

**LEGISLATIVE COUNCIL GENERAL PURPOSE STANDING COMMITTEE No. 1**  
**INQUIRY INTO SERIOUS INJURY AND DEATH IN THE WORKPLACE**  
**Complete set of Questions on Notice and Answers**

**Questions Arising from Evidence of Monday, 1 March 2004**

2.1 Can you please provide the Committee with details of the number of cases where a victim impact statement has been received in the Industrial Relations Commission under section 27 of the *Crimes (Sentencing Procedure) Act 1999* for an offence under the OH&S Act 2000 resulting in death or actual physical bodily harm?

**Answer:**

A victim impact statement is given following conviction of a defendant before sentencing.

To date, there have been no victim impact statements received in the Industrial Relations Commission for offences under the OHS Act 2000. There should however be proceedings occurring during the course of 2004 where that opportunity will arise and victims will be given the option of making a statement.

2.2 Over the last five years, WorkCover has successfully prosecuted an average of 444 prosecutions per year. What proportion of these matters were processed by the Legal Group in WorkCover, and what proportion was outsourced to private law firms in 2002 and 2003? What is the amount, in dollar terms, of fees paid to private law firms for work outsourced from the Legal Group in 2002 and 2003?

**Answer:**

The prosecutions activity in the Legal Group during any given year is most accurately measured by the number of current matters, rather than only considering the successful prosecutions.

During the 2001/02 financial year WorkCover conducted 680 defendant matters. Of these matters 176 (25%) were conducted by WorkCover and 504 (75%) were conducted by external legal service providers.

During the 2002/03 financial year WorkCover conducted 442 defendant matters. Of these matters 158 (36%) were conducted by WorkCover and 284 (64%) were conducted by external legal service providers.

For the financial year 2001/2002, external legal service providers were paid \$2.2 million.

For the financial year 2002/2003, external legal service providers were paid \$3.1 million.

These figures include payments for prosecution work on matters that may or may not have been finally determined by the Courts.

The arrangements for conducting prosecutions by external legal service providers have been implemented via a competitive tender process that was chaired by the Legal Management Service of the Attorney-General's Department.

Since the establishment of the Workplace Fatalities Investigation Unit on 30 September 2002 it has been WorkCover policy to conduct all fatality prosecutions in house and instruct external legal service providers to conduct prosecutions for less serious incidents. This practice enables WorkCover to target its in house prosecution resources to fatalities and other incidents of major concern, and is consistent with the practice of other law enforcement agencies.

2.3 Can you please provide the Committee with details on the operation of the Workplace Fatality Investigation Unit? When was it established? How many people are employed in it? What are their roles? Where does this unit sit in WorkCover's organisational structure? Is this unit an appropriate place for a liaison team to closely liaise with the families of people killed in workplace incidents?

**Answer:**

As indicated at paragraph 6.7 of WorkCover's submission, the Workplace Fatality Investigation Unit, which sits within the Criminal Law Practice of the Legal Group, began operation on 30 September 2002.

The Unit reports directly to the Manager Litigation, who in turn reports to the Director of the Legal Group, and comprises one Principal Solicitor Grade VI, one Senior Solicitor Grade V, three Senior Solicitors Grade IV, and is supported by one Paralegal Clerk and two Legal Secretaries.

The Unit's role is to conduct WorkCover prosecutions in relation to fatalities arising from breaches of the OHS legislation. The Unit's prosecution process involves an intensive system of case management that includes close communication and regular liaison between the Unit's solicitors and the inspectors from the OHS Division. This system ensures that inspectors are provided with legal assistance throughout the course of an investigation and subsequent prosecution. The Unit also contributes to the conduct of Coronial inquests related to workplace deaths.

Yes, as indicated at paragraph 7.11 of WorkCover's submission and in response to the Committee's question on notice 1.2 dated 23 February 2002, a new position has been created in the Workplace Fatalities Investigation Unit to liaise with families and coordinate counselling services. This is the appropriate place to co-ordinate liaison with the families of killed workers because the Unit will be closely involved with the initial investigation of an incident and any subsequent Coronial inquiry and prosecution.

2.4 Can you please provide details of breaches of the following sections of the OH&S Act 2000 since its commencement, and the penalty imposed, if any:

- Section 86 – notification of incidents
- Section 90 – failure to comply with investigation notice
- Section 92 – failure to comply with improvement notice
- Section 94 – failure to comply with prohibition notice

**Answer:**

In 2002/03, WorkCover has issued the following penalty notice for breaches of the OHS Act:

- Section 86 - 39 penalty notices (penalty \$600 each)
- Section 90 - 1 penalty notice (penalty \$1,500 each)
- Section 92 - 154 penalty notices (penalty \$1,500 each)
- Section 94 - There is no power to issue penalty notices under this section. Breach of the section results in prosecution.

2.5 How many applications have been made under section 96 of the OH&S Act 2000 to review an investigation, improvement or prohibition notice issued under Part 6 of the OH&S Act 2000? Please provide details of the outcome of these reviews?

**Answer:**

In 2002/03, Notices appealed were:

- 71 Improvement
- 8 Prohibition
- 0 Investigation

In the vast majority of these instances appeals were unsuccessful.

2.6 How many applications have been made to the industrial magistrate under section 97 of the OH&S Act 2000 following an unsatisfactory review under section 96? Please provide details of the outcome of these applications.

**Answer:**

Four. One is due for hearing in the Chief Industrial Magistrate's Court in May 2004. WorkCover withdrew two notices after the appellants gave an undertaking to WorkCover to carry out the requisite remedial steps under the Improvement Notice. WorkCover withdrew one notice after further review.

2.7 The Government Response to the NSW Workplace Safety Summit established certain targets for injury and fatality reductions in certain industries. For example, for the construction industry, the target was a 20% reduction in injuries over 5 years, with 10% improvement in the first 2 years. Although it is an early stage, can you give the Committee an indication of how much progress has been made towards meeting these targets?

**Answer:**

It is an early stage but the initial signs are very encouraging. The December 2003 Compendium of Workers' Compensation Statistics Australia shows the common trends in OHS, based on accepted workers' compensation claims, for 2001-02, and indicates there has been a 16% improvement in the incidence of compensation claims over the past 6 years, with a 10% improvement from 2000-01.

Preliminary data for 2002/03 indicates that there has been a 20% reduction in the number of workplace fatalities in NSW since 2001/02.

2.8 The Government Response to the NSW Workplace Safety Summit noted that assessing and managing risk should be learnt by young people before they enter the workforce, and accordingly indicated that the Government would integrate information on safety and risk management into education curriculum, together with specific training for students and trainees in vocational education. How much has been achieved to date?

**Answer:**

Significant progress has been achieved to date including:

**Education Curriculum**

The revised HSC syllabus for Construction includes mandatory work placement and requires students to satisfactorily complete a WorkCover approved Construction Industry OH & S General Induction Training Program prior to work placement.

The revised HSC syllabus for Design and Technology includes responsible and safe use of resources to realise quality major design, including the principles underlying safe working practices and environments.

The revised new HSC syllabus for Hospitality includes units of competency in health, safety and security.

The revised syllabus for agricultural technology (years 7 to 10) includes knowledge and skills in implementing cooperative and safe work practices in agricultural contexts and applies OHS requirements when using, maintaining and storing chemicals, tools and agricultural machinery.

The revised syllabus for agricultural technology (years 7 to 10) includes knowledge and skills in implementing cooperative and safe work practices in agricultural contexts and applies OHS requirements when using, maintaining and storing chemicals, tools and agricultural machinery.

The revised syllabus for Commerce (years 7 to 10) includes legal issues relating to the workplace occupational health and safety.

The revised syllabus for Design and Technology (years 7 to 10) includes project management strategies including implementing and evaluating a process of OHS and risk management and applying risk management practices in each design project.

The revised syllabus for Industrial Technology (years 7 to 10) includes knowledge of and competence in applying OHS and risk management procedures and practices.

The new syllabus for Marine and Aquaculture Technology (years 7 to 10) includes problem-solving, workplace communication, cooperative work practices and OHS.

The syllabus for Science (years 7 to 10) includes selecting appropriate equipment (including safety equipment) and/or resources to perform the task and ways to reduce risks when working in the laboratory or the field.

### **Training Programs/Kits**

The Master Plumbers Occupational Health and Safety Awareness and Management Courses -- Master Plumbers Association of NSW received funding from WorkCover Assist for 2004; one target group is young workers who are studying Advanced Plumbing Draining and Gasfitting Certificate IV and related trades

Workplace Rehabilitation Coach – National Electrical Contractors Association (NECA) received funding from WorkCover Assist for 2004; program targets some 200 host employers of the 260 NECA Group Training apprentices

Legislative Education Training Courses -- Australian Manufactures Workers Union (AMWU) received funding from WorkCover Assist for 2003 to deliver a NEW@WORK program and material in partnership with NSW TAFE to all apprentices and trainees in the manufacturing industry

OH&S Practical Roof Tiling Industry Specific Education and Information Program – The Master Roof Tilers and Slaters Association of NSW received funding from WorkCover Assist in 2003 to develop the training program, which includes a VETAB accredited competency based training package for young workers

YouthSafe Education Package – NSW Labor Council received funding from WorkCover to develop and roll out package to educate and raise awareness of the importance of workplace health and safety for young workers and future young workers, includes the YouthSafe website maintained by the Labor Council and a Teacher's Kit – Safety First or Expect the Worst, Classroom Activities on Occupational Health and Safety

### **Face to Face Information and Advice**

Future Farmers – collaboration between WorkCover, Farmsafe NSW, WorkCover's Rural Industry Reference Group, Australian Centre for Agricultural Health and Safety, Farm Safety Action Groups and rural high schools to educate high school students about the importance of farm safety

Paralympian Sponsorship Program that includes two athletes who were injured young workers – Heath Francis and Terry Giddy – who visit schools as part of the program to deliver a safety in the workplace message.

WorkCover inspectors in metropolitan and country regions play an active role in presentations to school & TAFE students explaining the importance of OHS, workplace hazards, legislative rights & responsibilities. For example, from April 2003 to the present the Country South Team has visited high schools in the Riverina and Illawarra regions and provided presentations for students undertaking VET courses as part of their HSC studies ie woodwork, construction, hospitality, business, IT.

The Rural Team also has significant interaction with students and young workers at rural field days.

### **Publications**

Safety At Work – Guide for Young Workers in the Hospitality Industry – produced by WorkCover’s Consumer Services Industry Reference Group; 40,000 copies distributed to TAFE colleges, schools and restaurant and catering colleges; has been reprinted

Protecting Young Workers from Workplace Hazards – part of YouthSafe

Teacher’s Kit – Safety First or Expect the Worst, Classroom Activities on Occupational Health and Safety – part of YouthSafe

Starting Work? Know Your Legal Rights – DL brochure and poster produced in conjunction with the Department of Industrial Relations

### **WorkCover advice on CD ROM**

Young People, Work Experience and Work Placement Students

New Apprenticeships and Traineeships – Your opportunity to improve occupational health and safety

### **Websites**

WorkCover NSW – Young Workers section under Workers; [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au)

Safety Zone – developed by WorkCover <http://workcover.cadre.com.au>

YouthSafe – funded by WorkCover and developed by the NSW Labor Council <http://www.ohs.labor.net.au/youthsafe>



## Articles

WorkCover News regularly publishes articles on young workers, including Issue # 44 and Issue # 56, which both had a focus on young workers

Rural Safety Magazine, published by WorkCover's Rural Industry Reference Group annually for Rural Safety Week in July, regularly publishes articles on young workers

## Advertising

Revised 'Parallel Stories' campaign, February 2004

### Questions Taken on Notice on Tuesday, 2 March 2004

2.9 Mr West asked Mr Watson: How many construction sites do WorkCover estimate there are in NSW? (Hansard, page 49)

#### Answer:

The Australian Bureau of Statistics scope of the Building Activity Survey indicates that during any given quarter there are approximately 16,000 construction sites in NSW.

2.10 Ms Burnswoods asked Mr Watson: In relation to the investigation into the incident that occurred at St Peters on Saturday, 28 February 2004, does the employer at that site have any unpaid fines and has he ever been prosecuted before? (Hansard, page 51)

#### Answer:

The site visit was conducted in response to a complaint regarding unsafe work practices. No incident had occurred and the complainant was unable to identify the employer. At the time of the inspection two employers were identified on the site, namely:

- Montano Property Development P/L – 4 fines issued in 2001 at Arthur St Homebush site no prior convictions.
- Romanous Formwork P/L - no record of any fines or prior convictions.

No prior OHS convictions are recorded for the directors of these companies.

2.11 The Chairman asked Mr Watson: What proportion of the breaches of OH&S legislation is identified by WorkCover inspectors following an inspection (as distinct from attending after an accident or responding to a report from employees)? (Hansard, page 51)

**Answer:**

Approximately 39%. The number of breaches is measured by the number of notices issued by inspectors. As a representative sample, in 2002/03 the construction team identified 5019 breaches overall. 1967 of those were identified as a result of random unannounced 'blitzes' of commercial building sites.

2.12 Ms Rhiannon asked Mr Watson: In the OH&S Division of WorkCover, what percentage of the top 10 of senior management, from you down, have had experience in industry as OH&S managers? (Hansard, page 52)

**Answer:**

In OHSD, there are 13 senior managers (1x GM, 2x Directors, 10x Team Managers). All senior managers bring a wealth of experience from a diverse range of industries. This expertise has been acquired in an equally diverse range of roles covering all 13 designated industries (construction, health, manufacturing etc). It should be noted that since the implementation of industry teams, managers have further developed an in-depth understanding of issues in the particular area they manage. Two have experience as OHS managers in industry.

2.13 The Chairman asked Mr Reed: Could WorkCover provide a copy of the draft protocol with the State Debt Recovery Office on the recovery of fines? (Hansard, page 61)

**Answer:**

At attachment A is a copy of the draft Protocol for the Recovery of Fines that has been submitted for endorsement to the relevant law enforcement agencies including the State Debt Recovery Office and the Attorney General's Department.

2.14 Mr Clarke asked Ms Grant: Have you sought to bring to the attention of the Government the anomaly whereby employers may avoid a prosecution for a breach of safety through a breach of another part of the Act by not reporting the breach within the required time? (Hansard, page 68)

**Answer:**

As a result of this matter being raised during the Committee's inquiry WorkCover is preparing advice on this issue.

2.15 Mr Primrose asked Mr Blackwell: Is Mrs Jardine entitled to receive the lump sum benefit of \$285,750 payable to dependants following a workplace fatality under section 25 of the *WorkCover Act 1987*, given that her husband was not covered by a workers compensation policy? (Hansard, page 70)

**Answer:**

WorkCover has provided Mrs Jardine with details of how to make a claim under the Uninsured Liability and Indemnity Scheme (ULIS) operated by WorkCover which pays workers benefits under the *Workers Compensation Act 1987* when a worker suffers a compensable injury or death and their employer is uninsured. All benefits and conditions as per the 1987 Act are applicable in these circumstances.

The one-off benefit payable to dependants under s25(1)(a) of the 1987 Act is the amount in force at the date of death, the benefit applicable to July 2002 is \$271,500.

2.16 The Chairman asked Mr Watson: In relation to WorkCover's supervision of the Newcastle BHP site during August-September 2002 when Mr Rees was injured, how many days was there supervision while Inspector McMartin was away and can WorkCover provide the names of inspectors who visited the site and the days on which they visited? (Hansard, page 70)

**Answer:**

As stated previously it is the employer's responsibility to supervise worksites. Inspector McMartin was on leave for a period of 15 days. Inspectors at Newcastle Office were available to service the site should the need have arisen. During this period no incidents or requests from the workplace were received and no visits were undertaken at the site.

2.17 Mr West asked Ms Grant: In relation to the death of David Selinger at Fox Studios, is it possible that the WorkCover inspector who inspected that matter was not a fencing expert? (Hansard, page 74)

**Answer:**

The investigating inspector and a Construction Team inspector attended the site. The Construction Team inspector had expertise in the investigation of structural collapses and plant.

2.18 Ms Burnswoods asked Mr Wood: In relation to the death of Mrs Welch at St Ives, did the employer at the site notify WorkCover of the accident? (Hansard, page 76)

**Answer:**

There is no record of notification. WorkCover attended the site in response to a complaint and following the completion of its investigation, is prosecuting the controller and owner of the site, CJ & SJ O’Keeffe Building Ltd and the proprietor, Mr O’Keeffe. The matter is set down for hearing in June 2004.

2.19 Ms Rhiannon asked Mr Blackwell: In relation to the death of Chun Lin at UNSW, when will WorkCover make a decision whether it will prosecute this matter? (Hansard, page 77)

**Answer:**

On 12 March 3005 WorkCover received advice from counsel in relation to this matter and further inquiries are required.

2.20 Mr Primrose asked Ms Grant: How often does WorkCover appeal a sentence and would you give the Committee examples? (Hansard, page 78)

**Answer:**

WorkCover considers the adequacy of a sentence in every matter, but WorkCover appeals against sentence must, like other Crown appeals, be exercised with caution and restraint. The rationale for this was expressed by Kirby J (at para.62) in the High Court case of *Dinsdale v The Queen* [2000] HCA 54 (12 October 2000):

*“For reasons of legal history and policy, the position of Crown appeals against sentence has long been regarded, in Australia and elsewhere, as being in a class somewhat different from that of an appeal against sentence by a convicted offender. When first introduced, Crown appeals were considered to cut across “time-honoured concepts” of the administration of criminal justice in common law legal systems. For this reason, it has sometimes been said that, as a “matter of principle”, such appeals should be a comparative rarity. The attitude of restraint reflected in such remarks has often been justified on the basis that a Crown appeal against sentence puts the prisoner in jeopardy of punishment for a second time, a feature that is ordinarily missing from an appeal, or application for leave to appeal, brought by those who have been sentenced. The consequence is that where the Crown appeals, it is normally obliged to demonstrate very clearly the error of which it complains. The further consequence is that, where such demonstration succeeds, it is conventional for the appellate court to impose a substituted sentence towards the lower end of the range of available sentences. This convention tends to add an additional restraint upon interference, given the strong resistance that exists against appellate “tinkering” with sentences.”*

The right for WorkCover to appeal in OHS proceedings comes from both section 196 of the *Industrial Relations Act 1996* and section 5D of the *Criminal Appeal Act 1912*. WorkCover also has the right to appeal against acquittals in OHS proceedings under section 197A of the *Industrial Relations Act 1996*. The right to appeal in OHS proceedings was not available to WorkCover until section 196 of the *Industrial Relations Act 1996* commenced on 2 September 1996: see *WorkCover Authority of NSW (Inspector Game) v. Celea* [1998] NSWIRComm 179. Section 197A commenced on 12 January 1997.

Recent examples of WorkCover appeals to the Industrial Relations Commission on sentence and acquittal include: *Inspector Neil Buggy v Weathertex Pty Limited* [2003] NSWIRComm 273; *Dowling v Bournelis & Bedrock Constructions (NSW) Pty Ltd* [2003] NSWIRComm 88; *Legge v Coffey Engineering Pty Ltd (No 3)* [2002] NSWIRComm 30; *Vierow v Ridge Consolidated Pty Ltd (No.2)* [2002] NSWIRComm 254; *Batty v Graincorp Operations Limited* [2002] NSWIRComm 49; *Bultitude v Grice Constructions Pty Limited (No 2)* [2002] NSWIRComm 234; *Inspector Ian Lancaster v Burnshaw Constructions Pty Ltd* [2002] NSWIRComm 319; *Workcover Authority of New South Wales (Inspector Keenan) v. Technical & Further Education Commission* [1999] NSWIRComm 489.

2.21 Ms Burnswoods asked Mr Blackwell: In relation to the 20 year old painter who was killed at a TAFE college in the Hunter (as discussed during the hearings on 17 February 2004), could WorkCover provide the Committee with more information on WorkCover's investigation into that case? (Hansard, page 79)

**Answer:**

On 25 May 2001 Mr Peter Cruickshank, a fourth year apprentice painter, was fatally electrocuted and two other workers suffered electric shock injuries when the mobile scaffolding they were moving came into contact with overhead power lines at Cessnock TAFE.

Cessnock TAFE had contracted Mr Cruickshank's employer to perform painting work to the windows of a building on their campus.

In order to perform the work, the employer hired an 8.5m mobile scaffold that could be moved along the walls of the building to access all the windows that were required to be painted.

The employer arranged for a foreman to oversee the work. The foreman decided to move the scaffolding approximately 180m along an internal campus road and then onto an external roadway to gain access to the other side of the building. As the workers were wheeling the scaffolding onto the external roadway it veered into the gutter and contacted overhead power lines that were 8.25m high.

Prosecutions for breach of section 15(1) of the OHS Act 1983 commenced in the Industrial Relations Commission in Court Session on 31 July 2002.

The matter was listed for hearing commencing on 17 February 2003. Conferences were with held with witnesses, including the foreman and the other worker prior to the hearing date.

Counsel advised that evidence from witnesses was insufficient to establish a prima facie case, and the proceedings did not have reasonable prospects of conviction. WorkCover withdrew the prosecution on that basis.

2.22 Ms Rhiannon asked Mr Reed: Could WorkCover provide details of the legal qualifications of lawyers below the Director and Manager level employed in the prosecutions branch? (Hansard, page 79)

**Answer:**

Details of the legal qualifications of the Solicitors in the Criminal Law Practice (CLP) include:

*Senior Solicitor # 1*

- 1987 to 1997 NSW Police Service
- Admitted 1997
- 1997 to 2002 private practice including commercial litigation
- 2002 to the present CLP

*Senior Solicitor # 2*

- Admitted 1993
- 1993 to 2003 private practice including civil and industrial/employment litigation
- 2003 to the present CLP

*Senior Solicitor # 3*

- Admitted 1999
- 1999 to 2002 private practice including civil litigation
- 2002 to the present CLP

*Senior Solicitor # 4*

- Admitted 1996
- 1997 to 2002 private practice including civil litigation
- 2002 to 2003 WorkCover Civil Practice
- 2003 to the present CLP

*Senior Solicitor # 5*

- Admitted 1984
- 1989 to 1996 DPP
- 1996 to 1997 NSW Police
- 1997 to 1999 Police Integrity Commission
- 1999 to 2001 DPP
- 2001 to the present CLP

*Senior Solicitor # 6*

- Admitted 2000
- 2000 to 2003 private practice including criminal defendant work
- 2003 to 2004 Law Society and Legal Aid
- 2004 to the present CLP

*Senior Solicitor # 7*

- Admitted 1982
- 1982 to 2003 private practice including criminal defendant work
- 2003 to the present CLP

*Senior Solicitor # 8*

- Admitted 1993
- 1994 to 2001 criminal law work at DPP, private practice and Crown Solicitor's Office
- 2001 to the present CLP

*Solicitor # 9*

- Admitted 2003
- 2003 to the present CLP
- Previously Judge's Associate and paralegal with CLP



2.23 Ms West asked Mr Watson: Can the Committee be informed whether any persons have been successfully prosecuted for obstruction of inspectors? (Hansard, page 80)

**Answer:**

WorkCover considers that the obstruction of its inspectors is a serious matter. Since 1996 there have been 17 successful prosecutions for obstructing inspectors, resulting in penalties totalling \$26,650 being imposed.

WorkCover inspectors also routinely deal with obstruction issues by referring matters to the Police: see also the answers to questions 2.53-2.56.

**Additional questions placed on notice by the Chairman arising from  
WorkCover's response to questions on notice tabled Tuesday, 2 March 2004**

2.24 In your answer 1.26 regarding WorkCover's advice to Mrs Jardine you state that WorkCover "recently contacted Mrs Jardine to advise her of progress of the investigation". Was this before her appearance at the Committee's inquiry or afterwards? If before, what date?

Has Mrs Jardine been advised further of the conduct of the investigation?

**Answer:**

Most of the contact WorkCover has had with Mrs Jardine occurred prior to her appearance before the Committee. As indicated in the response to the Committee's question on notice 1.26 dated 23 February 2002, a senior inspector of the Construction Team liaised with Mrs Jardine shortly after the death of her husband and advised her about WorkCover's role and the ongoing investigation by WorkCover and the State Coroner.

In July 2003 Mrs Jardine was subsequently contacted by the senior investigating inspector, in order to provide an update on the progress of the investigation.

The Director of Legal Group contacted Mrs Jardine on Friday 20 February 2004 to advise her that the investigation was complete and that prosecution proceedings had commenced on Friday 20 February 2004. The Director of the Legal Group subsequently met Mrs Jardine and her son on Tuesday 2 March 2004 in order to provide further details in relation to the prosecution proceedings.

2.25 In regard to your answer to the experience of lawyers employed by WorkCover (1.50) you have described the skills required of solicitors employed by the Branch. Can you state how many solicitors in the branch had prior experience of criminal litigation prior to working for WorkCover? How many have prior OH&S practice experience?

**Answer:**

Please see the answer to question 2.22 above.

2.26 Do your answers to the Committees questions on the decision whether to prosecute a matter (1.41 and 1.42) mean that the CEO or senior managers of WorkCover will only overrule a recommendation of the Legal Branch to prosecute if there is a “public interest” reason for doing so?

Have you ever overruled a recommendation of the Legal Branch to prosecute?

If so, can you explain on what basis you made this decision?

**Answer:**

No. The answers provided to the Committee indicated that the decision to prosecute in any matter including a fatality is made having regard to certain established principles being the “overall” public interest and in particular:

- whether the admissible evidence available is capable of establishing each element of the offence, ie a prima facie case;
- whether there is a reasonable prospect of conviction; and
- whether there are discretionary factors, which nevertheless dictate that the matter should not proceed in the public interest. An example being whether it would be unduly harsh and oppressive and not in the public interest to prosecute a father, who, tragically killed his child with a tractor on a farm on which the family home was located.

In considering the public interest, the main criteria for consideration will be similar to that adopted by the ODPP Guidelines and will include:

- a) the seriousness or triviality of the offence and/or whether the breach is of a technical nature only; - WorkCover tends to prosecute when a death has occurred, when there has been a serious injury, or when there has been a risk of fatal or serious injury;

- b) any mitigating or aggravating circumstances;
- c) the length of time since the alleged offence;
- d) the degree of culpability of the alleged offender in relation to the offence;
- e) whether the prosecution would be perceived as counterproductive, for example, by bringing the law into disrepute;
- f) the prevalence of the alleged offence and the need for deterrence both specific and general;
- g) any prior breaches of or convictions under the OH&S or workers compensation insurance laws;
- h) whether the alleged offence is of considerable public concern;
- i) any precedent which may be set by not instituting proceedings;
- j) the age, physical or mental health or special infirmity of the alleged offenders or witnesses;
- k) the length and expense of a Court hearing;
- l) whether proceedings are to be instituted against others arising out of the same incident;
- m) community expectations that proceedings will be instituted;
- n) the availability and efficacy of any alternatives to prosecution.

The applicability of and weight to be given to these and other factors will vary and depend on the particular circumstances of each case. Other matters might include giving priority to prosecuting offences relevant to:

- a) target industries and or hazards;
- b) injury types and workplace fatalities;
- c) alleged failure to comply with a prohibition notice;

d) offences against inspectors or authorised officers which prevent them from exercising their powers; and

e) offences relating to impersonating an inspector.

No. There is no record of the CEO overruling a decision to prosecute.

2.27 Do you have any statistics on the number of prosecutions that are contested in the courts (what proportion plead not guilty)? We have heard evidence that a majority of parties plead guilty because of the complexity of the OH&S legislation and a belief that it is very difficult to 'win' the case and not be convicted.

**Answer:**

The OHS legislation is relatively simple in the obligations it places on employers and others in the workplace. A high proportion of OHS proceedings end in pleas of guilty because:

- WorkCover undertakes thorough investigations and prepares sound prosecutions; and
- Employers often recognise that they have committed an offence and want proceedings to be concluded as quickly and efficiently as possible; and
- Employers recognise that that they may get a discount on their sentence for a plea of guilty. The NSW Court of Criminal Appeal has issued a sentencing guideline recognising that the utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10-25% discount on sentence: R v. Thomson and Houlton (2000) 49 NSWLR 383.

2.28 Has the Minister directed WorkCover to prepare any special reports under section 88 of the OH&S Act?

If so, can the Committee please receive a copy of them?

**Answer:**

No. NA.

2.29 Where less than the maximum penalty was imposed by a WorkCover inspector (not the courts) for breach of the OH&S Act and regulation please explain the factors that determined the penalty level.

Who signs off on the level of penalty imposed?

**Answer:**

Penalty amounts are prescribed in Schedule 2 of the OHS Regulation. Penalties range from \$200 to \$1500. They depend upon the breach of the Act (e.g. destroy / damage /remove exhibited notice without approval has a prescribed penalty of \$200, and a failure to comply with an improvement notice has a prescribed penalty of \$1500).

**Additional questions placed on notice by Ms Cusack**

Case of David Selinger

2.30 During questioning we discussed Mr Blackwell's comment that the Workcover inspector "was not a fencing expert". The Chair said "The point is, it is not a question of the construction of a fence, these were panels leaning against a fence. That is different to a fence collapsing I assume?" Mr Watson replied, "That is correct". Can WorkCover please clarify that the panels referred to by the Chair were in fact temporary fencing panels. Can you confirm it was Ms Grant who in evidence referred to the fact "the fence" collapsed. When the Committee, taking its lead from Ms Grant asked about the collapse of the fence, we were referring to the collapse of the temporary fencing panels. Can Mr Blackwell clarify why he raised the fact that WorkCover lacks a fencing expert? His comment suggests that WorkCover lacked the expertise to investigate the collapse of the temporary fencing. Can we just have a clear explanation of this issue and why it was raised by Mr Blackwell?

**Answer:**

The panels involved were temporary fencing panels being used by the Fringe Festival for crowd control.

The issue of a fencing expert was raised by the Committee in its discussion. WorkCover inspectors have general skills as well as expertise in particular industry areas. As indicated in the above answer to question 1.17, the investigating inspector and a Construction Team inspector attended the site. The Construction Team inspector had expertise in the investigation of structural collapses and plant.

WorkCover notes civil proceedings against Fox Studios Pty Ltd, the Sydney Fringe Festival Inc and Event Security Personnel Pty Ltd have been commenced in the Supreme Court by the Selinger family.

2.31 Mr Blackwell also stated, in relation to the Coroner's recommendation: "The findings contained several recommendations relating to the police, the State Emergency Management Board, the management of Fox Studios and the Department of Fair Trading. No recommendations were made regarding breaches of the OHS Act or in relation to WorkCover, and no prosecution has been commenced."

However media reports suggest:

(a) the employee who stacked the fencing was not criminally negligent because of her inexperience on the job

(b) Fox were criticised because they did not have any person in charge of Occupational Health and Safety at the entertainment complex and recommended Fox should employ such a person. (ref: SMH 18/2/03)

Given WorkCover is responsible for Occupational Health and Safety, can you confirm such a recommendation was made, and why do you believe such a recommendation bears no relation to WorkCover?

**Answer:**

A copy of the Coroner's recommendations is at attachment B. The Coroner recommended that Fox employ a person in charge of occupational health and safety at Fox Studios. WorkCover understands that Fox did employ a Safety Manager with that responsibility at the relevant time.

2.32 Was WorkCover notified of this accident? Did a WorkCover Inspector ever attend the site? If so what did he/she recommend?

**Answer:**

At 9.15am on 16 January 2001 the Safety Manager of Fox Studios Australia notified WorkCover of a fatal accident that had occurred at the Fox Studios site.

WorkCover and the Police conducted an investigation of this incident assisted the Coroner for the purposes of the inquest. The Coroner's findings contained several recommendations directed to the Police, the State Emergency Management Board, the Management of Fox Studios Australia, and the former Department of Fair Trading. The investigating inspector recommended that no further action be taken.

2.33 Is there a correct procedure in relation to the stacking of the temporary fencing in question and did you ever investigate that issue and if so what was the result?

**Answer:**

Standards Australia is the organisation that issues standards for working procedures and plant across many areas. These standards are called Australian Standards and there are no standards that deal with the use of temporary fencing.

2.34 Why is the issue of employing a person not qualified to safely do a job not a WorkCover issue?

**Answer:**

Employers are required under section 8 (1) (d) of the OHS Act to provide appropriate information, instruction, training and supervision as may be necessary to ensure employees' health and safety at work. The duty does not extend to providing training to ensure the health or safety of people other than employees. The circumstances surrounding the Selinger matter did not fall within the employment relationship covered by the OHS Act and the situation was not one specified by the objects set out in section 3 of the OHS Act.

2.35 Who is represented on the Intergovernmental Working Party, which is looking at the issue of public safety? When was it formed and when did it begin to consider the issue of how best to deal with recreational incidents? Has this issue been finalised and if not, when will it be finalised?

**Answer:**

The term "public safety" is only defined under the OHS legislation in relation to plant. Law enforcement agencies recognise that some incidents or risks to health and safety may only have a tenuous link to the workplace and may fall outside the scope of the OHS legislation.

An example includes crowd control and safety and risk management at large-scale public events such as public performances and concerts. These activities are usually the responsibility of agencies including the Department of Environment and Conservation, NSW Police, the Department of Health and the Department of Sport and Recreation.

The Intergovernmental Working Party on Public Safety that was convened by the Premier's Department in early 2003 includes representatives of agencies including WorkCover, NSW Police, the Department of Sport and Recreation and emergency services. The issue has not yet been finalised. The Premier's Department is the lead agency.

2.36 When I suggested that had the OHS Act not been breached the fence would not have fallen over, Ms Grant indicated that my suggestion is a “question of fact”, and said circumstances included a severe windstorm gusting at 100 miles an hour. When I again suggested the Act had been contravened Ms Grant said “No, that is not correct.” How do you know that is not correct? What is the evidence on which you base your belief that there were 100 m.p.h. windstorms and that this was not foreseeable at Fox Studios?

**Answer:**

An independent Bureau of Meteorology report was obtained which indicated that the windstorm in question was 100 kilometres per hour. Establishing whether or not the windstorm was foreseeable does not establish a breach of the OHS Act. To decide whether the OHS Act has been breached a number of factors, depending on the facts of the case, need to be taken into account.

2.37 Who decided that this was a “public safety” issue and not an OHS issue (please name the officer) and was there ever any advice to the contrary?

**Answer:**

The decision not to prosecute in this case was made by Mr John Watson, then Director, Service Delivery Group and Ms Bernadette Grant, Director, Legal Group.



## Mr Bultitude's Evidence

2.38 Mr Bultitude indicated that based on 10 years experience primarily in the construction industry, the majority of workplaces have areas of non-compliance. What is causing this?

**Answer:**

The non-compliance referred to ranges from technical breaches including failure to provide clean amenities including toilets and eating facilities, to more serious breaches that constitute an immediate risk to a person. The reasons for non-compliance are varied but include the dynamic nature of some workplaces, which have numerous employers, contractors and workers on site, constant changes to the work environment and the nature of work, and productivity pressures arising from competition.

Details of the range of measures used by WorkCover to address non-compliance are included in part 5 of WorkCover's submission.

2.39 Who and how is it decided which sites are to be inspected?

**Answer:**

WorkCover inspectors respond to all complaints received. WorkCover also undertakes random and targeted inspections ('blitzes') of workplaces to assess compliance.

WorkCover management decides which priority areas to target by using data analysis and feedback from inspectors on the ground. Examples of areas that are being targeted include falls, trips and slips in the workplace, being hit by moving objects and body stressing.

2.40 Is there any formal system where priority is given to inspecting serial offenders and if so, what type of scrutiny can we expect of such operators?

**Answer:**

WorkCover decides which employers to target by using data analysis and feedback from inspectors on the ground. An example is the TargetSafe program that is designed to improve health and safety outcomes for employers with the greatest capacity to improve their performance, including those in high-risk industries or employing vulnerable workers. Employers being targeted will be subject to considerable scrutiny.

2.41 In evidence you indicated there are operators who have no idea about OHS. Please estimate what proportion of the construction industry falls into this category? Does WorkCover have adequate resources to monitor such businesses?

**Answer:**

Please see answer to question 1.38 above. WorkCover has sufficient resources to monitor these businesses. Details of the range of compliance activities used by WorkCover to address this issue are outlined in Parts 5 and 6 of WorkCover's submission.

## Question to Mr Blackwell

2.42 What is the profile of a business most likely to experience a serious injury or workplace fatality? (Please indicate number of employees; whether they had previous offences under OHS; what types of accident are most likely to occur (eg; fall from height; plant related injury etc) and what areas of the industry are most likely to suffer a fatality (eg: roofing; demolition etc).

### **Answer:**

The profile of a business most likely to experience a serious injury<sup>1</sup> or workplace fatality is as follows:

- Industry – Manufacturing
- Wages payroll – More than \$1 million (indicative of 20 or more employees)
- Mechanism of Injury – Body Stressing<sup>2</sup>
- Mechanism of injury (for fatalities) – vehicle accidents including journey claims and being hit by moving objects
- Area of Industry (based on fatalities)– machinery and equipment manufacturing; food, beverage and tobacco manufacturing; metal product manufacturing

2.43 We understand WorkCover has had dramatic success in the Agriculture area - can you describe the campaign and its outcome, and are there any lessons from this to be learned for the construction industry?

### **Answer:**

WorkCover has been involved in a number of initiatives to assist rural and agricultural employers to improve workplace health and safety. These include:

- since 1994, WorkCover has promoted, in conjunction with the National Farmers Federation, NSW Farmers Association and the wider agricultural community, the Managing Farm Safety course that helps farmers to increase productivity and reduce workplace injury;

<sup>1</sup> Serious Injury is defined as those injuries resulting in permanent total disability or permanent partial disability (where worker is totally and permanently incapacitated for any type of work; and where there is complete or partial loss, or loss of the use of any part of the body faculty, where, while able to work, the earning capacity of the worker or opportunities for employment are permanently affected).

<sup>2</sup> Defined as muscular stress while lifting, carrying, putting down objects; muscular stress while handling objects other than lifting, carrying or putting down; muscular stress with no objects being handled; repetitive movement, low muscle loading.

- since 1999 WorkCover has promoted the 'Farm Safety Starter Kit, incorporating 15 minute farm safety check and induction checklist' in association with a television advertisement campaign;
- in 2000 WorkCover began the 4 year Roll Over Protective Structure rebate scheme for tractors, which, has seen more than 9690 structures fitted to tractors;
- since 2001 WorkCover has promoted the Future Farmers program, in which OHS training modules are incorporated into the curriculum of high school agriculture courses;
- since 2001 WorkCover has conducted information sessions across rural NSW concerning the roll out of the OHS Regulation including information about the need to consult with employees to identify and manage potential hazards and risk in the workplace;
- the ShearSafety Program helps woolgrowers and shearers improve their working conditions via a worm device rebate, a dollar-for-dollar shed improvement initiative, and information and assistance seminars;
- the Rural Safety Hotline, which enables rural employers, workers and others to access information relating to safety initiatives as well as industry associations; and
- rural field days and small business information sessions.

Preliminary data for 2003-2004 indicates that there has been a 50% reduction in traumatic fatalities in the agricultural sector. The success of these initiatives is largely due to the commitment of workers and employers in rural and agricultural communities to a tripartite approach. The lesson that can be learnt for any industry is that a tripartite approach will significantly improve OHS outcomes.

**Additional questions placed on notice by Ms Burnswoods**

- 2.44 How many **deaths** of workers in the building and construction industry aged under the age of 25 were there in 2003 + 2002 + 2001.
- (a) In each of those deaths how many employers were prosecuted?
  - (b) What part of the Act were they prosecuted under?
  - (c) What was the outcome of the prosecution?
  - (d) Have the monetary penalties been recovered?

**Answer:**

For workers aged 25 years and under in the building and construction industry, there were 12 fatalities in the three financial years of 2000/01, 2001/02, 2002/03, as follows.

Date of Injury Year	Fatality Number
2000/01	3
2001/02	5
2002/03	4
<b>Total</b>	12

The following 7 prosecution actions have been taken for these fatalities:

Fatality	Employers Prosecuted	Section OHS Act (see below)	Outcome	Monetary Penalties Recovered
Case 1	1	15(1)	Dismissed	Not applicable
Case 2	8 prosecutions of companies and individuals in a range of capacities:  1 <sup>st</sup> Employer 2 <sup>nd</sup> Occupier 3 <sup>rd</sup> Employer 4 <sup>th</sup> Employer 5 <sup>th</sup> Director 6 <sup>th</sup> Director 7 <sup>th</sup> Director 8 <sup>th</sup> Occupier	8(1), 8(2) 10(2) 8(2) 8(2) 26(1) 26(1) 26(1) 10(1)	Pleas range from guilty to not guilty, matters currently awaiting sentencing	Not applicable

Case 3	3 prosecutions of employers and a director  1 <sup>st</sup> Employer 2 <sup>nd</sup> Employer 3 <sup>rd</sup> Director	8(1) 8(2) 26(1)	Awaiting coronial outcomes	Not applicable
Case 4	1		Awaiting coronial outcomes	Not applicable
Case 5	1, possibly 2		Awaiting coronial outcomes	Not applicable
Case 6	2  1 <sup>st</sup> Employer 2 <sup>nd</sup> Employer	155(1)WC Act 8(1), 155(1)WC Act	Insufficient evidence to proceed	Not applicable
Case 7	2  1 <sup>st</sup> Employer 2 <sup>nd</sup> Employer	8(1) 8(2)	Prosecutions are being considered	Not applicable

The other 5 fatalities (for instance, due to natural causes and arising out of commuting accidents) did not involve a breach of the OHS Act.

2.45 How many **accidents resulting in the injury** of a worker in the building and construction industry aged under the age of 25 were there in 2003 + 2002 + 2001

- (a) In each of those accidents resulting in injury how many employers were prosecuted?
- (b) What part of the Act were they prosecuted under?
- (c) What was the outcome of the prosecution?
- (d) Have the monetary penalties been recovered?

**Answer:**

There were 636 permanent total or permanent partial disabilities across the three years. For parts (a) through to (d), this data is not readily available. WorkCover records information about prosecutions in general. To derive specifics dependant upon age would be an onerous exercise requiring a significant resource commitment. However, for the Construction Industry as a whole, there were 158 prosecutions in 2001/02 and 2002/03.

2.46 How many **near accidents** involving workers in the building and construction industry aged under the age of 25 were reported to Workcover in 2003 + 2002 + 2001

- (a) In each of those near accidents how many employers were prosecuted?
- (b) What part of the Act were they prosecuted under?
- (c) What was the outcome of the prosecution?
- (d) Have the monetary penalties been recovered?

**Answer:**

For parts (a) through to (d), this data is not readily available. WorkCover records information about prosecutions in general. To derive specifics dependant upon 'near accidents' would be an onerous exercise requiring a significant resource commitment. WorkCover is not in a position to provide this information.

2.47 Young workers and apprentices are particularly vulnerable to workplace accidents resulting in injury or death. What programs does WorkCover have in place to educate the employers of young workers and apprentices and the workers themselves about workplace safety?

- (a) How are those programs delivered?
- (b) How is the effectiveness of the programs measured?

**Answer:**

Please see answer to question 2.8 above.

2.48 In relation to the 20-year-old painter killed at a TAFE college in the Hunter Valley (raised in an earlier hearing), will WorkCover provide a summary and chronology this case? Why was there no prosecution?

**Answer:**

Please see answer to question 2.21 above.

**Additional question placed on notice by Mr Primrose**

2.49 In the area that WorkCover regards as the Sydney Metropolitan area on any given day how many officers of the NSW WorkCover authority are in the field responding to complaints between business hours (on average)?

**Answer:**

197.



**Additional questions placed on notice by Ms Rhiannon**

2.50 Does your statement to the Inquiry on March 2 that “No recommendations were made regarding breaches of the OHS Act in relation to WorkCover, and no prosecution has been commenced” mean that WorkCover views the incident that resulted in the death of David Selinger as closed?

**Answer:**

WorkCover is not considering taking any further action in relation to the Selinger matter.

2.51 If the incident that resulted in the death of David Selinger is still being considered by WorkCover, when do you anticipate that a decision will be made on what further action WorkCover will take?

**Answer:**

This question is not applicable, given the response to question 2.50

2.52 When do you expect that WorkCover will decide whether to commence prosecution with regard to the death of Chun Lin at UNSW?

**Answer:**

On 12 March 2004 WorkCover received advice from counsel in relation to this matter and further inquiries are required.

2.53 Are you aware that a man called Mr Eugene Benson, associated with Columbus Property Development Pty Ltd:

- a) Last Saturday 28 February, abused WorkCover Inspector Denis Howard?
- b) At one time abused WorkCover Inspector Clive Woodington at a Manly worksite?
- c) Has engaged in similar behaviour on a number of occasions?

**Answer:**

- a) WorkCover is aware of a site visit on the 28 February involving Inspector Howard. This visit is subject to further investigation into possible breaches of section 136 of the OHS Act, which relates to obstructing or intimidating an inspector.
- b) WorkCover is aware of a site visit in 1999 involving Inspector Woodington. Issues relating to Mr Benson's behaviour were addressed by Inspector Woodington's supervisor.
- c) WorkCover has no record of any further alleged incidents. WorkCover takes inspectors' safety seriously, and requests that that any details be provided for consideration.

2.54 Has WorkCover prosecuted or penalised Mr Benson for his abusive behaviour to WorkCover employees? If so:

- a) On how many occasions (including details of the nature of each offence, date and place committed, and penalties issued?)
- b) Has WorkCover issued Mr Benson with fines for his abusive behaviour?
- c) If fines were issued, has Mr Benson paid them?
- d) If the fines have been paid where they paid in full?
- e) If the fines have not been paid in full or only in part what actions can WorkCover take to recover the outstanding money?
- f) Has WorkCover taken this action?
- g) If not, why not?

**Answer:**

- a) Mr Benson has not been prosecuted for any offences relating to section 136 of the OH&S Act. Section 136 relates to obstructing or intimidating an inspector. WorkCover currently has an investigation underway into a site visit at St Peters where possible breaches of section 136 of the Act are being examined.
- b) No, there are no penalty notice provisions for obstructing or intimidating an inspector. WorkCover would not support such a penalty notice as it views such matters as serious matters requiring prosecution.
- c) Not applicable
- d) Not applicable
- e) Not applicable
- f) Not applicable

g) Not applicable

2.55 Have any WorkCover Inspectors received an apology from Mr Benson in relation to the above abuses? If so which inspectors have received an apology?

**Answer:**

Yes. Inspectors Howard, Moore and Team Coordinator Rech attended the St Peters site on Monday 1 March 2004 and were accompanied by NSW Police. Mr Benson offered his apologies in person to the inspectors. In addition, Inspector Howard received a written apology later that week.

2.56 Are you aware that Mr Benson:

- a) Has set up a new company, Montano Property Pty Ltd?
- b) Has set up a new company, Romanous Constructions Pty Ltd?
- c) Operates at least one of these companies under the name Marcos Lazos?

**Answer:**

- a) ASIC records indicate that Mr Benson (born in 1958) is a shareholder of Montano Property Developments P/L
- b) ASIC records contain no record of any involvement with this company.
- c) ASIC records indicate that there is a Mr Marcos Antonio Lazo (born in 1970) listed as a former director of Montano Property Developments Pty Ltd, and is a current director of Cerro Constructions Pty Ltd & Joemont Property Developments Pty Ltd, and Camperdown Development Pty Ltd.