Table 6.6). Most prosecutions (80%) were initiated as a result of an 'accident', but very few were the result of a fatality (an average of one prosecution each year). Most cases (over 60%) prosecuted were concerned with amputations or lacerations to the fingers and hands of workers. Most defendants (75%) were represented by legal counsel during prosecutions. Interestingly, defences to the 410 prosecutions brought under ISHWA and OHSA up until the end of 1988 were conducted by 248 different people (barristers, solicitors or defendants in person). The data suggest that just over half of the pleas entered by defendants were guilty pleas or 'formal pleas' of not guilty, but with assurances that the charges would not be contested. It is likely that this understates the position, as in many cases the prosecutor did not distinguish between a 'not guilty' plea, and a 'formal plea' of 'not guilty'.

(3) Chapter 6 of the Report looks at some of the types of prosecutions brought by the Department, and highlights some of the problem areas that have arisen. Prosecutions under the machinery guarding provisions, the employer's general duty, and the general duty imposed upon manufacturers, designers etc have, on notable occasions, been met with the defence that the injured worker was careless or disobedient, and therefore that the defendant was not liable for the alleged offence. While the case law surrounding the machinery guarding provisions makes it clear that such a defence should not succeed, the courts have not been prepared to apply the same reasoning to prosecutions under the general duty provisions (see Chugg v Pacific Dunlop and Barnes v Fortuna Cabinets; both discussed in 6.4.2). As noted in 6.4.3. the legislation itself allows the court, in prosecutions under the manufacturers' etc duty, to consider whether the equipment etc was 'properly used'.

(4) The two Supreme Court decisions in the Chugg v Pacific Dunlop saga have restricted the operation of s.21 of the OHSA. The first decision indicated that the rule against duplicity (i.e. that every information be for one offence only) required the prosecutor to specify which one of a number of possible offences under s.21 was being prosecuted, and prohibited more than one offence being prosecuted in any one information. The second decision held that the onus of proving 'practicability' under the Act lay with the prosecution, and not with the defendant.

(5) The use of prosecutions for failure to comply with Notices issued under the 1985 Act has been underutilized, largely because of misconceptions relating to the elements of the offence (see s.6.4.4). There have been no prosecutions explicitly related to failure to comply with a Provisional Improvement Notice.

(6) When interviewed, Magistrates indicated that they did not regard persons convicted under the occupational health and safety legislation as 'criminals'. They preferred to see the jurisdiction as 'quasi criminal'; principally because they considered that in many offences employers had not been negligent or there was an absence of mens rea. In short, many Magistrates had difficulty

in seeing contraventions of strict liability legislation as being normal 'criminal' offences. Most consider employers to be highly responsible members of society Some also have difficulty in switching to occupational health and safety prosecutions which differ, in many respects, from the prosecutions that they hear most of the time.

(7) It is clear that the courts take into account in their sentencing, factors which they cannot take into account in determining whether an offence has been committed. While the courts have, over time, developed the law relating, in particular, to the machinery guarding provisions, and have begun looking at the other offences in the legislation, the courts, and Parliament, have provided very little guidance as to sentencing. Legislation has merely set out the maximum and in a few cases, the minimum penalties, and the power to place defendants on 'good behaviour bonds.' Indeed the courts have only set out one very vague principle, namely that it is a 'rare' case that would result in the courts placing defendants upon a 'good behaviour bond', particularly where there has been a severe injury to the employee. Consequently, while the court cannot, in determining whether charges had been made out under the machinery guarding provision, take into account that alleged 'carelessness' or 'disobedience' of the injured worker, the fact that an Inspector had allegedly 'passed' the accident machine before the accident, the fact that the guarding on the accident machine had conformed to the standards common in the industry, even if unsafe, and the fact that there had been no previous 'accidents' on the defendant's premises, the court can, when it comes to sentencing, take into account all these factors, and any other factors raised by the defendant. The courts have made full use of this broad discretion.

(8) In 20% of cases under ISHWA and OHSA up until the end of 1988, even though the charges were found to be proved by the prosecution, Magistrates found that a 'good behaviour bond' was appropriate. When prosecutions under OHSA are considered, this figure rose to 40%, suggesting that 'rare' cases were becoming more frequent (!), and that far from increasing the penalties under the Act, the increase in the maximum penalty may actually have led Magistrates to record fewer convictions and impose fewer fines.

(9) Where a conviction was actually recorded, Table 6.8 shows that the actual fine imposed by the court was very low. The average fine imposed under ISHWA peaked at $426 in 1985, around 22% of the maximum fine. Although the size of fines increased under OHSA, when expressed as a percentage of the maximum possible fine, they more than halved.

(10) Defendants raise, in mitigation of penalty, a wide variety of matters, most of which have no relevance to the issue of whether they are guilty of the alleged offence. The Department's major problem here is to ensure the veracity of these sentencing factors. A number of the prosecutions observed during the course of the research were notable for the manner in which the defendant

was able to make a virtue out of positive factors for which it may not have been responsible (such as the existence of Health and Safety Representatives or a Committee at the defendant's workplace), to present negative factors in a positive light (the existence of multiple requirements imposed by the Inspectorate being evidence of a 'guarding programme') and to assert mitigating factors which had no factual basis (a good 'safety record', a good 'safety attitude', and 'good co-operation' with the Inspectorate in the past). In most of these cases the Department's prosecution procedure has not yielded the information to counter these assertions, while in other cases the Prosecutor, for various reasons, has not been able to challenge these factors.

(11) Given the broad sentencing discretion given to the magistracy, Magistrates' views about occupational health and safety and the 'culpability' of employers for work hazards, are extremely important. Cases like the Simsmetal prosecution (see 6.7.1 of this Report) illustrate the way in which the courts tend to see industrial injuries, diseases and deaths as often being the result of bad luck or coincidences, rather than as a result of deficient Occupational Health and Safety procedures.

(12) Interviews with Magistrates revealed that most Magistrates had substantially the same approach to their sentencing function. They considered all the circumstances of the case, but most did not have any particular philosophy of sentencing. Generally they were guided by the maximum penalty set down by Parliament, which showed the penalty for a very bad case. Many Magistrates admitted that the infrequency of Occupational Health and Safety prosecutions made sentencing difficult because it made it difficult for the courts to develop sentencing standards. Most Magistrates suggested that for a 'run of the mill' offence they would be looking to impose a fine of about half the maximum penalty. The average penalties imposed for Occupational Health and Safety offences (see Table 6.8), as we have seen are well under half of the maximum, which suggests that either Magistrates had difficulty in establishing a standard, or else other factors are at play.

(13) According to most magistrates, important factors in sentencing were the defendant's degree of 'irresponsibility', the 'seriousness' of the offence, the defendant's safety record, and whether or not the injured worker had been 'careless' or 'disobedient'. The courts have tended to focus, in the sentencing process, on the circumstances of the 'accident' giving rise to the prosecution, which has diverted them away from the employer's contravention of the legislation and has focussed their attention on the nature of the injury or disease, and the behaviour of the injured person, factors which are marginal to the actual offence, which is essentially creating or failing to remove, a hazardous situation. The narrow, linear, individualistic, approach of the courts to issues of 'accident causation' invariably results in magistrates and judges taking a relatively benign view of the offence, and imposing low penalties. Magistrates tend, also to focus on the 'foreseability'

of the accident, or on whether the accident was a 'one off thing', rather than on the nature of the defendant's occupational health and safety performance.

8.1.6 The Industrial Relations Commission

The Industrial Relations Commission of Victoria has numerous appellate functions under the OHSA, particularly in relation to appeals against Improvement and Prohibition notices issued by Inspectors. This jurisdiction was vested in the Commission for reasons of practicability, rather than principle (see chapter 7.1.3). Dr W.B. Creighton undertook the task of studying the operation of the Commission's function in relation to OHSA, and his findings are summarised below.

(1) During the period under review the Commission dealt with a total of 36 cases under the OHSA. Of these, 22 dealt with appeals against the issue of Improvement Notices, 10 with appeals against Prohibition Notices, two with disputed entitlements under s.26(6), one to an assistant for a Health and Safety Representative, and one to the disqualification of a Health and Safety Representative (see Table 7.1).

(2) Most of the Improvement Notices subject to appeal dealt with the guarding of machinery, followed by dust extraction or ventilation. In only 4 cases were Improvement Notices cancelled on their merits (see Table 7.2 for the outcomes of appeals against Improvement Notices), and in each case the Department itself clearly believed the Notice should not have been issued. Most of the appeals were resolved by negotiations between the parties, with consequent orders being made by the Commission.

(3) All but one of the appeals against Prohibition Notices were resolved by negotiation between the appellant and the Department, with consequent orders by the Commission. In the one case that proceeded to a full hearing, there was a successful application for interim relief, and the notice was eventually affirmed.

(4) Of the two proceedings taken in relation to employers' attempts to withhold wages from employees after a direction to cease work under s.26(2) of the 1985 Act, one resulted in the Commission in Court Session affirming the determination of a single Commissioner that wages be paid for the period of the stoppage, and in one the employer conceded the union's claim without the matter proceeding to a full hearing.

(5) Issues relating to representation (legal or otherwise) do not appear to have given rise to any very serious problems during the period under review.

Initially the Department tried to prevent Health and Safety Representatives who had issued Provisional Improvement Notices which had initiated proceedings giving rise to an appeal against an Improvement Notice from appearing before the Commission. There later appeared to be a welcome change in policy to allow such appearances.

(6) In relation to the onus of proof in matters coming before the Commission under OHSA, the practice of the Commission and of the Department during the period under review has been confusing and no clear principle has emerged.

(7) While the processing of most cases before the Commission could not be described as 'fast', it appears that this was partly due to factors largely outside the control of the Commission, and partly to the needs and wishes of the parties themselves.

8.2 Main Conclusions and Recommendations

8.2.1 Information

Conclusion (1) Throughout the research and the consequent Report, it has been apparent time and time again that the Department of Labour has experienced chronic and extreme problems in relation to the collection, collation and retention of data about its own activities and the behaviour of the employers for whom it carries enforcement responsibility. To a substantial degree, it would seem, the Department was its own worst enemy in this context, because it singularly failed to carry its own field staff along with it in the process of change to a new, possibly unnerving, ostensibly not very helpful and potentially threatening system. An internal document 'Overview of OHS Systems', dated August 1989, sets out the steps being currently taken by the Department to remedy this situation. What obviously remains unclear, however, is the extent to which these steps are proving successful.

Recommendation (1) As a matter of urgency, the Department's computerised information system should be brought up to an acceptable and credible level of reliability. In achieving this, it is crucial that the Department should involve its field staff in order to allay justifiable suspicions about the system, to make the system operationally useful from their point of view, and to explain openly that it does involve a justifiable element of accountability and reduced discretion. Many other recommendations, including those for a Graduated Enforcement Response and for improvements to the Department's input to the

sentencing process, hinge crucially on this recommendation being implemented.

8.2.2 Patterns Of Contact

Conclusion (1) Quantitative data showed that the rate of file generation for factory premises had dropped fairly dramatically in the wake of the Act, particularly in relation to investigated accidents. This decrease may be offset by the use of Improvement Notices which would not entail the opening of a file. Evidence set out in Chapters 4 and 5 suggests, however, that there may have been considerable reluctance about the use of such Notices during the period covered by the Act. Another offsetting factor may be the effects of targetted, non-file generating programmes of inspection arising out of a risk-management approach.

Recommendation (1) The Department must ensure that the information system established under 8.2.1, above, is able to record the nature and outcome of contacts which would formerly have generated files but may no longer do so.

Conclusion (2) Both qualitative and quantitative data revealed a decrease in contact with smaller factory premises (2.1.1 and 4.4), though the proportion of accident files generated by such premises actually increased after the Act. The main reasons adduced for this development were the amount of time being spent with Health and Safety Representatives at the larger workplaces, on entering data with new computerised systems, and an emphasis on larger workplaces resulting from risk-management strategies. The Report therefore concluded that there was a real risk that self-regulation would not work for the larger premises and that, in consequence, the large majority of people who work in smaller workplaces might receive even less protection from the law than they did before passage of the Act (4.4).

Recommendation (2) The Department should review its priority setting procedures in order to ensure that adequate routine coverage of smaller workplaces is maintained. This may entail putting in place special programmes designed to run in parallel with those generated by Accident Compensation Commission data.

Conclusion (3) Non-factory premises generated very few contact files, and coupled with qualitative data contained in Chapter 4, this led to the conclusion that, although performance in this respect is improving, the intention to extend

effective coverage to all Victorian workplaces has not been conspicuously fulfilled.

Recommendation (3) As a matter of urgency, the Department should review its policy in the light of this conclusion, and in particular it should identify and remove the obstacles which currently constrain Inspectors in relation to non-factory workplaces. Such steps would include training to counter the Inspectorate's tendency to be preoccupied with machinery guarding, the production of relevant regulations and codes, and encouragement of a more confident and assertive approach to use of s.21 of the Act.

8.2.3 Enforcement Processes

Conclusion (1) Whatever the enforcement setting, the Inspectorate has leant very heavily upon enforcement strategies which stop far short of the institution of legal proceedings. In the period before the 1985 Act, the picture was very much one of responses comprising little that went beyond sanctions such as verbal or written requirements or, at most, warnings. In the post-Act period, prosecution continued to be substantially eschewed, and while Improvement Notices and Prohibition Notices made some appearance, they came nowhere near to constituting 'generally speaking the principal instruments to be used by the Department for securing compliance', as laid down in the 1985 Ministerial Guidelines (Tables 3.7, 3.17, 3.18 and 3.21).

Recommendation (1) While the traditional pattern is to be expected in the pre-Act period, the pattern exhibited in the post-Act period is not. It is therefore recommended that, in order to meet the intentions of the Legislature, the Department should institute a 'Graduated Enforcement Response' which would both restore some elements of professional discretion to Inspectors, and at the same time, make the Inspectors accountable for their use of that discretion. It would also implement Ministerial Guidelines by creating an operational presumption of prosecution in specified circumstances, instead of leaving the law to remain the somewhat self-evident sham that it has been since legislative intervention in this aspect of workplace conditions first took place. Since we regard the introduction of this system as being so crucial to the successful implementation of the 1985 Act, it is set out here in some detail, rather than being included as an appendix to the Report.

A Graduated Enforcement Response to Violation of Occupational Health and Safety Legislation in Victoria

(A) Provisional Improvement Notices

The first line of enforcement in the Occupational Health and Safety field should be the Provisional Improvement Notice issued by a duly appointed Health and Safety Representative. The Provisional Improvement Notice (PIN) should be completed in triplicate, one copy going to the employer, one to the Department and one being retained by the Health and Safety Representative. The issuing of a PIN should be recorded on the Department's INSPIRE system, along with the date specified for compliance. The PIN should include a tear-off section, to be held by the Health and Safety Representative, and returned to the Department indicating compliance or non-compliance by the due date. Where an expired and non-complied with PIN is either indicated by INSPIRE or by written notification from a Health and Safety Representative, the issue should be automatically triggered to the Prosecution Branch outlined under (E), below, the presumption being that prosecution will follow. Unless a system along these lines is put in place, the Victorian workforce and, more specifically, the Health and Safety Representatives will be entitled to feel that the 1985 Act has been nothing less than an act of governmental deception underpinned by other, and principally economic motives.

(B) Section 40(2)

Inspectors should be permitted, as we understand they now have been, to make use of s.40(2) of the Act as their first-line response to contravention.

Such Notices should only be used where formal and effective consultative arrangements, established under the Act, are in operation, and where the Inspector is satisfied that these arrangements are likely to lead to satisfactory completion of the matters in question. Conversely, such Notices should not be used where such arrangements do not exist, even if the judgment of the Inspector is that the employer has a record of adequately and promptly rectifying deficiencies. The purpose here is to encourage establishment of the self-regulatory procedures envisaged by the framers of the Act. Such Notices should also not be used in a series of particular circumstances such as may be specified from time to time by the Department of Labour.

The Notice given to employers and Representatives under s.40(2) should incorporate a tear-off portion for confirmation of compliance to the Department. Such confirmation should be signed by the employer and countersigned by the Representative.

The issuance of a 's.40(2) Notice' should be entered on the INSPIRE system, together with the date specified for completion. Expiry of the completion date without receipt of the completion confirmation referred to above, should automatically trigger a follow-up visit via INSPIRE.

Confirmation of non-completion in the course of a follow-up visit triggered under the procedure outlined should automatically result in the issuing of an Improvement Notice, with its different enforcement connotations (see C below).

Where non completion leading to an Improvement Notice has taken place, an Inspector should not again make use of a 's.40(2) Notice' in connection with the same workplace within a period to be determined by the Department.

The 's.40(2) Notice' is a much less cumbersome device than the Improvement Notice, approximating more closely to the old system of 'requirements' under the procedures followed prior to 1985. Many Inspectors acknowledge difficulty in conceiving use of the Improvement Notice as their primary response to most and often multiple things found wrong. Adoption of the 's.40(2) Notice' would recognise this difficulty. It would also identify the implementation process at this level as clearly administrative. The use of a time-limit for completion need not lead to confusion with Improvement Notices since failure to complete the matters referred to in a 's.40(2) Notice' would not, in itself, constitute an offence under the 1985 Act.

The 's.40(2) Notice' enhances the discretion of Inspectors who, apart from often finding the Improvement Notice cumbersome, feel that they know from experience which occupiers will readily cooperate and which will not. Thus the new Notice proposed should help to counteract the sense of de-skilling and bolster professional self- esteem.

The 's.40(2) Notice' permits the Inspectors to exercise their professional judgment, but it does not allow them to do so incorrectly and persistently. Where completion has not been confirmed by the specified date, the follow-up trigger provided through INSPIRE, along with automatic escalation to Improvement Notice, means that matters should not be allowed to drag on and on over a very protracted period. Moreover, while the Inspectors are allowed a much wider exercise of their professional judgment, they can and should be held accountable for how they use it.

The exclusion of workplaces lacking formal and effective consultative arrangements established under the 1985 Act from the proposed use of 's.40(2) Notices' is designed as an incentive towards adoption of the Act's procedures. In being compelled to issue an Improvement Notice, Inspectors should point out the provisions of section 29(12) of the 1985 Act, as well as the potentially much more serious consequences flowing from the strengthened Improvement Notice procedure under the system proposed here. It seems to us that encouragement of the adoption of Part IV of the Act at workplaces, particularly the smaller ones, is a matter of great importance.

(C) Improvement Notices

It is suggested that the Improvement Notice, including those emanating from uncompleted 's.40(2) Notices' and Provisional Improvement Notices affirmed under section 35(4), should mark a pronounced and palpable change in the gear of enforcement response, setting in train a process heading inexorably towards prosecution unless there is active intervention to check its progress. Apart from indicating rights of appeal etc., Inspectors should inform employers, at the point of

issuing such Notices, that such a process has now been set in train. More specifically, it should be explained that this Notice will now be entered into a computerised system which, unless a further entry indicating compliance is made before the specified expiry date, will automatically pass the matter into the hands of a Prosecution Branch with a view to prosecution.

Questions about the need to commence collection of court-relevant evidence at the stage of issuing an Improvement Notice should be clearly resolved without delay. Employers can, but rarely do, appeal against such Notices, and where such appeals are lodged they should then become the responsibility of the Prosecution Branch referred to above. The Branch can then request the Inspector to collect relevant evidence, the assumption being that in the event of an appeal, little is likely to have been done to remedy the relevant matter in the meantime.

It should be made clear to all parties, if it is not already clear, that where an Improvement Notice has been issued, no appeal has been lodged and compliance has not eventuated an offence against the Act has taken place. This would imply that even where the opinion of an Inspector under s.43(1) was in fact wrong, but there has been no appeal, the offence would still stand. Against claims that such an implication is unfair, it can be argued that the attentive employer would have exercised the right to appeal under s.46 of the 1985 Act.

(D) Prohibition Notices

Prohibition Notices should continue to be used in cases of immediate threat to the health and safety of any person. Apart from their extreme nature, such notices should not constitute part of a graduated enforcement response except in the rare instance where a situation formerly requiring improvement has deteriorated into one of immediate threat.

(E) Prosecution

Prosecution should, it is suggested, become the subject of a more robust approach on the part of the Department, such an approach to be signalled, among other things, by the creation of a Prosecution Branch. Test-cases and greater reconciliation to losing cases should be adopted as departmental policy. A more vigorous policy on prosecution should become the quid pro quo for the extension of consultative and advisory procedures, where the effectiveness of these has been exhausted. Requirements of equity across the criminal justice system as a whole necessitate this development. As proposed at 4.6, a new offence of causing death by violation of the Occupational Health and Safety Act, 1985, or of Industrial manslaughter should be created, with suitably severe penalties (see below).

* The advisory role favoured by the Department is enhanced, and the discretionary expertise of Inspectors is maximised.

* The creation of a Prosecution Branch to which issues are automatically passed in specified circumstances distances the Inspector from the more coercive side of enforcement, thereby reducing ambiguity. Concomitantly, however, in the circumstances specified, the presumption becomes that prosecution will follow: it would be for the employer etc to persuade the Branch that there are extenuating circumstances sufficient to warrant a prosecution not being taken.

  The composition of the Prosecution Branch is obviously for the Department of Labour to decide, but it should include a group of Inspectors with a strong record and requisite training in collecting evidence and instituting legal proceedings. While use would still be made of the field Inspectors for such tasks as the collection of evidence, they would now be acting as 'agents' of the Prosecution Branch rather than as Inspectors who have changed roles. Every effort should be made to give the Prosecution Branch sufficient staff to enable it to maintain a significant and visible field presence in its own right. Creation of such a Branch would ideally be funded from additional rather than redistributed resources. Whether the recently formed Central Investigation Unit fulfils this function we are unable to say.

8.2.4 The Inspectorate in Transition

Conclusion (1) For the reasons and in the ways outlined at 4.2, above, the Inspectorate was facing a grave crisis of morale during the period covered by the project. Whatever steps may have been taken to deal with this matter since November 1988, we do not believe that, especially given the reaction of senior management at that time, the problem will by any means have gone away.

Recommendation (1) The Department should acknowledge existence of this crisis instead of pretending that it is nothing more than an artefact of tall stories told to gullible researchers. More specifically, where not covered by other recommendations of this Report, the Department should institute positive programs to deal with the following matters:

- The sense of deskilling and worry about more overt surveillance among the older Inspectors.

- Providing support systems for new staff posted to Regions.

- The integration of new staff with different backgrounds from those with the more traditional trade/craft background.

- Reestablishment of central control and leadership while maintaining a regionalised system.

- Putting a firm and final end to discriminatory practices, particularly against women, within the Department of Labour, and instituting effective means for investigating allegations of harassment which, if true, have in the past amounted almost to criminal behaviour on at least one occassion.

Conclusion (2) The timing and mode of regionalisation had an adverse effect upon the Inspectorate, both in terms of morale and of loss of central control at a time when such control and leadership was most crucial.

Recommendation (2) Steps should be taken to ensure that despite the merits of regionalisation as a concept, central leadership and control are reestablished. Some internal reorganisation designed to effect this result has, we understand, already taken place, but procedures to ensure that momentum is maintained should be put in place

Conclusion (3)

See 8.2.2(2) above.

Recommendation (3)

Conclusion (4) Inspectors were faced with a series of profound changes in the philosophy and practice of the legislation which they enforced. It is questionable whether adequate steps were taken to familiarise, train and persuade the Inspectors in relation to a number of these changes.

Recommendation (4) Training programmes already instituted should be continued, and under newly reasserted central leadership further efforts should be made to familiarise Inspectors with the philosophy of the Act and the changed approaches which it requires. Particular attention needs to be paid to training with regard to the role of Health and Safety Representatives, to the purpose and value of new information systems, to multi-skilling and to the provision of basic expertise in areas other than machinery. The Department should recognise that it cannot make field-staff experts in all relevant fields, the target therefore being the inculcation of sufficient basic knowledge to enable Inspectors to know when to call for specialist assistance.

Conclusion (5) The Inspectorate was very slow to change its attitude to enforcement. The use of Notices met with considerable resistance and reluctance to prosecute remained a prominent feature of the overall response to contravention.

Recommendation (5) The Graduated Enforcement Response outlined at 8.2.3(1), above, should be implemented and the Inspectors adequately trained in its purposes and operation. It should be noted that the proposed system formally restores more discretion to Inspectors, makes the exercise of that discretion accountable, provides support for Representatives and introduces a more robust approach to Notices and to prosecution.

8.2.5 **Self-Regulation**

Conclusion (1) Health and Safety Representatives were heavily concntrated in larger workplaces, thereby creating the effect referred to at 8.2.1(2) above.

Recommendation (1) See 8.2.1(2) above.

Conclusion (2) We encountered very few accounts of Health and Safety Representatives having misused their powers under the Act for ulterior industrial relations motives.

Recommendation (2) The Department should take steps through its various publications to publicise the falsity of this common myth.

Conclusion (3) Representatives on the whole have used their various powers responsibly and sometimes even sparingly. But they found their role time-consuming, and did not agree that adequate support was forthcoming form the Inspectorate. Support in the matter of Provisional Improvement Notices was particularly singled out in this report, the lack of any prosecution for failure to comply with such a notice being emphasised. It should be noted that this conclusion is different from that which would be drawn from the evidence addressed in Chapter 4.

Recommendation (3) The Graduated Enforcement Response recommended at 8.2.3(1), above, would gurrantee support in the matter of Provisional Improvement Notices. With reference to support in general, the Inspectorate may note that its own view is not necessarily shared by all Health and Safety Representatives.

Conclusion (4) Health and Safety Representatives who were followed up emphasised the need for further training, particularly in negotiating skills. At other parts of the Report (eg. Chap 4) technical deficiencies and lack of provision in Provisional Improvement Notices of adequate time for compliance were noted, the training implication arising again.

Recommendation (4) The current question about further training for Health and Safety Representatives should be answered in the affirmative, and provision for such training instituted forthwith.

Conclusion (5) Representatives found their role stressful, and cited lack of knowledge and understanding of the Act on the part of management and supervisors as one of the main sources of their frustration.

Recommendation (5) Considerations should be given to the provision of mandatory training through courses approved by the Commission for managers and supervisors.

Conclusion (6) Another reported source of stress on the part of Representatives was the feeling that they were being used as 'surrogate police' by employers.

Recommendation (6) In training programmes for both Representatives and management it should be strongly emphasised that this is not part of the Representative's role.

Conclusion (7) While both employers and Representatives responded positively to questionnaire enquiries about Health and Safety Committees, severe reservations about their operation in practice were expressed. In particular, Health and Safety Representatives and union officials saw such Committees as being used to divert issues away from other negotiation and enforcement procedures, or even as a means of procrastination.

Recommendation (7) In training programmes, both for Representatives and Management, it should be stressed that Health and Safety Committees are not intended to be used as the mechanism for resolution of day to day health and safety issues, but for consideration of longer term policy matters.

8.2.6 Prosecution and the Courts

Conclusion (1) The discussion of the two Chugg v Pacific Dunlop decisions in 6.5.2 highlighted a number of problems with

s.21 of the OHSA as interpreted by the Supreme Court. The first problem arose out of the issues of duplicity raised by Fullagar J's decision in 1987 in the first case before the Supreme Court. While it is arguable that the decision is wrong, it is unlikely that the courts will reconsider the issue in the near future. As indicated in 6.5.2, the consequence of the decision is effectively to turn s.21 into at least five discrete offences, and possibly more.

Recommendation (1) This should be remedied by a simple legislative amendment. The opening words of s.21(2) could be altered to ensure that it is clear that s.21(2) merely provides 'examples' of the way in which s.21(1) may be contravened and that there may be a single contravention by a combination of the 'examples' in s.21(2).

Conclusion (2) In the second Chugg decision the Full Supreme Court held that the onus of proving 'practicability' in s.21(1) lies with the prosecution. This onus should be reversed.

Recommendation (2) Where 'practicability' is an element in an offence, as it is in s.21(1), an amendment is also required to place the burden of proving 'practicability' on the defendant, along the lines of the New South Wales Occupational Health and Safety Act 1983 (see also s.40 of the British Health and Safety at Work Act 1974, which gave statutory approval to a rule established in civil actions arising under earlier safety legislation[1]). Once the prosecution had proved the basic elements of the offence, the onus of proving that it was not practicable to comply would fall on the defendant. This amendment would recognise the reality that in many cases, despite the extensive powers given to Inspectors in ss. 39 and 40 of the OHSA, the defendant employer has virtually exclusive access to evidence about the 'practicability' of measures to remove workplace hazards.

Conclusion (3) The earlier discussion of Herless Pty. Ltd. v Barnes in 6.5.3 illustrated the limitations in the phrase 'when properly used', which qualifies all the duties of designers, manufacturers, importers, suppliers, installers etc., under s.24 of the OHSA. Section 24(4) further defines the proper use of the concept by providing that '... any plant or substance is not to be regarded as properly used where it is used without regard to any relevant information or advice that is available relating to its use.' Section 24 as a consequence falls far short of providing employees with the appropriate level of protection against the risk of injury and disease in

consequence of the defective design or manufacture of plant or substances which are provided for use at the workplace. The concept of 'when properly used' seems to exclude from the scope of s.24 situations where even quite foreseeable worker error has contributed to the creation of the work hazard, and also suggests that the plant or substance must be actually used before there is a breach of the section[2].

Recommendation (3) Section 24 should, therefore, be reformed so as to remove this restrictive concept of 'when properly used.' The retention of the concept of practicability in s.24 will ensure that the duties imposed on designers, manufactures etc is not too onerous or unjust.

Conclusion (4) As indicated in 6.5.6., the informant cannot appeal to the Country Court against a decision of a Magistrate under the OHSA. The only avenue available to the informant is to have the Magistrate's decision reviewed for an error in law by the Supreme Court. As a consequence a decision of a Magistrate which is wrong on the facts, or the imposition by a Magistrate of a penalty that is too lenient, cannot be challenged by the informant in the County Court.

Recommendation (4) This unsatisfactory position should be rectified, so that the prosecution can appeal against inadequate penalties. This will in itself invariably lead to an upward drift in the penalties imposed, as judges in the County Court, in the two cases they have heard to date, have indicated that they will impose tougher penalties than hitherto imposed by Magistrates. In addition, some of the cases that have been dismissed by Magistrates (see, for example, 6.5.2), could have been appealed to the County Court. By backing up its Inspectors with appeals to the County Court in appropriate cases, the Department of Labour would be improving the morale of Inspectors who prosecute unsuccessful cases in the Magistrates' Court. It is important to note that, as discussed in 6.3 and 6.5.6, most of the appeals to the Industrial Appeals Court and the Industrial Relations Commission under the previous occupational health and safety provisions were brought by the informant. Appeals to the County Court would, therefore, be an important supervisory constraint on the decisions of Magistrates under the legislation.

Conclusion (5) The OHSA gives Magistrates a huge discretion in imposing sentences (see 6.5.1). Not only is there an unlimited discretion in the size of the fine up to maximum penalty, but the court may in all cases decide to adjourn proceedings without convicting the defendant

and may place the defendant on a 'good behaviour bond'. As the interviews with Magistrates and the observation of cases has indicated, Magistrates take into account in sentencing a huge range of factors, most of which are expressly excluded from the decision as to whether the defendant has committed the offence in the first place. The consequence, as the sentencing statistics in Table 6.5 and 6.8 show, is that the Magistrates' Courts often resort to adjournment of charges without conviction, and when they do fine a defendant, the fine is often very small when expressed as a percentage of the maximum.

A Bill before the Victorian Parliament during 1989 which sought to increase penalties to a considerable degree,[3] would have been an important step forward. It attempted to raise the maximum penalty for the four serious offences to $250,000 for a corporation, and $50,000 for an individual. Individuals or corporations with prior convictions under the Act were to face additional fines of from $10,000 to $50,000 and $50,000 to $250,000 respectively, in addition to the fine which is appropriate to the offence. In all other offences the maximum penalty would be $40,000 for a corporation, and $10,000 for an individual. Apart from the penalties for the serious offences, it may be that even these penalties are not a sufficient deterrent to large corporations, unless the courts make an effort to impose higher penalties. In addition, the courts can still adjourn any of these offences without conviction and place the defendant on a 'good behaviour bond'.

Recommendation (5) The only way in which the occupational health and safety legislation is going to serve as a deterrent to employers is if the courts impose higher penalties, and if they resist the temptation to put defendants on 'good behaviour bonds.' To this end we recommend that the sentencing discretion of the courts be severely limited, so that the courts are not able to impose low fines upon defendants who have huge resources, and who have committed serious offences. In jurisdictions overseas there has been a strong move to limiting the discretion courts can exercise in imposing sentences[4]. There are a number of ways of reducing the discretion of the courts.

One way would be for the appellate courts, particularly the Victorian Supreme Court, to use the occasion of reviewing sentences under the OHSA to spell out principles of sentencing for occupational health and safety offenders. Unfortunately, Australian courts have

shown a great reluctance to interfere with the sentences imposed by the lower courts unless faced with manifest injustice, and have been reticent about laying down principles of general application.

A better approach, we suggest, is the use of statutory regulation to control sentencing discretion. The current Victorian occupational health and safety legislation says too little about sentencing, confining its provisions to the maximum and minimum penalties. Parliament could set out guidelines for the sentencing of offenders against the occupational health and safety legislation. The courts would then only be able to impose fines in accordance with the guidelines. We suggest an approach similar to the 'presumptive sentencing' or 'guideline sentencing' schemes adopted in some jurisdictions[5]. Each type of offence under the Act should be broken down into several categories of differing gravity, each with a different 'penalty' which is related to the seriousness of the offence. The prosecutor, or the defendant, should be required to give the court details of the defendant's resources, in the form of recent balance sheets and income statements, so that the court can take into account the resources of the defendant. The court should also be supplied with evidence of the defendant's previous criminal record in relation to occupational health and safety, and any other related offences (particularly to do with environmental protection legislation or industrial relations legislation.) Evidence should also be given of (i) the industrial injuries and diseases suffered by the defendant's employees in the recent past, (ii) evidence of the defendant's compliance with requirements placed on it by the occupational health and safety Inspectorate in the recent past, (iii) the severity of the disease or injury suffered, or the potential disease or injury that might have been suffered, as a result of the contravention, and (iv) the resources devoted by the defendant to improving workplace health and safety in the recent past. All these factors can be combined onto a carefully constructed 'grid which would then specify a sentencing range which gave the court a discretion of about 5% of the maximum penalty in imposing the final penalty. The guidelines should specify that certain factors can <u>not</u> be taken into account in determining the final sentence. The most important factor would be the alleged 'carelessness' or 'disobedience' of the diseased or injured worker, unless the disobedience was wilful in the sense of being in conscious defiance of the employer's occupational health and safety policy and procedures.

A court would have to give exceptional reasons for deviating from the grid, and such a decision would be subject to appeal to a higher court.

Such a grid would not be easy to draw up, and would need to be done by a committee comprising Department of Labour officials, representatives of the judiciary, and other persons with appropriate expertise.

The advantages of this approach are that it would give consistency to the sentencing of occupational health and safety offenders, it would ensure that sentences were based only upon appropriate factors and reflected a coherent policy of occupational health and safety, and would be based on the capacity to pay off the defendant. Its major disadvantages are that it may be difficult, but far from impossible, to work out the appropriate formulae for the grid, and may be resisted by judicial officers and public servants with a very simplistic view of the independence of the judiciary or of workplace illness and injuries. It would also involve the Department in greater preparation for each prosecution, although most of the data required is fairly easy to obtain from the corporate affairs office (income statements and balance sheets) or from the Workcare data bases (the incidence of illness and injury at work). It would require Inspectors to keep accurate and reliable records of workplace visits and employers' compliance with notices and other requirements (see 8.2.1).

Conclusion (6) The revenue from fines which are imposed upon offenders against the occupational health and safety legislation at present are paid into central revenue as are all other fines in Victoria.

Recommendation (6) In our view, it is desirable that these funds be poured back into occupational health and safety in Victoria. Not only will this give added incentive to Magistrates and judges to impose penalties on employers, but it will also increase the resources available to the Department to devote to reducing the incidence of work-related illness and injury in Victoria. The revenue from fines can be used to bolster the ranks of the Inspectorate, to employ outside consultants to go into workplaces with a bad record of workplace injury and disease and to require them to carry out occupational health and safety programs at their own expense, to devote resources to training the Inspectorate, to provide subsidies for the design of healthy and safe plant, equipment and substances, and to provide resources for occupational

health and safety research, better record keeping, and for publicity and public education.

Conclusion (7) There are two issues involved in the question of who should hear prosecutions under the occupational health and safety legislation. The first is the level within the court hierarchy at which prosecutions should be conducted, and the second is whether, within that level, there should be a special industrial court, or specially trained Magistrates or Judges.

In many senses, the debate about who should hear prosecutions is undercut if the recommendation to develop a sentencing grid is adopted. If the courts are given a restricted discretion in sentencing, the dangers of having Magistrates or Judges with a weak grasp of the principles of occupational health and safety are reduced.

Recommendation (7) (i) Nevertheless, if it is accepted that one of the greatest problems in the use of prosecution for occupational health and safety offence is that Magistrates, and the general community, do not consider occupational health and safety offences as 'real crime', one factor which might change public attitudes is a clear indication from Parliament that these are serious 'crimes'. A step in the right direction may be to take occupational health and safety prosecutions out of the Magistrates' Courts (which historically have dealt with 'petty' crime) and have them run in the County Court. This would place a larger burden on the Prosecutors, but the fact that the Prosecutors are under-resourced tends to reflect the lack of seriousness with which governments view factory crime.

(7) (ii) The other option is to have special Industrial Magistrates or Judges who are trained in occupational health and safety and industrial relations matters, and who have a specialist knowledge in industrial law. Chapter 6.4 shows how the 410 occupational health and safety prosecutions over the past six years have been heard by approximately eighty Magistrates, which gives Magistrates very little opportunity to come to grips with the issues posed by the legislation. One way of countering the problem of the court's inexperience in dealing with the legislation is for the magistracy, or County Court, to assign occupational health and safety prosecutions to a small number of 'specialist' Magistrates or Judges, without the need to formally create a specialist industrial magistracy or division of the County Court. In many respects this would be a

more sensible approach because it does not require legislation and can be implemented simply by negotiation with the relevant court administration. The disadvantage of the approach is that occupational health and safety matters are only heard by a narrow band of Magistrates or Judges, who are then able to exercise a huge personal influence over the future direction of occupational health and safety in Victoria. The success of the venture would then depend entirely on the quality of the persons selected to perform the specialist roles.

Conclusion (8) 6.4 indicated that, at least up until the end of 1988, most occupational health and safety prosecutions focused on machinery guarding. Consequently, prosecution as an enforcement mechanism has been under-utilised in relation to other kinds of occupational health and safety issues, and the non-machinery guarding principles in the legislation have not been properly developed.

Recommendation (8) In order to develop the legal principles in the legislation, the Department will have to conduct more 'test cases'. These will have to be carefully chosen, so that the right cases are used when the courts are asked to consider legislative provisions that are not easy to interpret.

Two kinds of test cases can be used. The first involves bringing prosecutions in areas where the Department has not been heavily active in the past, so that the range of experience of the Inspectors and Prosecutors is broadened. This would basically involve more prosecutions outside the area of machinery guarding. These are 'test cases' in the sense of easing the Inspectorate into new areas of prosecutorial activity so that new skills can be developed. They are also 'test cases' in that they are trying to ascertain how the courts are likely to react to different types of prosecutions, so that new procedures can be developed. During 1989 the Department initiated several important such test cases, particularly the Dandenong Pools and Bonlac prosecutions. These initiatives are to be commended.

The other type of 'test case' is the case that is taken to the Supreme Court for review on a question of law. The only case where this has been done has been Chugg v Pacific Dunlop. There have been other opportunities that have been missed, and which could have yielded a better result for the Department. One example was Barnes v T. & D. Fortuna Cabinets Pty. Ltd. which was discussed in chapter 6.5.2. That case

raised important issues as to the scope of s.21 of the OHSA and did so in a context where the foreseeability of the risk was not a major issue, unlike the second Pacific Dunlop case.

The 'test case' approach involves the Department devoting resources to the clarification of the legislation, but is important to achieve the objective of giving the inspectorate the confidence in the provisions of the legislation. The Department needs to assure Inspectors and Prosecutors that legislative changes will be made where the courts inhibit the development of the legislation as intended by Parliament.

Conclusion (9) As discussed above, (see chapters 3, 4 and 6.4) enforcement activity has been skewed towards machinery hazards, at the expense of other workplace hazards. In order to better protect the workforce the Department will need to broaden its enforcement activity.

Recommendation (9) More emphasis should be placed on the use of s.24 of the OHSA to put pressure on manufacturers, designers, importers etc. of plant, equipment and substances to produce healthy and safe products. This is an important aspect of the Robens schema and involves dealing with many workplace hazards on a structural level, and close to source.

Conclusion (10) Another important aspect of prosecution policy relates to the framing of charges in the alternative (see 6.4) with a view to one of the charges being withdrawn upon conviction or during pre-trial negotiations.

Recommendation (10) Where the prosecution is for failure to comply with an Improvement, Provisional Improvement or Prohibition Notice, and an alternative charge relates to the hazard that gave rise to the Notice (see 6.4), that latter charge should be withdrawn, so that the conviction can be recorded for the failure to comply with the Notice. The notice system depends for its effectiveness on employers being made aware that they are a step away from prosecution, and that prosecution is an inevitable result of a failure to comply with the terms of the Notice. The more prosecutions that are recorded under these povisions, the more awareness there will be of the seriousness of notices. This point will be strengthened if there is adequate publicity of such prosecutions.

Conclusion (11) A much debated issue in Victoria in recent months has been the issue of whether charges should, in appropriate cases, be laid against employers for

manslaughter, rather than under the provisions of the OHSA. While it is not clear, under the law as it now stands, whether a corporation can be prosecuted for manslaughter, the better view would appear to be that such an action is possible, because s.5 of the Crimes Act 1958 permits a judge to impose a fine on a person convicted of manslaughter, so that a prosecution of a corporation for manslaughter would not be defeated by the argument that a corporation cannot be imprisoned. There are conceptual difficulties with prosecuting a corporation for manslaughter. As manslaughter is not a crime of strict liability, and requires proof of mens rea, it must be shown that the offence arose out of the acts or omissions of the senior officers of the company, whose mental state and actions are then ascribed to the company. A company can only act through the mind and will of those who form its central core or brain. To succeed in a prosecution for manslaughter, criminal negligence will have to be proved against a manager acting on the company's behalf, and there may be doubts whether the safety officer, or supervisor in charge of the relevant work area, will be a 'manager' in this correct legal sense. Another problem is that the standard of negligence required to prove manslaughter by gross recklessness is significantly higher than the standard required to succeed with charges under s.21(1) of the OHSA. A prosecution for manslaughter will focus the attention of the court on the deaths of the employees concerned, and will involve long and complex evidence.

Recommendation (11) These technicalities aside, there are strong policy reasons for not using manslaughter provisions to prosecute employers responsible for industrial deaths. The use of such provisions would seriously undermine the criminality of the OHSA, as it would suggest that the magistracy and the public are correct in not regarding occupational health and safety offences as 'really criminal', because when a serious 'crime' is committed, involving gross negligence, it is prosecuted under the 'criminal law', rather than under the OHSA. (See the 'Dupes of Hazard' paper in the Appendix to this report.) One solution to this debate would be to amend the OHSA so that it includes an offence of causing death through violation of the Act itself, or an offence of Industrial Manslaughter.

Conclusion (12) The experiences of the Prosecutors in a number of the observed cases tended to suggest that Inspectors were not aware of the need to get thorough evidence of the offence and of the possible ways of remedying it. In

many instances the informant Inspector failed to follow up adequately on answers given by company representatives in the interviews for the Breach Report. This often had serious consequences during the prosecution, and invariably led to a low penalty if there was a conviction. The investigation of an offence under the Act and the preparation of evidence for prosecution in court are not easy tasks, and with the advent of more complex offences, such as those under s.21(1) of the Act, Inspectors will need specialist training, investigation and in giving evidence in court. This is particularly so if more prosecutions are going to be taken in the County Court.

Recommendation (12) For this reason we have recommended (see 8.2.3) the formation of a prosecution branch staffed by a group of Inspectors skilled in investigation, and committed to a prosecution as a method of enforcement. This prosecution branch would also be staffed by lawyers who are committed to the aims of the legislation and who are skilled in the preparation of evidence and cross examination. These lawyers should be involved in the collection of evidence for prosecution at the earliest stages.

Conclusion (13) The staff entrusted withthe prosecution of offenders under the legislation will need to be supported by information gathering procedures that enable them to challenge assertions made by defendants in court as to the defendant's safety record, their co-operation with the Inspectorate in the past, their compliance with previous notices and requirements, and the resources they have devoted to occupational health and safety in the past. These are all matters that are commonly raised by defendants in the sentencing stage of a prosecution, and invariably go uncontested because the prosecutor has not been briefed with the relevant information.

Recommendation (13) Informant Inspectors as a matter of routine should ensure that they go to court armed with details of all previous injuries or industrial diseases which had occurred at the defendant's premises, a clear record of all visits within the previous five years and of the defendant's response to notices or requirements issued by the inspector and so on. This will involve the Department changing its record keeping to get all files relating to a particular employer together and easily accessible to informant inspectors.

Conclusion (14) Even if all these recommendations are carried out, and there are more diverse and a greater number of

prosecutions, all resulting in higher fines, the role of the OHSA as a general deterrent will be lost if there is not adequate publicity of successful prosecutions. In recent times the media has given excellent coverage to the 'spectacular' incidents such as the Simsmetal prosecution, and the Dandenong Pools cases. There has not been much media attention given to other cases. While all publicity is important, the danger of this selective publicity is that it gives the impression that prosecutions are only conducted for 'disasters', reinforcing the notion that it is only in rare and exceptional cases that employers fall foul of the Act.

Recommendation (14) Accordingly, the Department should do all it can to publicise the results of prosecutions in the Courts, particularly where a high fine has been imposed on a defendant.

8.2.7 Orders Made by the Industrial Relations Commission

Conclusion (1) In chapter 7 it was concluded that the decision to invest the Industrial Relations Commission of Victoria with a review and appellate function under the OHSA has been fully vindicated (see 7.4).

An issue raised in that chapter (see 7.2.2) pertained to the approach to be taken by the Commission where there is compliance with a Notice, or a negotiated settlement of an appeal against a Notice. Here the preferred approach should be to ask the Commission to confirm the Notice where there has been compliance, and then to give the appellant leave to withdraw the appeal. Where there has been a negotiated settlement, the preferred approach should be to ask the Commission to affirm the Notice with or without modifications, if at all possible, and then give leave to withdraw the appeal. Only if it is absolutely necessary should the order be to cancel the Notice.

Recommendation (1) Where, during the course of an appeal against a Notice, the matter has been resolved by the appellant's compliance or by a negotiated settlement, the Department should, wherever possible, ask the Commission to affirm (with modifications, if necessary) the Notice and give the appellant leave to withdraw the appeal.

Conclusion (2) Wherever there is an appeal against an Improvement Notice which originated as a Provisional Improvement Notice issued by a Health and Safety Representative,

the Department's policy should be to support applications before the Commission by Health and Safety Representatives to intervene in the proceedings (see 7.3.1).

Recommendation (2) The Department should support applications by Health and Safety Representatives to intervene in appeals against Improvement Notices which originated as a Provisional Improvement Notice.

Conclusion (3) In 7.3.2 it was suggested that the Commission has not fully developed an approach to the issue of who has the onus of proof in its relation to its appellate or review functions under the OHSA. The Department should argue before the Commission that the appropriate legal principle that should govern such proceedings is that it is for the appellant to establish that the decision under appeal is erroneous or should be reversed. Only in exceptional circumstances should there be a departure from this fundamental principle.

Recommendation (3) Unless there are exceptional circumstances, the Department should insist that, in proceedings before the Commission under the OHSA, the onus of proof should be on the party initiating the appeal, review or application.

Conclusion (4) In 7.3.3 there was evidence that the procedure of the Commission was sometimes not as 'fast' as it could be, and that this was usually in line with the needs and demands of the parties. If the Department considers that the Commission's procedures err on the side of tardiness when exercising its functions under the OHSA, it should urge the Commission, during the programming of cases, to hear matters as expeditiously as possible.

Recommendation (4) Wherever necessary, the Department should urge the Commission to exercise its functions under the Act as expeditiously as possible.

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Department of Labour, 1989b Annual Report 1988/89, Melbourne, Department of Labour.

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ENDNOTES

1. Nimmo v Alexander Cowan & Sons [1967] 3 A11 ER 187.

2. See Creighton, W.B., Understanding Occupational Health and Safety Law in Victoria (CCH, Melbourne, 1986) para. 649.

3. Occupational Health and Safety (Miscellaneous Amendment) Bill 1989.

4. See Fox, R.G., "Controlling Sentencers" (1987) 20 ANZJ Criminology 218-9.

5. Ibid 233-241.

APPENDIX ONE

The Political Economy Of Legislative Change: Making Sense Of Victoria's New Occupational Health And Safety Legislation[1]

Kit Carson And Cathy Henenberg

INTRODUCTION

In mid-1985, taking advantage of a brief political weather window of opportunity provided by a fleeting majority position in the Legislative Council, the Victorian Labor government enacted the Occupational Health and Safety Act, 1985. Modelled largely though not exclusively upon the Robens type approach adopted in the United Kingdom just over a decade earlier, this enactment had been delayed for nearly two years by conservative and employer opposition to some of its more innovative features.[2] Even in the watered down form in which it was rushed through, however, it remains the most progressive legislation of its kind in Australia. Among other things, the Act established a tripartite Occupational Health and Safety Commission s.7, provided for the election of health and safety representatives at the workplace s.30, and gave trade unions, where present, the key role in the nomination and electoral processes involved s.30. The elected representatives were given a wide range of powers including those of inspecting the workplace, accompanying inspectors and accessing information held by the employer about actual or potential hazards s.31. Crucial and most contentious was the decision to give them the additional power to issue provisional improvement notices s.33 and, where faced with immediate threat to the health and safety of any person, to order cessation of work s.26. For their part, employers were subjected to a general duty of care s.21, and were required to establish health and safety committees at the request of the representatives

s.37. Inspectors were empowered to issue improvement and prohibition notices s.43 and 44, and were required to perform various adjudicative roles, particularly in relation to disputes over provisional improvement notices and work cessations s.35 and 26.

In this paper we wish to commence, albeit in fairly speculative fashion, the task of 'making sense' of this legislation. By this we do not mean that we intend to unpack its contents or examine its operation in any technical legal sense - the first of these tasks has already been undertaken anyway by one of our colleagues (Creighton, 1986). Rather, our concern here is to make broader sense of the Act by linking its enactment and import to the wider social structures, processes and developments within which it is embedded. We wish to ask how it intersects with the broad sweep of historical movement, what C. Wright Mills called 'the big ups and downs' of society (1959:3) and with the way in which that totality is constituted, reproduced and, not least, possibly changed. In this paper, to use our preferred terminology, we wish to locate this legislation, its genesis, potentialities and constraints within a broad framework of political economy.

In order to undertake this task we shall begin with a discussion of what might be termed the traditional hegemonic ideology of occupational health and safety, the way in which, historically, certain ways of perceiving and responding to issues of health and safety at the workplace came to be taken as 'natural' and to be the subject of acquiescence. Against this background, we will go on to touch on some of the institutional and structural factors behind the developments which led both to a possible loosening of this hegemonic grip and to passage of the Occupational Health and Safety Act with its rather different assumptions, perceptions and approaches. Finally, the potential of the Act, and of the systems put in place for its implementation, to effect real changes in our approach to occupational health and safety will be discussed briefly, in the light of some constraints which have become discernible since its inception.

THE HEGEMONIC IDEOLOGY OF OCCUPATIONAL HEALTH AND SAFETY

That the connection between health and safety at the workplace and notions of hegemony has not been very extensively addressed in the literature on the latter subject is, at least at first sight, somewhat surprising. After all, the conditions under which labour is performed must surely be one of the most vulnerable points in what Gramsci himself saw as the always incomplete and unstable nature of hegemonic processes (Jessop, 1982:148). The relative centrality of work to human experience and the potentially egregious demonstration of stark domination or exploitation represented by occupational health and safety issues cannot but have rendered them one of the most likely locations in which fatigue fractures or pressure cracks could have appeared in the fragile edifice of consent. That such breaks have not occurred on any substantial scale is due in no small measure, we believe, to the important ideological role played by occupational health and safety legislation over the past century and a half - at first in the United Kingdom and subsequently here in Australia. Sociologists in turn, and perhaps not quite so surprisingly after all, appear to have taken their cues largely from this efficacious ideological work, their relative neglect of the hegemonic connotations of the occupational health and safety question reflecting its substantially successful marginalisation in the arena of political, economic and ideological conflict itself.

Stated very briefly, what used to be called 'factory legislation' appears to have accomplished two crucial and related things: it signalled an ideological separation of occupational health and safety issues from the war-torn terrain of industrial relations, and it achieved this not insubstantial feat by indicating that these matters were now the business of the state. Even if the business in question was only ever half-heartedly taken on and was certainly less than enthusiastically conducted, the clear legislative message was that

these issues need no longer be canvassed as ones of conflictual class relations or of class domination. To be sure, it is important to acknowledge that the organised labour movement may never have been completely taken in, but there is no doubt that the ideological thrust of historical development was away from viewing the prevention of occupational health and safety hazards as central to industrial relations. The state could be and frequently was criticised for the inadequacy of its attention, but even such indictment of deficient practice conceded and underlined a responsibility assumed.

The significance of factory legislation and of the pattern of its implementation in the above respect has been explored at considerable length by one of us elsewhere (Carson, 1985). An additional point warranting emphasis here, however, is that such crucial ideological effects are not just accomplished on a once and for all historical basis by formal enunciation through law, symbolically powerful as such enunciations and their attendant corpus of 'legislative knowledge' may be. Rather, or in addition, it must be recognised that the constant reproduction of such important ideological representations and distinctions as natural, timeless and to be acquiesced in, is a matter of continuing ideological work carried out through the actual practice of the institutions comprising state and civil society. Moreover, as Dow and Williams pointed out some years ago, with specific reference to the world of work, the activities involved 'are routinely practiced even by those whose "objective" interests would be better served by active opposition to ruling-class hegemony' (1980:2).

One aspect of such practice, ideological impact by default, as it were, was undoubtedly the long-sustained trade union preoccupation with issues other than occupational health and safety, or when the latter did become salient, the practice of negotiating monetary settlements within the framework of wage bargaining and compensation. In the context of wages, as the former head of the Australian Council of

Trade Unions - Victorian Trades Hall Council Occupational Health and Safety Unit observed before the present Act came into being, union policies of negotiating danger money and allowances offered little protection to members and little incentive to employers, while placing the unions in the position of 'accommodating to an existing hazardous technology without seeking to change it' (Mathews, 1985:191). In the same context, there was also probably more than a small element of the process whereby dangerous conditions are translated into the coinage of male readiness to meet them, and 'the brutality of the working situation is partially re-interpreted into a heroic exercise of manly confrontation with the task' (Willis, P. 1977:150). As far as compensation is concerned, one union official interviewed in the course of research related to this paper, described the not yet quite in the past attitude as often being one of occupational health and safety only becoming a priority 'when somebody gets killed or something', at which point, he asserted, 'they rush out of the bloody joint and they make a big noise ... and they say, well, compensation and all that ...' Overall, this side of the matter was summed up with characteristic frankness in 1983 by Eddie Micaleff (1985:205), former fitter and union health and safety officer who was elected to the Victorian State Parliament:

> It must be acknowledged that in the past the trade unions often seemed to place too much emphasis upon achieving satisfactory workers' compensation entitlements and upon securing penalty rates for working in hazardous conditions rather than upon preventing the occurrence of injury. Of course some unions did involve themselves in preventative issues .... but it is still true to say that unions have tended to leave prevention to the law, and to concentrate upon compensation and allowances.

The commodification of risk was, then, by no means a one-sided affair, though as some commentators point out, the unions may not have been able to perceive much alternative (Willis, E. 1988:6). Equally, the perpetuation of a hegemonic ideology which systematically distracted attention from the prevention of workplace hazards as a matter

of basically conflicting interests was not just some kind of plot conceived by capital and executed by the state. This said, however, it must also be recognised that the latter, and more specifically the inspectorates concerned with occupational health and safety, also played a crucial role. From the very outset in the United Kingdom, inspectorial practice had played a key part in drawing labour onto employer terrain with regard to the important issue of time, an issue about which there was certainly plenty of debate, but increasingly within categories laid out by capital and acquiesced in by labour (Thompson, 1967; Carson, 1980). As the second half of the nineteenth century wore on, however, the focus shifted increasingly to other questions such as health and safety at the workplace, and the practice of factory inspection came to contribute powerfully to the generation and reproduction of the aura of uneasy ideological hegemony surrounding this issue. Indeed, as two critics of some earlier work carried out by one of us put it, thereby hoisting themselves with their own petard so to speak, the nineteenth century English factory inspectors played a crucial part in creating 'a viable class society' (Bartrip and Fenn, 1979; Carson, 1979).

This is not the place in which to chart the details of the analogous processes in Australia following the first Victorian Act of 1873 and particularly in the wake of the Factories and Shops Act 1885 (Vic.), the statute which formed the basis of state response up to 1958, and in considerable measure right up to the 1980s.[3] As a by-product of research which involved familiarisation with the practice of inspections prior to the 1985 Act, however, it is possible to map out the broad contours of what was involved.

First and perhaps foremost, it must be stressed that in everyday practice, as in legislative principle, the very fact of visits of inspection, whatever their frequency and adequacy, served to maintain and reinforce the perception of regulatory responsibility assumed by the state. Moreover, a regulatory relationship which, on a day to day basis, was virtually exclusive to inspectors and management constantly underlined the 'natural'

fact that occupational health and safety was a matter for managerial prerogative on the one hand and for the state on the other. Thus, there was little in the practice of factory inspection to counter what one senior official of the Victorian Chamber of Manufactures saw in 1983, with regard to the question of responsibility, as a community attitude of 'they should do something' (Crompton, 1985:180). Conversely, there was nothing to foster any possible convergence between industrial relations and occupational health and safety when, as one official explained, 'the inspectorate at large, the old mode inspectorate, shied away from industrial relations type situations'.

This is not to say, of course, that the workforce had no place whatsoever in the pre-reform practice of the inspectors. All too often, however, the role alloted was one which only served to enhance further of the hegemonic ideology of occupational health and safety. In particular, the assiduous attention paid in accident investigations to the possible contribution of victims to their own injury helped to perpetuate the 'careless worker syndrome' as a central theme in that ideology. As Evan Willis has pointed out (1988:7), this in turn has other distracting effects:

> This hegemonic approach to occupational health and safety problems in the workplace can be summed up by the phrase "fix the worker not the workplace". Hazards in the workplace were defined as being the problem of the worker not of the process of production itself, and if remedial action was required it should be directed at the worker him or herself rather than the organization of production.

But what were 'they' in the collective form of the inspectorate actually doing in practice about violation of provisions designed to secure workplace health and safety in the period before 1985? Once again, the answer has an important bearing upon how certain ways of perceiving and responding to occupational health and safety issues were taken for granted and entrenched as natural. Thus, and despite what few would deny to have been widespread contravention[4], the inspectors only rarely prosecuted (Braithwaite

and Grabosky, 1985:15), resort to such steps being widely regarded as failure (Prior, 1985:54). Instead of seeing themselves as law-enforcement agents instigating legal proceedings, they preferred to occupy a somewhat ambiguous position which leant very heavily towards advisory strategies of gaining compliance, while keeping the role of enforcer in reserve for the particularly serious offence or the peculiarly intransigent offender. Paul Prior, former Permanent Head of the relevant Department explained the reasons for what he called 'the kid-glove style' as follows (Prior, 1985:56):

> The most compelling reason for adopting the soft approach is its time/cost effectiveness as compared with prosecution action. On the one hand the time taken to advise the employer is minimal even where a written notice of non-compliance is prepared .... On the other hand, a prosecution requires the preparation of a written "Breach Report", which is often quite long and detailed, and this has to be followed by interviews .... When the court day arrives, the inspector is absent from his district, usually for a substantial period .... The result of the prosecution is usually a minimum or token fine, but more importantly, a disgruntled and uncooperative employer ....

The idea that such a gentle approach to factory inspection is the most appropriate one has a long historical genealogy. The notion of inspectors as advisors rather than policemen, for example, can be traced back to at least 1876, when Alexander Redgrave, the United Kingdom Chief Inspector of Factories, explicitly endorsed the approach and opined that 'a prosecution should be the very last thing we should take up' (Thomas, 1948:41). In the present context, however, it is not the longevity of such ideas so much as the ideological effect of their continual and constant deployment in practice that is important. Thus we would argue that the Victorian inspectorate's always ready embrace of advice as its major modus operandi, coupled with its more than slightly ambivalent attitude to prosecution, continued the ideological processes which had begun over a century earlier on another continent. More specifically, it perpetuated the perception of most occupational health and safety violations as customary, conventional and not really to be regarded as criminal.[5] Toleration of contravention was institutionalised as something

normal; what was abnormal was the occasional treatment of contravention as illegality. As for crime, Mr Prior might have been less apparently ingenuous about the penalties imposed by the courts if he had realised that his own inspectorate was ideological heir to another one which, more than a century earlier, had already conceded that it was 'not unnatural that magistrates should have some difficulty in associating the idea of CRIME (sic)' with violation of this kind of legislation (Carson, 1980:165). The point here however is that the 'natural' disconnection of occupational health and safety crime from 'real' crime did not finish in the middle of the nineteenth century - its accomplishment has been a matter of continuing institutional practice right up to the present day.

In summary then, the argument of this section is that it is possible to identify a hegemonic ideology of occupational health and safety in the pre-reform era. Always tentative and never complete, this ideology nonetheless dominated perceptions of occupational health and safety issues, thereby structuring responses. Central to this ideology was the separation of the preventative sphere from that of industrial relations, a separation stemming from both legislative import and from the institutional practices of unions and the state. Concomitantly, the practice of inspection reinforced ideas of managerial prerogative and did little to displace the careless worker issue from its fairly central position in the commonsense discourse of occupational health and safety. Most signally, it also perpetuated the effective decriminalisation of occupational health and safety offences to the point where the idea of such violations as crime virtually vanished from public consciousness.

THE GENESIS OF LEGISLATIVE CHANGE

At one level, the Occupational Health and Safety Act of 1985 requires little explanation. Following publication of the Robens Report in 1972, there began a slow

process whereby a number of Australian states enacted legislation based to a greater or lesser degree on that United Kingdom model. South Australia took the first but very tentative steps in 1972, followed by Tasmania in 1977 and by New South Wales, with rather more vigour, in 1983. As far as Victoria was concerned, the Industrial Safety, Health and Welfare Act 1981 contained a number of Robens principles, but these were left largely unactivated (Creighton, 1986:9). The Act of 1985, in contrast, went much further and indeed even outstripped Robens and its related 1974 United Kingdom legislation in some respects, particularly with regard to the powers of health and safety representatives (Creighton, 1986:111).

Looked at like this, the 1985 Victorian Act might seem just to represent further progression in the penetration of the Robens philosophy into Australian occupational health and safety regimes, part of what various authors cover in sub-sections analysing or summarising 'the Robens Push' or 'Robens at Work in Australia' (Quinlan, 1988:57; Pearse and Refshauge, 1987:640). Assuming these developments to reflect something more than a kind of belated cultural cringe in the legislative sphere, however, several questions still remain to be addressed. Why, for example was the Robens model picked up in this era? Why does the Victorian legislation go as far as it does? Not least, and again assuming that the Act does constitute in some measure a fracture in the framework of hegemonic ideology described in the preceding section, why and how did this break occur?

Part of the answer to questions such as these indubitably lies at the level of political and ideological leadership. The election of a Labor Government in Victoria early in 1982 was certainly of great importance, as was the capacity of the more active unions and the left of the Victorian Australian Labour Party, both of which had espoused a robust Robens - type approach, to secure solid support in Cabinet with a Minister fully committed to the cause. Thus, when the Government, faced with opposition parties willing to exercise their

Legislative Council majority substantially in favour of employers, came to temporise with the Bill's opponents, it did so with a very important eye over its own constituent shoulder. As a result, the Act is replete with compromises which, while certainly surrendering ground, do not give all that much away. Section 30(3), for example, accords the right to all employees in a designated work group, rather than just union members as originally proposed, to stand for and vote for the position of health and safety representative. But a non-union employee in a unionised work group may only be nominated by a trade union; where there is even one union member, the union has the right to control the election process (Creighton, 1986:117). Similarly, after some dalliance with the ideas of falling back to a position proffering nothing more substantial than an individual right to stop work when faced with immediate threat, Government finally did accord the right of ordering work cessation to health and safety representatives, albeit after consultation s.26. In a peculiarly refined balancing act explained to us by one participant in the process, a rider of 'practicability' accompanied by criteria amounting to 'reasonable practicability' was inserted into the final Act because of employer pressure; but the word 'reasonable' was omitted for fear of appearing too willing to compromise.

One crucial feature of the backdrop to these developments was the continuing thread of labor movement interest and activism which had always managed to insert itself into the interstices left by the incompleteness of the ideological hegemony already described. Charted in broad outline by Pearse and Refschauge, this history attests to the fact that acquiescence was never total. As the same authors note, however, it was not until the mid-1970s that the issue of occupational health and safety really came onto the political agenda in any major way (1987:638). Thereafter, interest and activity grew fairly rapidly, with mounting union involvement and the establishment of various action groups. In 1979, the Australian Council of Trade Unions (ACTU) adopted a comprehensive occupational

health and safety policy, and the early 1980s saw a number of unions attempting to negotiate health and safety agreements with employers. In 1981, the Victorian Branch of the Australian Labor Party endorsed a policy in the area, and when the Party was elected to state office in the following year, it therefore already had a commitment and numbered a group of highly dedicated occupational health and safety activists in its ranks.

When one or two of the participants in the political processes leading up to the Act of 1985 were asked for their interpretation of these events, they experienced some difficulty in constructing a historical account that went beyond individual agency and ideologies. They appeared to have forgotten the old Marxist adage which, appropriately paraphrased and re-deployed, would counsel that while they may indeed have had a hand in the making of history, they had not done so entirely under circumstances of their own choosing. Equally, when dealing with shifts in hegemonic politics, whatever their direction, it is important to remember that analysis should not be restricted to questions of political and ideological leadership. In addition, it is crucial to lay bare at the broadest level of political economy the structural determinants, the unchosen circumstances so to speak, behind such shifts (Jessop et.al., 1985:92).

When attention switches to this plane, the first thing to become apparent is the extent to which the occupational health and safety developments of this era were tied in with wider economic issues. At its most obvious, the connection was clear, for example, when the then Victorian Minister for Employment and Training began a keynote address on occupational health and safety in 1985 by referring to an estimated national annual cost of workplace injury and disease of $6.5 billion (Crabbe, 1985:2). Just a few months earlier his Commonwealth counterpart had issued a Ministerial Statement in which he located that Government's plans for occupational health and safety within nothing other than 'overall economic policy' itself (Willis, R. 1985:90). Self-evidently, claiming a connection between

political approaches to this issue and the level of the economic is not just some sleight of hand born of economic reductionism.

Nor does the connection stop with such broad statements as these. If we turn to the economic strategy outlined for Victoria by the Treasurer in 1984, Victoria The Next Step (Economic Strategy, 1984, a and b), the more detailed links are spelled out very clearly indeed. The Government was concerned to increase the competitiveness of the State's trade exposed sector and to 'change the structure of the Victorian economy' (ibid, 1984b:5). This would require steps to promote exports and to strengthen Victorian producers relative to interstate and overseas imports. Recognising that many determinants of competitiveness lie outside State control (eg. at Commonwealth level or within the international market), the Government went on to isolate those factors it believed it could influence. And top of the list came operating costs such as the 'cost of employing and availability of labour, particularly the level of on-costs such as workers' compensation, payroll tax, leave loadings etc.' Similarly, workers' compensation and occupational health and safety explicitly headed the list of 'those factors that fall within the ambit of the Victorian Government's influence' (ibid:27-29).

Against this background it is not surprising that when the Government came to address the need to reform the workers' compensation system, the influence of broader economic considerations is clearly to be seen once again. More specifically, apart from the inherent deficiencies of the lump sum system which had prevailed up to that time, increasing workers' compensation premiums were seen as 'presently strangling Victorian business' (Economic Strategy, 1984c:11). Whole sections of the business sector were paying out at least 10 per cent of wages and salaries and, crucially, this included a large part of the trade exposed industry sector which the Government was so anxious to promote. Accordingly, reducing the cost of workplace accident compensation became a

'top priority' for Government (ibid), and a new scheme was put forward. Levies were to be imposed on employers according to bands of risk, with the maximum rate (apart from that for a few individual high risk industries) being set not at or above 10 per cent of wages and salaries, but at 4 per cent (ibid:5). As for the preventative side of occupational health and safety, it was to play its full part in the cost-cutting exercise through a premium penalty system and through the introduction of new occupational health and safety legislation (ibid:45). Overall, the minimum set of assumptions for the reformed system in which such legislation was to play a vital part was that 'the number of accidents or diseases generating claims per employee be 10 per cent lower at the end of ten years than at present' (ibid:5).

Viewed through the lens of Government's economic strategy, the attempt to identify some structural determinants behind Victoria's shifting occupational health and safety regime is not just some exercise in analytical star-gazing. As already indicated, however, another proximate factor in the emergence of the new legislation was a revival of interest in the preventative side of occupational health and safety, particularly among the trade unions, from the mid-1970s onwards. Once again this development warrants brief discussion in terms other than simply those of the undoubted presence of a number of dedicated and far-sighted individuals.

At least part of the key here would seem to lie in the complex history of wage-fixing in Australia. Initially, the profound and potentially adverse structural effects of the ending of the long post-war boom had been offset by successful demands for improvement in money wages (Pearse and Refschauge, 1987:638); but as the 1970s wore on, under the auspices of Australia's centralised wage-fixing system the space for securing increases in real wages began to close over, and unions began to look to other aspects of the social wage such as occupational health and safety as a means of securing improvement for their members. Under pressure from a campaign led by the Amalgamated Metal Workers

Union, the centralised system temporarily collapsed in 1981-2, only to be resurrected in 1983 as part of the so-called 'Accord' between the Commonwealth Government and the unions. Significantly, this agreement not only included understandings on such matters as wages and prices but also a commitment on the part of Government to occupational health and safety. One basic objective of what the Commonwealth Minister, Ralph Willis, termed 'the Prices and Incomes Accord' was to be 'the improvement of working conditions' (Willis, R. 1985:90):

> A national occupational health and safety strategy is, therefore, an essential component of the non-wage aspect of the Accord. At the heart of this commitment is the Governments' belief that all workers have the right to a safe and healthy working environment.

As far as occupational health and safety is concerned, the significance of these events is open to different interpretations. Some observers, for example, would probably cite union involvement in demands for increased attention to the preventative side of occupational health and safety as part of the evidence for a 'new unionism' moving beyond traditional concerns into the arenas of industrial policy and the social wage (Ewer et al., 1987). Others, more sceptical, would include changed union attitudes and the movement's subsequent 'incorporation' into national agreements as part of the more general history of corporatism. Leo Panitch, for example, includes 'progressive legislation' with regard to issues such as health and safety as reforms which 'constitute the new quid pro quo for wage restraint under resuscitated corporatist political structures' (1986:203). Some of the respondents interviewed in the course of the research to which this paper is partly related were more straightforwardly pragmatic. According to one union official, reflecting no doubt the frustration of a centralised wage-fixing system combined with a concerted assault on real wages, 'things were sort of quiet at that time, and we needed something to sort of put our hat on'. Another was even more expansive:

> ... during the late 70s where you had your central wage-fixing process, where unions didn't have to spend all their time dealing with wage negotiations and claims and all that sort of thing .... I think [it] primarily came about because of having the centralised wage fixation system and therefore having resources available for things other than wages and straight conditions at work ....

Whether we take Government strategy or union activism, then, it seems clear that there was more to passage of the 1985 Act than visionary leadership, important as that certainly was. It is important that this structural backdrop to the new legislation is recognised because, for one thing, it helps us to make sense of some of the directions subsequently taken by the new occupational health and safety regime in Victoria. Not only that, it is important because it provides some early indication as to just how widely framed a fully developed account of the enactment would need to be. Thus, for example, fleshing out the complex context surrounding the above summary of how the new legislation intersected with Government economic strategy would entail some understanding of the changing position of Australia and Victoria in a changing world economy. On a similar plane, and given the tripartite thrust of the legislation, we would have to ask whether, indeed, it does represent part of that shift to corporatism which writers such as Clegg were predicting at the beginning of the decade for late semi-peripheral capitalism in countries like Australia (Clegg, 1980). Concomitantly, the relevance of the legislation to attempts at restructuring the economy, particularly in the context of the cross-sectoral subsidisation effects of Workcare as the system replacing workers' compensation is called, would have to be teased out in much greater detail. So too would the changing face of trade unionism, the continuing role of the state in fostering profitable accumulation and, not least, the specific conjunction of political forces that emerged in Victoria during the first half of the present decade. Clearly, a fully fledged account of the passage of the Occupational

Health and Safety Act, 1985, would involve a major exercise in the study of political economy.

CHANGE AND CONSTRAINT

What potential for change in the hegemonic framework of occupational health and safety does implementation of the 1985 Act represent? Clearly, to begin with, the old idea of this sphere as one which is separate or almost hermetically sealed off from that of industrial relations is no longer so comfortably tenable. The trade unions are involved not only in the tripartite structure of the Victorian Occupational Health and Safety Commission but also, where present, in the new arrangements envisaged for the workplace itself. Thus, they may have a role in the determination of designated work groups s.29, as well as in the appointment and often subsequently the training of health and safety representatives. Attempts by employers to have representatives disqualified on a series of grounds specified in the Act are a matter for the Industrial Relations Commission s.36, as are appeals against improvement and prohibition notices s.46. Significantly too, a survey of health and safety representatives which we carried out in 1987 revealed that around 36% were also shop stewards or union delegates. Under section 32(1) of the Act, representatives may also seek the assistance of persons outside the workplace in order to perform their duties, a provision which obviously facilitates direct union back-up in terms of occupational health and safety expertise.

The 1985 Act thus appears to offer fairly substantial scope for breaking down what were always the potentially flimsy barriers between industrial relations and occupational health and safety. In addition to this, however, it also portends a fairly major assault on the received orthodoxy which would define occupational health and safety as a matter for state regulation, on the one hand, and managerial prerogative on the other. With regard

to the first, part of the whole thrust behind the legislation appears to have been the idea that many workplaces, particularly the large unionised ones, would become substantially self-regulating. Problems would be sorted out between employers and health and safety representatives, the state playing a largely adjudicative role or stepping in only as a last resort. As far as managerial prerogative goes, the Act not only allows for the participation of workers at various levels, but also to an extent purports to empower them. Thus, to take only some of the most celebrated examples already mentioned, health and safety representatives can issue provisional improvement notices and can order work cessation in cases of immediate danger s.33 and 26; employers must accede to their requests for establishment of a health and safety committee, with 50 per cent employee representation thereon s.37; there are rights to consultation about proposed changes at the workplace, to receive information pertaining to hazards and to accompany inspectors during inspection s.31. As for the old system of 'closed' inspectorate/management relationships, inspectors are now required to notify health and safety representatives when they enter premises and also to give them, as well as management, information with regard to observations made s.40. While not perhaps amounting to the 'direct challenge to managerial prerogatives' which Quinlan sees as the sine qua non of greater union activity (1980:38), the Act's provisions in this context do certainly nonetheless make some significant inroads.

In addition to the above implications for change stemming from the formal provisions of the Act itself, there are also some features of how the enactment has been implemented which mark another possible shift in the hegemonic ideology of occupational health and safety. Thus, for example, a concerted effort is being made to move away from the old somewhat scattergun approach of fairly haphazard, uneven and dilatory inspection. Given the nature of some of the economic forces underpinning the passage of the Act, it comes as no surprise to find that this shift is very much towards new implementation ideologies

such as risk management and data driven systems of inspection. 'Getting claims down' by advising on claims-management and by targetting particular high risk industries or premises has become an institutional goal of the Department in question. Associated with this change of emphasis has been a perceptible alteration with respect to recognition of the inspectors' advisory role. Historically 'smuggled' in under the guise of discretionary wisdom and efficient time-management, as we have seen, this role has become much more explicit. Although the change is not enshrined in the Act, itself, inspectors are now actively encouraged to think of themselves as advisors. That they should do so is entirely in accord with a broader conception of the Department of Labour as being in the business of service provision, an image which has been further operationalised through regionalisation of its activities virtually across the board.

What the wider, long-term significance of these operational changes will turn out to be is difficult to predict at such an early stage. When taken together, however, it is hard to see how they can have any effect other than to heighten the ambiguity of the position of the Department and its staff. With reference to the former, they may presage yet further movement away from the notion of contravention as law-breaking, the organisation being left to hover even more uneasily than before between the role of counselling service and law-enforcement agency. While the inspectors/advisors may attempt to resolve the personal dilemma in theory by insisting that there is no conflict between the two roles, it would not be surprising if, in practice, they attempted to resolve it by emphasising one at the expense of the other. Should this turn out to be the case, it would be even less surprising if they were to opt for the less confrontational approach with its concomitant effect upon how contravention comes to be perceived.

The possible changes touched upon thus far in this section should not be exaggerated. Nor, whatever the extent to which their potential is realised, are they all

necessarily for the better. By way of conclusion therefore, we will attempt to identify some of the factors limiting the realisation of potential change, whether for better of worse.

Turning first to the potential conflation of categories spanning the spheres of industrial relations and occupational health and safety, it should be said at the outset that some of the direr forecasts of industrial chaos have not been borne out - by fairly general agreement, Victoria has not been brought to a standstill by work cessations inspired by ulterior industrial relations motives but presented under occupational health and safety auspices. This said, however, it very much remains to be seen whether the more positive side of conflation, through the involvement, interest and back-up support of trade unions, will be sustained. Just as centralised wage-fixing and the Accord may formerly have freed them to place issues like occupational health and safety on their agenda for action, so more recent changes in that same realm may militate against a high level of continuing involvement. Thus, the introduction of a two-tier system requiring a partial return to direct bargaining over wage increases, not to mention issues such as superannuation, could well detract heavily from the continuation of enthusiastic union participation. At least one union official has reported, for example, that staff who were previously engaged heavily in occupational health and safety matters have now had to be substantially redeployed back to the more traditional scramble over wages and conditions. Nor should it be forgotten that union activity in the occupational health and safety area depends fairly heavily on government funding for such things as the appointment of health and safety officers and, of course, for the provision of training programs for health and safety representatives. Hence, pressures stemming from the political pre-occupation with fiscal crisis since the Act's passage in 1985 could also exact a heavy toll. As Stilwell has observed on a broader front, 'the point remains that the tendency towards fiscal crisis constitutes a significant

check on more progressive interpretations of the Accord which involve increases in expenditures on the social wage' (1986:120).

These observations alert us to the fact that just as analysis of the push for new legislation must be couched in terms of a broad framework of political economy, so some of the major constraints upon realisation of the Act's full potential for change must also be located at this same level. In addition to the considerations already mentioned, however, we would argue that this level of analysis entails looking critically at the limitation imposed by the arguably corporatist arrangements of which Victoria's new occupational health and safety regime forms a part. Thus, for example, just as Pashukanis stressed the importance of how law sustains the appearance of equal juridical subjects in the face of manifest inequality (Pashukanis, 1978), so Panitch again warns that corporatism similarly creates appearances of equivalence which may obscure what are historically resilient differentials in power (1986:138). Moreover, he observes, any real attempt 'to pose fundamental challenges to managerial prerogatives ... as a quid pro quo for wage restraint, finds capital withdrawing from the process' (ibid:9). Referring to Australia as the 'new vogue' in the repertoire of allegedly successful corporatist arrangements, he goes on to imply that there is no more reason here than elsewhere to suggest capital's willingness to remain at the corporatist party once any fundamental challenge is thrown down (ibid:35).

As already suggested, the extent to which the new arrangements for securing health and safety at Victorian workplaces thus for constitute a fundamental challenge of this kind is doubtful. Nonetheless, inroads upon managerial prerogative have certainly been made, and the points raised by Panitch must be taken seriously in the light of these developments and of the Act's further potential in this respect. Equally, questions do have to be posed about the extent to which participation on the basis of apparent equality is actually achieved by the tri-partite structures established under the new law's auspices. Thus, for

example, at Commission level it is appropriate to ask about the extent to which unions actually participate as equal partners, particularly if what Mathews saw as the challenge to the hegemony of technical experts has not been as successful as he predicted (1985:197). As Schrecker has pointed out in the context of the political economy of Canadian environmental hazards, moreover, we also have to consider the crucial dimension of power involved in the selection of issues and the definition of alternative causes of action (1984:3).

Further down the line, at the workplace itself, similar questions arise in connection with the operation of health and safety committees and the role of health and safety representatives. The former have been described to us by several union officials, for example, as a means of diverting issues away from the system of provisional improvement notices and into the committee room, there to be buried under the procrastinatory propensities for which such rooms are famed. Nor should 50 per cent representation for employees blind us to the fact that such committees still operate within the milieu of the broader hierarchy of power relations operative in the workplace. So too with health and safety representatives, their powers and protections may indeed be substantial in the legislative sense, but they must nonetheless be exercised within the context of productive relations of substantive inequality. Indeed, perhaps the biggest question to be addressed in this whole field is the extent to which law, in purporting to empower, can in fact transcend the structural relationship between capital and labour.

What this underlines, of course, is the fact that the state-imposed legal order is not the only order, not even necessarily the only 'legal' order which has to be taken into account in identifying the structural constraints militating against this enactment's potential to effect change (Henry, 1983). Within a multiplicity of intersecting 'legal' orders the 1985 Act, under the plausible rubric of self-regulation, may have inadvertently moved the fulcrum of occupational health and safety onto the terrain of a more private order where unequal

relations of power have even fuller rein. Thereon, occupational health and safety issues may become even more vulnerable than before to the obfuscating effects of an ideological hegemony pertaining, not this time to the role of the state, but to the 'natural' and possibly more difficult to challenge relations of production. Thus, reluctance about issuing notices or ordering work cessation would have to be seen in terms of constraints other than those emanating specifically from the legal order imposed by the Occupational Health and Safety Act. Similarly, attempts to use representatives to police other workers, a role categorically not countenanced by the legislation but one reported by several interviewees, would have to be interpreted as part of another authority structure comprising part of a different order. Whether seduced, intimidated or simply alienated by serving on a health and safety committee, employee representatives with less than satisfying experiences of such committees would have to be viewed as victims of another kind of hierarchical order rather than just of some failure in the legal order established under the auspices of the state.

Finally, and currently most contentious of all, there is the question of the official enforcement response to violations of the new legislation. With the provision and ministerial endorsement of notices issued by inspectors as the 'principal instruments' for securing compliance (Guidelines, 1985), the system might seem to be firmly headed in the direction of further institutionalising the toleration of violation as normal. Self-regulation within which provisional improvement notices are explicity to be used to deal with contraventions s.33 could also represent a step in the same direction. As discussed earlier, so too could the relevant Department's apparent shift towards adoption of a more advisory and service oriented role. In terms of the justice system as a whole, it might well seem, this all adds up to a further step in what Foucault called the 'restructuring of the economy of illegalities' and their differential repression along class lines (Foucault, 1977:87).

This said, however, there may well also be constraints upon just how far this process can go. In recent months, for example, there have been public calls, including some from trade union leaders, not only for prosecution under the Act, but also for arraignment under the much more unambiguously criminal auspices of the Crimes Act, itself (The Age, 18 May, 1988). Equally, the Ministerial Guidelines on Prosecution issued under section 48 of the Occupational Health and Safety Act specify a series of offences where, the normal less punitive response to most contraventions notwithstanding, 'proceedings will generally be instituted' (Guidelines, 1985). Nor should we assume that such guidelines will be just blatantly ignored. In a paper which has placed so much emphasis on the structural backdrop to legal and other changes, it is appropriate in the end to return to the ideological role of law. To be sure, the legal order may mask inequality, class relations and the rest of it, but as Thompson pointed out over a decade ago in his controversial defence of the rule of law, an essential pre-condition of its success in these respects is that 'it shall display an independence from gross manipulations and shall seem to be just' (1975:263). Paradoxically, by espousing policies and practices which promote even further a hegemonic ideology that effectively decriminalises contravention of occupational health and safety laws, the authorities may provoke well nigh irresistible demands that the appearance of independence and justice be displayed.

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FOOTNOTES

1. This paper is a by-product of an investigation into the implementation of the Occupational Health and Safety Act 1985, funded jointly by the Victoria Law Foundation, the Victorian Department of Labour and the Australian Criminology Council. Dr. W.B. Creighton and Mr. R. Johnstone were also involved in that project and we are particularly grateful to the latter for his helpful comments on parts of the present paper.

2. The Robens Committee reported in 1972 (Robens, 1972) and its findings formed the basis for the Health and Safety at Work, etc. Act of 1974.

3. For discussion of the development of legislation in Australia see Gunningham (1984).

4. Inspections of 23 factories involving eight different industries in the Geelong district during 1983 revealed 3,000 breaches of safety regulations, relating to 1,000 different machines (Economic Strategy, 1984c:41).

5. For discussion of the historical processes involved in the 'conventionalisation' of factory crime, see Carson (1979).

APPENDIX TWO

The Dupes of Hazard: Occupational Health and Safety and the Victorian Sanctions Debate*

Kit Carson and Richard Johnstone

In September 1981, two Melbourne teenagers were killed as a result of being overcome by trichloro-ethylene fumes while cleaning out a degreasing vat. They had not been told how to carry out this task; they had not been warned about the dangers of such solvent fumes in confined spaces; their protective masks were totally inadequate, and indeed, according to police evidence at the subsequent coronial inquest, there had been 'a complete disregard for safety regulations' (The Age, 11 February, 1982). At the same time, the same police evidence reported that 'there were no suspicious circumstances surrounding (the) deaths' (ibid), and following court proceedings, the company was fined less than $2000. In his 1981 Maitland Oration, 'Work - How Much a Health Hazard', Bob Hawke later expressed his outrage at this sequence of events, and suggested that charges of manslaughter would have been appropriate (Hawke, 1981).

In making such a response to what has now become a celebrated case, the then still to be Prime Minister was displaying a not uncommon reaction to the frequently egregious gap between the enormity of industrial injuries and the paltry sanctions subsequently imposed upon those responsible for their occurrence. In more recent times, a series of incidents - notably an explosion at Simsmetal Ltd in Melbourne which killed four workers - has provoked similarly controversial remarks. Thus, for example, Dr. David Neal,

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* Parts of this paper are based upon Ph.D research currently being undertaken by Richard Johnstone into the role of court proceedings in occupational health and safety.

workers - has provoked similarly controversial remarks. Thus, for example, Dr. David Neal, a member of the Victorian Law Reform Commission, has advocated prosecution for manslaughter under the Crimes Act in cases of serious negligence resulting in the death of employees, while in slightly more ambiguous vein, a former legal officer of the ACTU has opined that 'in cases where there has been a death, then authorities ought to look at the criminal laws' (Age 18 May, 1988). In September 1989, the Victorian Minister for Labor, Mr. Pope, was quoted as saying that 'the Government would consider bringing charges under the Crimes Act, as well as charges under the Occupational Health and Safety Act in some cases (Age, 20 September, 1989). Recognising the difficulties which securing conviction on manslaughter charges might entail, Mr. John Halfpenny, secretary of the Victorian Trades Hall Council, has called for the creation of new offences analogous to culpable driving in appropriate instances (Age 16 May, 1988). This particular suggestion finds a close academic counterpart in Andrew Hopkins' argument for the establishment of an offence of causing death by regulatory violation, a step which he claims would help to close the gap between public sentiment and legal reaction in cases of what he calls 'industrial homicide' (Hopkins, 1988:17).

Unimpeachable as the moral integrity of such calls for a greater measure of social justice in the distribution of criminal justice may be, they do not, however, lack their broader difficulties. On one plane, to which we shall return later, for example, these arguments for the most part seem implicitly to accept that offences under the occupational health and safety legislation somehow or other are not already criminal. Thus the ACTU official quoted above seems to be implying that in looking to the criminal laws, the authorities would be looking to something that is in this sense different from occupational health and safety legislation. Similarly, Mr Halfpenny's call is couched in terms of the need for equality of treatment with offences like negligence causing injury on the road, 'which is punished under

the criminal law' (Age, 16 May, 1988), again appearing to accept implicitly that current occupational health and safety legislation is something else. When Dr. Neal argued against the creation of new offences, he did so on the grounds that the area was already sufficiently covered by 'existing occupational health and safety legislation and the criminal law' (Age 18 May, 1988). Again, the two seem to be perceived as different animals.

What the confusion evidences, as much as anything else, is the crucial element of ambiguity that constitutes one of the central characteristics of white-collar crimes such as violation of occupational health and safety laws (Aubert, 1952:64). The protagonists in the Victorian sanctions debate are heirs to a protracted history of concrete social processes which have rendered such law ambiguous vis á vis its status as criminal law. Moreover, they are caught up in what is almost certainly a continuation of those processes - the 'natural' disconnection of occupational health and safety crime from real crime did not finish somewhere in the middle of the last century - and in so being, they might do well to reflect upon the concrete, structural and other factors responsible for maintaining this momentum.

Yet this is precisely what they do not do. Indeed the debate in its current form must surely fall in the category of what Elling, in his recent book on the struggle for workers' health, sees as a search for alternatives which is disembodied from the socioeconomic, political and cultural contexts in which it is embedded (Elling, 1986:42). It is as if the sanctions debate, as is all too often the case with the official enquiries into the horrific events to which they might or might not be applied, is one to be conducted in isolation from the political economy of the social context which structures it and, at least to some extent, determines its outcome. In this respect, it is fair to note that even Hopkins' analysis is restricted to a call for contextualisation of sanctions in terms of some vague notion of 'societal values' (Hopkins, 1988:19). At the most basic level, there is a failure to appreciate

that how offences are going to be conceptualised - whether as crimes warranting the full force and opprobrium of the criminal process, or as mere, quasi-criminal, regulatory violations to be conventionally tolerated under pain of minimum penalty - hinges on much more concrete and material forces than the relative rhetorical strength of academics, union officials and law reformers. Such interventions, to be sure, are neither irrelevant nor inconsequential; but neither are they the only sanctioning determinants which those who would like to think they can make history, regardless of circumstances not of their own choosing, would have us believe. In Victoria, as elsewhere, the occupational health and safety debate over the use of criminal sanctions, revolving as it must around the issue of the criminality involved, lost sight of the conceptual vision provided by Raymond William more than a decade ago:

> 'When the most basic concepts - the concepts, as it is said, from which we begin - are suddenly seen to be not concepts but problems, not analytic problems either but historical movements that are still unresolved, there is no sense in listening to their sonorous summons or their resounding clashes. We have only, if we can, to recover the substance from which their forms were cast' (Williams, 1977:11).

Elsewhere, one of us has attempted at length to recover the substance from which the crucially ambiguous criminal form of occupational health and safety violations was originally cast (Carson, 1980). Basically, it was argued, that during the development of British manufacturing, in the early nineteenth century, there was an internal thrust towards regulation within capitalist production, itself. This was driven by a number of very concrete and identifiable reasons such as reduction of competition, the creation of a healthy, disciplined workforce, and not least, the legitimation of the class relations of early capitalism. In that context, moreover, it was essential that there should be some attempt to enforce the relevant legislation, if it and the whole legal framework of which it was part, were not to be revealed as a sham. As two critics of this earlier work put it, thereby

inadvertently hoisting themselves with their own petard, the earliest inspectors played a crucial part in creating 'a viable class society' (Bartrip and Fenn, 1979:185).

What accomplishing any or all of the above objectives involved was some form of regulation without the unambiguous criminalisation of offenders. For one thing, any strategy which involved the latter would have entailed designating as criminal a very large proportion of a powerful and prestigious class, so widespread was contravention. By extension, such an approach would moreover, have pushed the perceptible moral contours of the nation out of line with its social structure, a socially unsustainable lack of fit even in the short-term. The result was an uneasy compromise involving an ambiguous system which attempted to impose controls and tried to show itself as actively regulating, but which effectively disconnected the criminality of the behaviour in question from 'real' crime.

This is not the place to rehearse at length the details of what was involved in this important process of creating ambiguity. Crucially, however, it involved the development of a system of enforcement which, in the main, treated occupational health and safety violations as normal, conventional and not to be exposed to the full rigours of strong criminal sanctions. Thus, for example, as early as 1833 the suggestion that manslaughter charges should be laid against employers whose negligence led to death was rejected. The grounds, Mr Hawke et. al. might be interested to know, were that such 'penal clauses .... are of a nature so vexatious and so arbitrary as ... would create a serious objection to the investment of capital in manufacturing industry' (Carson, 1983:7)! As for the more routine offences, the emergence of strict liability in the 1840s led to the elision of mens rea and moral culpability from their public adjudication, as well as to the effective fracturing of any connection between notions of intention and features of how the labour process might be organised. By the 1850s, the inspectors were bringing <u>exceptional</u> evidence of intention to buttress appeals to magistrates for maximum penalties (BPP, 1852-3:XL, 8). More

commonly they were countenancing a 'natural' disconnection between factory crime and real crime, while still using competitive arguments to justify calls for support from magistrates:

> It is not unnatural that magistrates should have some difficulty in associating the idea of CRIME with working young persons and women 11 hours a day instead of 10 ½; ... but there is no part of the Factories Regulation Acts that I am so often called upon by mill-owners themselves to enforce with rigor ... They say, and most justly, that it is of the first importance that all who sell in the same market should be upon one footing as to time, and that those who strictly obey the law should be protected against the unfair competition of those who transgress it [B.P.P., 1851:XXIII, 5 ff emphasis in original].

This shadow-boxing with the concept of crime, together with the penetration of considerations other than independent legal principles into the processes of interpretation and sanctioning, was a central feature of the British system in the years preceding its export to Victoria in 1885. In the crucial case of Ryder v. Mills, for example, Lord Parke upheld the legality of a loophole, one commonly exploited by employers, on the grounds that the 1844 Act imposed penalties and must therefore be strictly construed; yet, just a week earlier, with delightfully injudicious indiscretion, he had told none other than the Attorney General that, despite his certainty as to the intentions of Parliament, 'as it is a law to restrain the exercise of capital and property, it must be construed stringently' (Carson, 1980:169). Above all, however, the process was one which saw law-enforcement in the occupational health and safety area moving inexorably away from the connotations of crime control. As one Chief Inspector put it in 1876:

> In the inspection of factories it has been my view always that we are not acting as policemen, ... that in enforcing this Factory Act, we do not enforce it as a policeman would check an offense which he is told to detect. We have endeavored not to enforce the law, if I may use such an expression, but it has been my endeavor ... that we should simply be the advisers of all classes, that we should explain the law, and that we should do everything we possibly could to induce them to observe the law, and that a prosecution should be the very last thing we should take up [Thomas, 1948:41].

This brief excursus into history is important because it alerts us to the fact that the occupational health and safety sanctions controversy currently under way in Victoria is tied up with a history that stretches right back to another place and another time. Nor is this mere antiquarianism. As Williams again observes, serious cultural analysis is impossible without a developed consciousness that has to be historical, a consciousness which, among other things, has the effect of 'forcing us back from so much that seemed positive and available - all the ready insertions into a crucial argument, all the accessible entries into immediate practice' (Williams, 1977:11). Current Victorian proponents of resort to the Crimes Act, to charges of manslaughter and the rest of it might have been better advised, we will argue, to share this sense of hesitation born of awareness of their place in an as yet incomplete history and a still unresolved historical movement. Had they done so, it will be suggested, they might not so readily and paradoxically have become unwitting dupes of social processes which we believe will result in the further decriminalisation of occupational health and safety crime. For people can, we believe, make history more effectively if they are cognisant of the unchosen and historically given circumstances under which they are attempting so to do.

II Ambiguity in Australia

The enactment of the Victorian Factories and Shops Act 1885 was the first major initiative of an Australian colonial government in the legal regulation of occupational health and safety. Although the Act was amended and consolidated in subsequent years, its basic approach to the statutory regulation of occupational health and safety remained unchanged until 1985. The Act was very much in the British tradition, and all of the relevant occupational health and safety provisions, particularly those relating to the fencing of machinery, sanitary requirements, and the powers of inspectors, were lifted almost

verbatim from the British Factories Act of 1878. Indeed, Mr Deakin, in his second reading speech, noted that 'the Bill is largely a copy of the English Act' (Victorian Parliamentary Debates, 1885:1439). Mr Wrixon commented that:

> We cannot go far wrong if we follow the great English Act ... That Act is one of the greatest monuments of legislative beneficence and ingenuity known to the world. Nothing can exceed the benevolence of its design, or the minuteness and exactness of the machinery for carrying out that design. It is a great monument of legislative labour. By following that Act ... we will no doubt avoid, in our factory system, the abuses which have marked the factory systems of older countries - abuses which have been submitted to, in those countries, quietly enough, although they are serious and great ... Those abuses, by our early adoption of the British Factory Act, we will be able to prevent growing up here, because the manufacturers of the colony will have to accommodate themselves to the law (Victorian Parliamentary Debates, 1885:1440).

The early Victorian inspectorate made constant reference to the Reports of the British Factories and Shops inspectorate, particularly to the machinery guarding techniques devised by the British inspectorate (Annual Report, 1886: 4, 1887:5-6; 1888:3-4, 10; 1889:1,4,15). Nor is it unlikely that it would have taken some note of the prosecution rates indicated by the statistics set out in the British reports.

A cursory analysis of the use of prosecution as a means of *enforcing* occupational health and safety provisions in Victoria in the century after 1885 suggests that the enforcement of the Victorian legislation strongly mimicked that of the British legislation. From the outset, the inspectorate was reluctant to prosecute, and the Chief Inspector remarked in an early annual report that 'legal proceedings are never instituted till every other means of enforcing the law has been tried' (Annual Report 1893:7). From 1886 to 1899 there were 1571 informations prosecuted under the Factories and Shops Act, (Annual Reports 1886-1899) but only two for failing to guard machinery, and thirteen for diverse offences such as overcrowding, failure to report an accident, untidy factories, inadequate seating etc. Most prosecutions conducted by the Department of Labour were in relation

to after hours shop trading, operating unregistered factories, and overworking women and children. According to the Chief Inspector those prosecutions placed extra work on the inspectorate and had the 'further disadvantage of bringing them into conflict with many persons engaged in retail trade' (1886 Report 8). Similarly, in the early years of the Act the inspectorate noted with dismay the antipathy of the magistracy to its provisions. In 1891 Chief Inspector Levey lamented that:

> It is to be regretted that in some Courts of Petty Sessions the officers of this Department do not receive more support and consideration from the justices of the peace before whom prosecutions for breaches of the Act are tried. On one occasion when I was conducting a prosecution a justice who was adjudicating took the opportunity as a suitable one to abuse the Act as unjust and also insult me personally with regard to my position in relation to it. When such observations are made from the magistrate's chair it can hardly be expected that the general public will respect the law (1891 Report 10).

Table 1: Occupational Health and Safety Prosecutions in Victoria 1900-1986

Period	Total Infos	OH&S Infos	% Total	Dismissed	Convictions	Average Fine (% of max.)
1900-1919	7730	172	2.2%	15	154	24%
1920-1939	10603	335	3.16%	29	276	11%
1940-1959	7816	318	4.07%	13	299	14%
1960-1979	16077	1228	7.6%	69	1079	16%
1980-1986	3318	970	29.2%	24	760	14%

Sources: Annual Reports 1886-1986

Table 1 summarises the position from 1900 until the middle of 1986. It shows how relatively infrequent resort to prosecution for occupational health and safety offences was prior to the advent of the Occupational Health and Safety Act 1985, both in absolute terms and in relation to the total number of prosecutions conducted by the Department, although

the beginnings of a change in this latter respect is evident in the Eighties. Moreover, these prosecution statistics record the number of informations prosecuted, and it should be noted that many, if not most, cases involved more than one information, so that the figures expressed in terms of informations obviously overstate the number of defendants taken to court.

The inspectorate's principal means of dealing with breaches of the occupational health and safety provisions prior to 1986 was by imposing 'requirements', usually orally, upon employers to remedy contraventions. These 'requirements' would then be 'followed up' by inspectors. In 1983, for example, there were 19903 'requirements' issued in relation to safety matters (Annual Report, 1983:77). There were, however, only 134 informations issued for breaches of machinery guarding provisions. That same year, a task force of eleven inspectors conducted inspections of 22 factories in 8 industries in the Geelong district and identified 3,000 safety breaches of safety regulations, relating to 1,000 different machines (ibid 17). In the year from July 1984 to June 1985 the annual report shows that there were 63,658 'requirements' on employers 'to improve safety, and only 140 informations issued for all types of occupational health and safety offences enforced by the occupational health and safety inspectorate (Annual Report, 1984-5, 97-8). Clearly, the preferred method of dealing with contraventions of the legislation was through the giving of advice to employers, and through attempts to persuade them to carry out the will of the legislature by issuing of 'requirements'.

This pattern of enforcement was explained by Paul Prior, the former head of the Department of Labour and Industry in Victoria as being based on the inspectorate's view that 'any inspector who constantly has to launch prosecutions in order to gain compliance' is a failure, because inspectors see the legislation they administer as being 'remedial in nature i.e. they are there to improve the conditions of work, not to make the employer or

employee suffer penalties for breaches of the law.' This approach is justified by Prior on the grounds of 'time/cost effectiveness'. It takes very little time to advise an employer of what should be remedied, whereas the preparation and conducting of a prosecution is extremely time consuming, and usually results in 'a minimum or token fine' (Prior, 1985,54).

This evidence would seem to confirm that the Victorian inspectorate has perpetuated the perception of most occupational health and safety violations as customary, conventional, and not really to be regarded as criminal. The evidence of penalties imposed by the courts suggests that this view would appear to be shared by magistrates. Indeed, most of the magistrates interviewed during the course of research into the role of the courts in the enforcement of the occupational health and safety legislation in Victoria did not consider that employers who contravened the occupational health and safety legislation were 'criminal', but saw the offences as 'quasi criminal offences'. One indicated, for example, that he thought that the offences 'were social offences, rather than criminal offences', and that occupational health and safety offences only approximated 'crimes' when they were 'blatant'. Another indicated that he did not consider occupational health and safety offenders to be 'criminals in the strict sense', particularly for their first offence. If, however, 'these people come back a second time, the courts would think of them as criminals who just happen to be employers rather than just as straight employers.'

All this suggests that the 'natural' disconnection of occupational health and safety crime from 'real crime' indeed did not finish in the middle of the nineteenth century, but has been part of the institutional practice of courts and inspectorates in Victoria right up to the present day.

III The 1985 Act and the Sanctions Debate

The Victorian Occupational Health and Safety Act of 1985 brought a far-reaching set of changes to the régime pertaining to health and safety at the workplace in that State. Among other things, it established a tripartite Occupational Health and Safety Commission (s.7), provided for the election of health and safety representatives at the workplace (s.30), and gave trade unions, where present, the key role in the nomination and electoral processes involved (s.30). The elected representatives were given a wide range of powers including those of inspecting the workplace, accompanying inspectors and accessing information held by the employer about actual or potential hazards (s.31). Crucial and most contentious was the decision to give them the additional power to issue provisional improvement notices (s.33) and, where faced with immediate threat to the health and safety of any person, to order cessation of work (s.26). For their part, employers were subjected to a general duty of care (s.21), and were required to establish health and safety committees at the request of the representatives (s.37). Inspectors were empowered to issue improvement and prohibition notices (ss.43 and 44), and were required to perform various adjudicative roles, particularly in relation to disputes over provisional improvement notices and work cessations (ss.35 and 26).

With regard to sanctions, a breach of any provision of the Act or regulations was an offence against the Act and liable to prosecution by the inspectorate (ss. 47(1), 48(1)). While breaches of the regulations were summary offences triable only in the Magistrates' Courts, breach of the provisions of the Act itself were indictable offences, which could be prosecuted in the County Court (s. 47(3)), although provision was made for the option of summary prosecution (Magistrates' Court Act 1971 s. 69(1)). The maximum fines were increased markedly from the $2000 maximum prior to 1985. Most offences against the Act were punishable by a maximum fine of $25000 for a corporation, and $5000 for an

individual (s. 47(2)). There were four more 'serious' offences which attracted higher maximum penalties. These were obstructing, assaulting etc an inspector (s. 42), failing to comply with a prohibition notice (s. 44(3)), wilful repetition of an offence for which the wrongdoer had already been convicted (s. 53), and discrimination by an employer against an employee exercising a right or power under the Act or assisting in the implementation of the Act (s. 54). The penalties for these 'serious' offences were a minimum penalty of $5000 and a maximum of $50000 where a corporation was involved, and a minimum of $1000 and a maximum of $10000, or up to five year imprisonment, for an individual. Where an indictable offence was prosecuted summarily, the maximum penalties for all offences were reduced to $10000 for corporations, and $5000 or two years imprisonment for individuals for "serious" offences, and $2500 for individuals for all other offences (Magistrates Court Act 1971 s. 69(6)).

The Minister of Labour has issued inspectors with prosecution guidelines as required by the Act (s. 48(5)). These guidelines envisaged that prosecutions would be brought for a failure to comply with a prohibition, improvement or provisional improvement notice, for an alleged breach of the Act which resulted in a 'serious accident' or fatality; for the wilful repetition of the same offence, for offences such as the assault or obstruction of inspectors, for discrimination against an employee, and where 'the issue of notice is not considered appropriate for ensuring compliance with the Act or regulations' (Guidelines, 1985).

What might be called the political economy of these developments has been explored at some length elsewhere (Carson and Henenberg, 1988). Two points, however, are particularly germane as part of the all too often forgotten backdrop to the current Victorian sanctions debate. In the first place, it must be remembered that this legislation was part of an integrated package designed quite explicitly to reduce the costs of workers' compensation premiums to the trade exposed sector of the Victorian economy, with a view

to the restructuring of that economy by manipulating the few factors within the control of the State government as opposed to that of the Commonwealth or of international market forces. The objective for the reformed system, in which the preventative prong comprising occupational health and safety legislation was to play a vital part, was that the number of accidents or diseases generating claims per employee should be reduced by 10 per cent within ten years (ibid.). As a result, and whatever the law in books might have had to say about sanctions, the new law in action was one with an appropriately refurbished enforcement ideology, one preoccupied with 'getting claims down'. To this end, strategies like risk management, and inspection systems driven by highly dubious data from the Accident Compensation Commission (ACC) increasingly became the order of the day. To facilitate 'service delivery' a regionalisation process for the relevant department was put in train and the formerly ambiguous 'inspectors' were now enjoined to become 'advisors'.

The second background factor of importance to any understanding of the sanctions debate is the way in which, arguably or even plausibly, the Occupational Health and Safety Act of 1985 forms part of a broader pattern of corporatist developments such as were predicted by writers such as Clegg at the beginning of the decade for late semi-peripheral capitalism in countries like Australia (Clegg, 1980). As Leo Panitch comments, for example, 'progressive legislation' in areas such as this may 'constitute the new quid pro quo for wage restraint under resuscitated corporatist political structures' (1986:203). Under such arrangements, and leaving aside for the moment who gets excluded as opposed to included, there would be clear implications for the deployment of sanctions in terms of ostensibly cooperative and participative processes, as well as a bottom line drawn under the point at which cooperation might no longer be forthcoming.

What this all adds up to in terms of the Victorian sanctions debate is a background of developments conducive to further decriminalisation and ambiguity in the arena of

occupational health and safety crime. Thus, there is no doubt that predeliction for service delivery, risk management and role redefinition in advisory terms has indeed further blunted the image of the relevant department as being in the business of law-enforcement concerned with essentially criminal activity. A former senior member of the Department of Labour described in interview the impact which these considerations and the overarching concern about WorkCare costs had upon sanctioning practice:

> ' ... again you had the influence of ACC coming in and rather than stepping back and looking independently at the Act and saying "what is the Act's purpose?" it was pushed into "what is the purpose of WorkCare?" And so you were losing; you couldn't sustain issues about prosecution policies in relation to what the philosophic intent of the Act was, when the major driving force was intervening in industry to get down the high cost industries in terms of their claims against WorkCare?

What is being pointed to here is the way in which an external set of constraints operated in such a way as to preclude any clear working out of the role which prosecution should play in the new system, despite the Guidelines earlier mentioned. Further ambiguity, if not confusion, was the result. Nor, in addition, did the broadly corporatist thrust of the legislation accord any heightened salience to the specifically criminal aspects of the legislation and its provision of sanctions. The Guidelines, as one very senior member of the Department explained in interview, made it quite clear that 'the number one priority is to try and get in (place) procedures for consultative practices'. Where these and other self-regulating mechanisms failed to produce the desired result, prosecution was to be by no means the next line of resort:

> 'The Department retains the right to initiate proceedings for any offence against the Act and regulations .... However, generally speaking the principal instruments to be used for securing compliance with the legal standards set out in the Act and regulations will be Improvement and Prohibition Notices' (Guidelines, 1985).

Given such public undertakings, it is not surprising that capital and employers, at any sign of government reneging on the corporatist deal, would begin to entertain thoughts of withdrawing from the bargain. As Panitch again has pointed out, with reference to Australia as the 'new vogue' in the latest fashion of corporatist arrangements, there is no more reason here than elsewhere to suggest capital's willingness to remain at the corporatist party once any fundamental challenge is thrown down (Panitch, 1986:35). While his primary concern in this respect was the effect of intrusions into managerial prerogative, the logic of the argument clearly extends to the question of sanctions. As one of the senior officials quoted earlier discreetly reported, publicising certain prosecutions during 1988 caused certain employers to 'attack the Department for changing the philosophy and for being pro-prosecution'. There had also been correspondence from at least one peak employer's group 'seeking assurances as to what the Government position is' in the light of the current sanctions controversy. And the Victorian Chamber of Manufactures did not hesitate to foreshadow playing the ultimate card if the Government went ahead with plans to increase maximum fines for breaching the Act to $250,000 and to $500,000 for 'repeat offenders', what are called in conventional criminological terms 'recidivists' (Workers Compensation Report, 103, 1989:4).

> 'Such penalties do not focus on the real issue of encouraging better safety practices and will only deter investment and jobs from Victoria' (Emphasis added).

Not that they had much to worry about in that respect, for the ambiguity engendered by the forces already described amply permeated legal proceedings under the new Act. This ambiguity was demonstrated on the one hand by the low fines imposed by the courts in prosecutions under the Act, and the large number of cases that were adjourned by the magistracy without conviction upon the defendant being placed on a 'good behaviour

bond'. From 1986 until the end of 1988, for example, 42 per cent of informations where the charges have been proved were adjourned without conviction, and the average fine imposed for the remainder was 8.4 per cent of the maximum fine. In one case, heard in 1986, for example, a magistrate found a corporation guilty of an offence against the regulations which resulted in a worker being dragged into an unguarded machine by some loose twine, and her ankle broken in three places. The magistrate adjourned the matter without conviction upon the company entering into a recognizance of $10000 to be of good behaviour, and at the same time ordered it to pay $8000 into the court box. The ambiguity was also apparent in the case which more than any other sparked off the sanctioning debate, the Simsmetal case, where a furnace in an aluminium smelter exploded when a quantity of sodium nitrate, instead of potassium chloride, was added to molten aluminium. Four men were killed, and seven suffered injuries of varying severity. Despite finding that the Act was 'significantly breached' by the company's officers, the court imposed fines of $15000 (out of a maximum of $25000) for each of three informations brought against the company under the Occupational Health and Safety Act.

On the other hand, the courts often retreat into construing the Act as penal when it suits them so to do in favour of defendents. For example, in one case decided in 1988 a magistrate had to determine which party had the onus of proving the 'practicability' of certain measures to comply with section 21 of the Act. He decided that the onus lay with the prosecution because, in his view, the Act, 'being a penal provision, must be strictly construed.' In upholding the magistrate's decision, a majority of the Full Court of the Victorian Supreme Court emphasised the fact that section 21(1) of the Act was an indictable offence, and that 'the criminality of such a breach is emphasized by s 28 which provided that any contravention of [the general duty provisions of the Act] does not confer a right of action in any civil proceedings' (Chugg v Pacific Dunlop Limited, 1989:15). Put

quite simply, in construing the provisions of the occupational health and safety legislation, the courts treat it as criminal legislation requiring a strict construction in favour of the defendant, but it is quite clear, both from the penalties imposed, and from interviews with magistrates, that the legislation is not regarded as 'criminal' legislation, but rather as 'regulatory' or 'quasi criminal'.

The proponents of use of the Crimes Act, manslaughter charges and so on are, then, attempting to swim in some pretty deep analytical waters, waters in which it is difficult enough to stay afloat if the dive has been deliberately taken, much less if you have inadvertently fallen in. Had they been able to pause at the edge, they might have been able to reflect at somewhat greater length upon the nature of the historical process into which they were essaying such a crucial intervention. Moreover, upon such reflection they might have recognised that their actions could, ironically, leave them in the unenviable position of colluding in the very developments they were attempting to forestall. Such unintended consequences of social action are often said to be the very stuff of which sociology is made.

It is now more than a decade since E.P. Thompson made his spirited and highly controversial defence of the rule of law as a positive good (Thompson, 1975). Therein, he argued, the legal order may indeed mask inequality, class relations and the rest of it, but an essential pre-condition of its success in these respects is that 'it shall display an independence from gross manipulations and shall seem to be just' (ibid:263). Where Thompson shot himself in the foot with this argument, so to speak, was of course that displays can sometimes be just that, impressive appearance rather than substantive reality. And herein, too, we would argue lies the danger with calls for resort to the Crimes Act and manslaughter charges in relation to occupational health and safety. For a very few such dramatic charges, as it would obviously turn out to be, would surely make an impressive

display of just appearances; but this would do nothing to halt what seems to us to be the inexorable slide of all those other thousands and thousands of occupational health and safety offences into further ambiguity and decriminalisation. Indeed, and contrary to the wishes of those involved, it might even distract attention from the process, thereby masking even further the real extent to which class relations, inequalities and the rest of it penetrate the field of health and safety at the workplace.

What then should we be doing? It seems to us that although we have no objection to the use of consultation, negotiation, notices and so on within the present Act (might these have some greater part to play in other areas of criminal law?), the criminal connotations of offences against occupational health and safety legislation should be emphasised both in principle and in practice. In the latter context, this would mean much more frequent recourse to prosecution in the criminal courts when the whole gamut of self-regulation, negotiation and notice procedures has been run without success. It would also entail a 'graduated enforcement response' such as that proposed to the Department of Labour in a policy paper prepared by the research team which carried out the research upon which this paper is partly based, a response system involving a much more automatic process of escalation towards court action without curtailing a proper element of inspectorial discretion. It would also involve a program to educate magistrates in particular with regard to the principle that what they are dealing with really <u>is</u> crime, and indeed very serious crime since the case will only have arisen either out of very serious incidents of injury, or out of protracted intransigence that has exhausted the Act's other and more conciliatory procedures.

As far as deaths arising from employer negligence are concerned, we are firmly of the view that these must be dealt with <u>inside</u> the framework of the Occupational Health and Safety Act itself. A general offence of 'causing death by regulatory violation' is not, we

believe, sufficiently specific to meet what is required in terms of the recriminalisation of serious occupational health and safety offences, and we would therefore propose amendment of the 1985 legislation to include the offence of causing death through violation of the Act itself, or of its attendant regulations. Alternatively, the offence of Industrial Manslaughter could be incorporated into the Act. Appropriate penalties, both corporate and individual should be applied. In this way, we believe, greater justice in the administration of occupational health and safety legislation could be achieved without running the risks involved in taking these issues out into some other and purportedly more criminal arena.

D Conclusion

In this paper we have taken issue with those participants in the Victorian sanctions debate who would resort to the Crimes Act and charges of manslaughter in relation to occupational health and safety offences. We have not done so because we disagree that the offences in question should be regarded as criminal. Rather, we have taken up this position because, we believe, the proposed strategy would have the contrary effect with regard to the vast bulk of occupational health and safety offences. By prising out a few cases for treatment under separate, criminal auspices, the criminal status of what is left is rendered even more ambiguous than it is already becoming under the impact of the continuing historical and structural processes which we have outlined. The objective, which we share, is better achieved by recognising occupational health and safety offences as much more unequivocally criminal, and by creating an occupational health and safety offence specific to the enormity of the criminality involved when employer negligence leads to death at the workplace.

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