HSE

Health and Safety Executive

Evaluation of EPS and enforcement action

Appendix A, B and C

Prepared by **Greenstreet Berman Ltd**
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Research Report

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Health and Safety Executive

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Appendix A, B and C

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This report provides three Appendix covering (A) a literature review regarding the impact of enforcement and exploratory discussions with stakeholders, (B) exploratory discussions proforma and (C) copies of postal questionnaires used for the surveys reported in Appendix D and E.

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Table 1: Comparative enforcement and injury data for Australian states (1998-99)

	Prosecutions per 100,000 employees	Notices & fines per 1000 employees	5 or more days injuries per 1000 employees	30 or more day injuries per 1000 employees
Victoria	9	2.3	12.3	4.9
New South Wales (NSW)	41	9	20.6	8.1
Queensland	10	11	15.7	4.5
South Australia (SA)	3	0.6	18.4	6.5
Western Australia (WA)	17	27	18.0	6.9
Tasmania	3	2.4	13.8	6.1
Australian Capital Territory (ACT)	6	3.7	21.1	10.1
Northern Territories	9	1.7	16.8	5.0

Figure 1: Plot of prosecution rates against 5-day injury rates for all Australian states (1998-99)

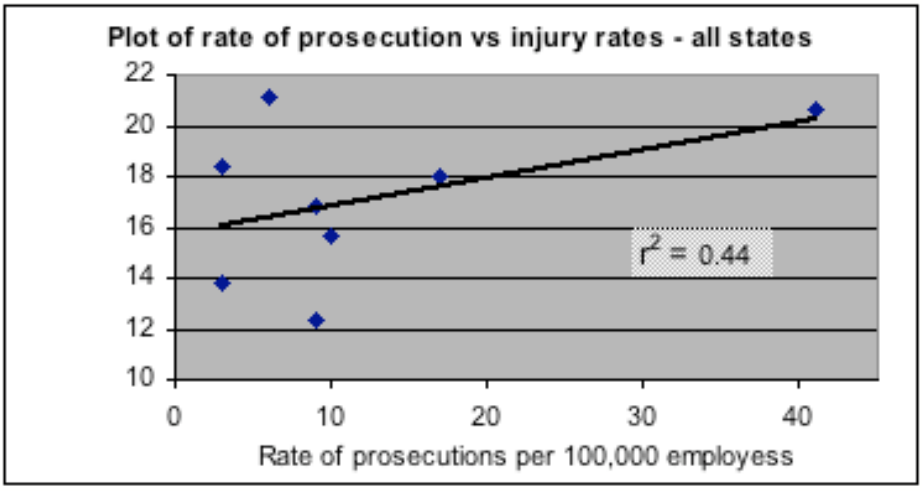
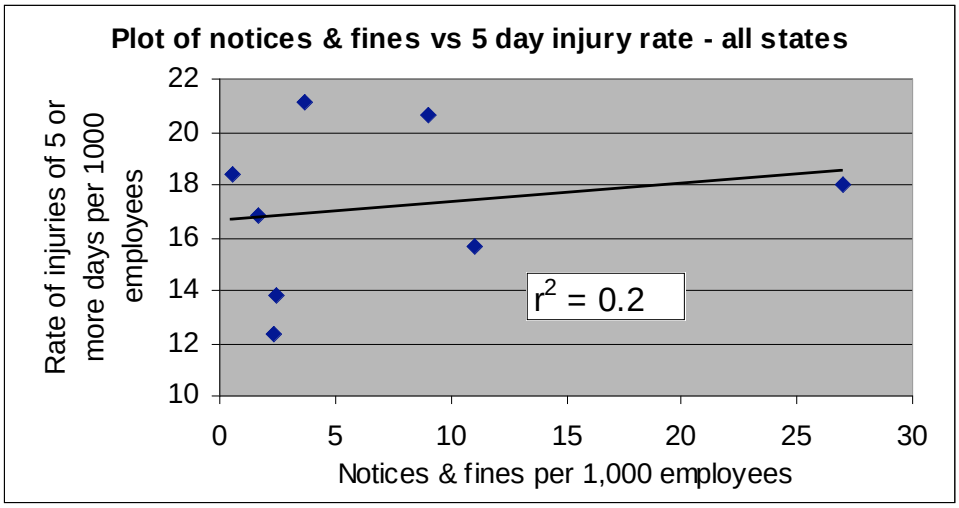


Figure 2: Plot of rate of notices & fines against 5-day injury rates for all Australian states (1998-99)



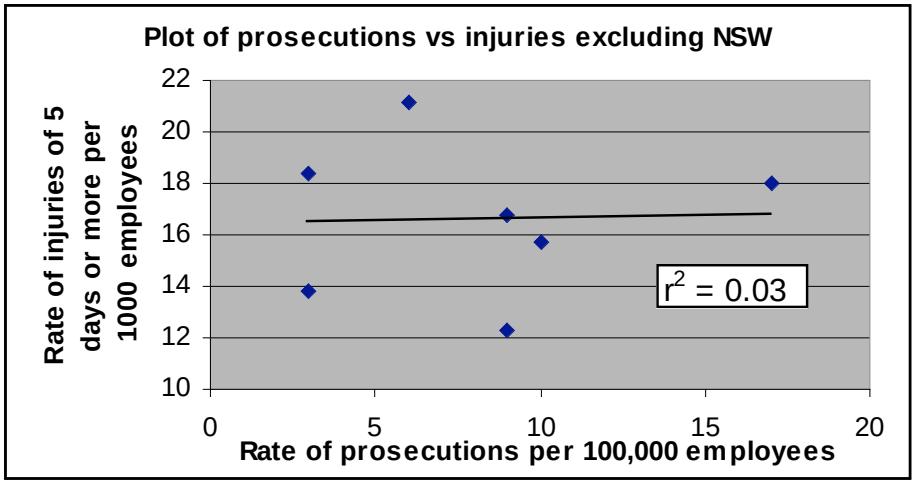
It is apparent that New South Wales is an outlier in the case of prosecutions. New South Wales is the data point in the top right hand side of Figure 1. Similarly, Western Australia is an outlier (the data point in the top right hand of Figure 2) in the case of notices and fines. It is apparent from Table 1 that NSW and WA reported the highest levels of prosecutions and notices respectively, far higher than other states.

If you exclude the New South Wales data there is:

- No or lower correlations between enforcement activity levels and injury rates, as shown in Figure 3 for prosecutions;

- A low negative correlation between prosecutions and injuries causing 30 days or more absence.

Figure 3: Plot of prosecution rate against injury rates excluding NSW (1998-99)

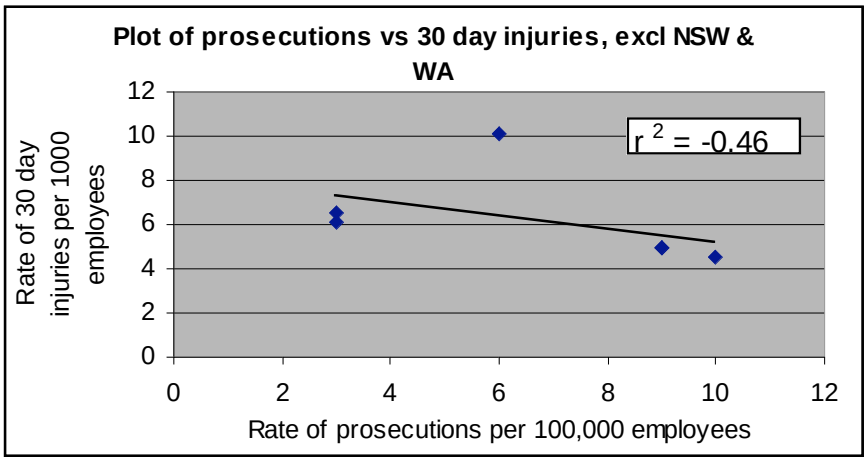


If you also exclude the data for WA, reducing the data set to an even smaller set of 6 states, it is apparent that:

- Enforcement levels are negatively correlated with injury rates:
- The strongest (if still moderate) negative correlations are with 30-day injuries.

Figure 4 shows the moderate negative correlation between prosecutions rates and 30-day injury rates after excluding NSW and WA data.

Figure 4: Plot of prosecutions against 30 day injuries excluding NSW and WA



It could also be possible that the benefit of more enforcement is indicated by a faster rate of decline in injury rates. It is possible that states with higher enforcement levels, NSW and WA for example, have higher risk industries. The benefit of greater enforcement levels might then be revealed by a faster or greater reduction in injury rates compared to states that have lower injury rates. To test this we acquired data on the 5 or more day and 30 or more day injury rates for each state and plotted them for the period 1995 to 2001. It was apparent that:

- NSW's 5 or more day injury rates did not decline any more than either the all Australia rate or the rate in Victoria – with rates of injury in each state falling by 20% (in NSW and the average for all states) to 45% (in ACT);
- The greatest decline in 5 or more day injuries was in ACT (a 45% fall) which has the sixth (out of 8) rate of prosecution and fourth highest rate of notices and fines;
- The state with the lowest rate of prosecution (Tasmania) also reported a 20% fall in injury rates, whilst SA (which has the lowest rate of notices and fines) reports a 15% fall.

Thus, there is no immediate evidence of rates of decline in injury rates being higher in those states with higher enforcement levels. Indeed, with the exception of ACT, the decline in injury with 5 or more days absence rates was close to 20% for all states.

This was further tested by collating injury rate data for each Australian state and enforcement data[4] for the period 1998 to 2002. This provides a larger data set of enforcement activity levels and injury rates. Moreover, as there was a significant increase in enforcement activity over this period, it provides data on whether the change in enforcement activity within each state was matched by a change in injury rates. Indeed, for Australia as a whole:

- Improvement notices increased by 21%;
- Prohibition Notices increased by 30%;
- Prosecutions rose by 6%;
- Court penalties rose by 375%.

In some states the level of enforcement activity rose greatly. For example the rate of improvement notices per 1000 employee rose seven fold from 1.4 to 9.9 per 1000 employees between 1998 and 2001 in Victoria. From a research perspective this is useful as it provides examples of whether an "extreme" change in enforcement level leads to a fall in injury rates. On the other hand, the rate of improvement notices per 1000 employees fell in NSW from 8.3 to 6.8 per 1000 employees in the same period, although the rate of improvement notices was fairly steady in 1998-2000.

An initial set of correlations of the level of enforcement with the rate of 5 day and 30 day injuries found positive correlations, i.e. you have higher enforcement levels in those years with higher injury rates. This result could simply reflect the higher injury rates and higher enforcement rates in some states. Therefore, we indexed the enforcement and injury rates, treating 1998 rates as 1. This transforms data into a rate of change. For example, if the rate of improvement notices in 1998-1999 was (say) 2 per 1000 employees, this would be called 1. If, in 1999-2000 the rate of Improvement Notices were (say) 3 per 1000 employees, this would be indexed as 1.5. This allowed us to check whether the change in injury rates is correlated with the change enforcement rates. The correlations are shown in Table 3. As the 30-day injury rate was not recorded after 2001, the results for 30-day injury rates are restricted to 3 years for each state.

[4] Australian Chamber of Commerce and Industry. Inquiry into Workers Compensation and OHS Frameworks. ACCI Submission No 81. 21st July 2003. Data sourced from the Workplace Relations Ministers' Council Comparative Performance Monitoring Report: Comparison of Occupational Health and Safety Arrangements in Australia and New Zealand, August 2002.

Evaluation of noise single issue inspection

Thomas et al (2004) completed an evaluation of a three-year single issue inspection exercise of over 200 factory sites in 2000/2001. The study was designed to test the impact of two alternative HSE interventions on organisational performance. The two interventions were:

- **Advice only.** One group of organisations were visited twice. On the first visit the HSE inspectors provided advice and rated the standard of risk control using the three Risk Control Indicators (RCIs) used on Inspection Report Form 1 (IRF1). On the second visit the HSE inspectors re-rated the organisations.
- **Enforcement.** The second group of organisations were visited three times. This group were subject to an initial enforcement intervention, such as an Improvement Notice or Instant Visiit Report, (and rated) and a further intervention, in some cases as enforcement or advice, at the second visit. They were also re-rated on the third visit.

The third visits were completed in 2002-2003. Thus, it was possible to measure the effect of giving advice versus the serving of notices, using inspector completed Risk Control rating scales. The ratings covered:

- Noise assessment;
- Control equipment;
- Ear protection.

The median scores for the two groups of organisations are summarised below.

Noise assessment

In the case of noise assessment, the advised organisations initial score was 2.35 versus 1.26 for the enforced organisations. In this case, the enforced scores rose to 3.57 on the second visit, and whilst they fell to 3.26 on the third visit, this was higher than the median score of 2.93 for advised organisations.

Use of control equipment

The three-visit ‘enforced’ organisations scored 2.85 out of 4 for control equipment on the initial visit compared with 3.12 out of 4 for two visit ‘advised’ organisations. The median score for enforced organisations rose to 3.35 on the second visit and then fell to 2.78 on the third visit.

Ear protection

The advised organisations had an initial score of 3.67 and a final visit score of 3.51. The enforced organisations score rose from 2.72 to 2.71 on the second visit and 3.49 on the final visit.

Thomas et al were able to complete a thorough statistical analysis of ratings to produce statistical robust findings.

It was found (quoting from the report) that, for the three visit ‘enforced’ organisations:

- The organisations chosen for enforcement action had lower initial levels of rated performance when compared with the two-visits group. Therefore, it can be concluded that HSE inspectors consistently chose organisations with poor performance to be the subject of further intervention.

- As noted below in Table 6, that the perception of the possibility of enforcement action being taken against them did vary according to organisational size in the expected direction, i.e. larger organisations are more likely to agree or strongly agree that there is a real possibility of enforcement action being taken against them. However, the survey did not test whether this was because larger organisations are more likely to be inspected and/ or have an incident simply due to their size.
- As per Table 7 there is no obvious variation in respondents citing that the low likelihood of inspection or prosecution as a reason for not making improvements.
- As per Table 8, the extent to which organisations report that the wish to avoid enforcement acts as a motivator does not vary greatly according to organisation size.

Table 6 : Perceived possibility of enforcement action (% who agree or strongly agree)

	Micro	Small	Medium	Large	Very Large	All
There is a real possibility of enforcement action being taken against us	9%	4%	13%	28%	28%	15%

Table 7: Does low likelihood of inspection deter improvements (% who agree or strongly agree)

	Micro	Small	Medium	Large	Very Large	All
The low probability of inspection or prosecution deters improvements	16%	10%	14%	18%	18%	15%

Table 8: Average rating of each motivator (where10 = great, 1 = not at all)

	Micro	Small	Medium	Large	Very Large	All
The wish to avoid an Improvement Notice, Prohibition Notice or prosecution motivates	6.9	6.9	7.6	7.3	7.3	7.32

The Wright et al (in press) 2004 survey of 1700 UK organisations also found, as per Table 9, that:

- 80% of respondents reported that they would “check their house is in order” if they heard of enforcement action in another organisation;
- 61% reporting hearing of incidents, prosecutions etc in their sector, ranging from 43% of micro to 78% of very large organisations;
- Only 32% of organisations, declining to 9% of small ones, are familiar with the HSE’s Offenders Database.

The OECD support this conclusion with reference to a number of studies of regulations, including the following health and safety ones:

- Bardach and Kagan found that business people scaled down their efforts to comply with the intent of the law if they felt the regulators were being overly legalistic in the application of the rules;
- The OECD refer to a series of studies of regulation of coal mines, nursing home regulation and environmental regulation that show that strict, coercive strategies break down goodwill and motivation of those actors already willing to be socially responsible and that an organised culture of resistance can arise.

This line of work is supported by the Australian KPMG Consulting (2001) study completed for NOHSC that concludes:

"..strongly indicate that the principal mechanism by which the regulation, inspection and enforcement pathway impacts on firms is because CEOs and supervisors agree with the intent of the regulation or comply in recognition of the legitimacy of the law." (p53).

This was indicated by the findings:

- That 90% of CEOs and 96% of supervisors agreed that health and safety requirements are important to preventing accidents.
- A number of firms consulted commented that they comply with legislation because "it expresses the community's expectation of how they should operate". (p55)

These findings can be related to the other common finding (see Wright et al in press) that the moral case is the greatest and most commonly cited reasons for managing health and safety. That is, if employers are motivated by the moral case to manage health and safety, then regulations and their enforcement need to be perceived to be legitimate to be complied with in a proactive or positive manner.

The aforementioned 2004 UK study (Wright et al in press) found, as illustrated by the findings noted below, that there is (on the whole) a positive attitude towards occupational health and safety and its regulation in the UK. As with other studies, smaller organisations report difficulties in compliance due to the number and complexity of regulations. The exploratory discussions found that:

- In general, UK occupational health and safety regulations are well supported and valued within all sectors as long as the benefits are clear;
- Organisations appreciate the opportunity to consult with the HSE on new regulations, and to a certain extent this increases the level of support for them because they have a level of ownership;
- Overall, all industry sectors stated that as long as the regulations were applicable to them and they could see the 'value', they would comply.
- It was widely reported that the regulations and associated guidance is, at times, overly complex, difficult to understand and not focused enough on specific sectors.
- Hence, although organisations in general support legislation, they feel it is made unnecessarily difficult for them to interpret.

The analysis of survey responses found,

- 70% of respondents agreed they had a good relationship with the HSE and/or Local Authority Environmental Health Officers (EHOs), rising from 40% of micro organisations to 84% of very large ones;
- 69% agreed that the HSE and/or Local Authority Environmental Health Officers (EHOs) give us good advice when we see them, rising from 49% of micro organisations to 72% of very large ones;

It also found, for all sizes of, organisations that have been inspected by the HSE or EHO in the past three years they:

- Are more likely to agree that they have a good relationship with the HSE/EHO and that the HSE/EHO give good advice, and;
- Are less likely to agree that they do not want to come to the attention of the HSE/EHO.

As regards perception of the occupational health and safety regulators, the exploratory discussions found that:

- It was generally felt that there were issues of inconsistency and a failure in some cases for the HSE to ensure local inspectors were provided with the information agreed with the national bodies;
- By far the greatest concern was raised in relation to enforcement by LA EHOs, where enforcement by LAs was seen to be generally unhelpful and inconsistent, and;
- Consistency was seen as an issue for Local Authority enforcers, particularly in the food business sector where workplace safety issues were rarely being taken up and all the emphasis being place on food safety.

The latter findings can be contrasted with those of a recent UK study of food safety compliance in small UK food enterprises. As discussed below, small food enterprises were found to hold more negative attitudes towards food safety regulations and their enforcement, and exhibited a far more reactive and distrustful attitude. These contrasting findings highlight the importance of maintaining employers' trust and acceptance of the legitimacy of the law.

It is also apparent from (for example) Wright et al (in press) that perceived practicality of the regulations, whether they are overly legalistic, the balance of costs and benefits and the 'applicability' of the regulations to the organisation also influence the judgement of whether it is reasonable to comply with a regulation. In particular:

- The number and perceived complexity of regulations impact the perception of whether it is reasonable to attempt to comply and hence whether the regulations are fair and proportionate;
- The availability and quality of advice and guidance from the enforcing body and inspectors impacts the perceived fairness of regulations and their enforcement.

The latter points are particularly apparent in the case of smaller firms. The studies (such as Yapp and Fairman discussed below) indicate that firms believe that there is an onus on enforcing bodies to explain the regulations they enforce and advise firms on how to comply with them. The absence of such advice and support reduces the perceived fairness and reasonableness of such regulations and enforcement, and hence the motivation to comply with them.

- Examples of active lack of trust covered both the prescriptive hygiene requirements and hazard analysis requirements;
- Only 9% felt a moral duty to comply with food safety regulations;

Perception of EHPs

- Nearly two thirds disagreed with the requirements made by EHPs during an inspection because they were considered irrelevant to food hygiene, such as cleaning structural items seen to be remote from the food preparation area;
- There was a widespread perception that the issues raised by EHPs were 'petty' and 'irrelevant but necessary for EHPs to do because they "have to find something otherwise they look unprofessional";
- EHPs were seen to act inconsistently[8], both within their business and between businesses, with different food safety requirements made each time premises were inspected;

Motivation to comply

- Two-thirds of SMEs were motivated to comply with food safety requirements to protect their reputation from adverse publicity and potential action taken by EHPs;
- Three-quarters complied because of legal duties, irrespective of whether they agreed with them;

Impact of level of enforcement

- There was a general lack of awareness of the level of enforcement within food SMEs.;
- SMEs were motivated irrespective of the level of enforcement and despite having a perception that it was either low or unknown.

The researchers attributed these findings to a lack of understanding of food safety amongst proprietors and a lack of trust in the regulator, combining to lead proprietors to think that legal requirements were not relevant to food safety of the business. The one third of SMEs that did have written documentation had received assistance from either EHPs or a consultant.

They also concluded that for SMEs to respond to non-compliance, there needs to be a perception that action will be taken by EHPs. However, as SMEs believe EHPs are inconsistent, this undermines the perceived importance of non-compliance

Therefore, they concluded that:

- Improving levels of knowledge and understanding in SMEs by educative approaches would improve awareness of food safety legislation and trust in the regulator;
- Ensuring EHPs requirements are consistent and followed up would improve perception of inconsistencies;
- Restricting the use of enforcement would NOT improve compliance.

[8] It should be noted that (1) EHPs are meant to adopt a flexible approach to securing compliance which may explain the perceived inconsistency and (2) the creation of Local Authority Co-ordinating Body for Food and Trading Standards and the Food Standards Agency in 2000 were aimed at improving consistency.

They conclude that, in the case of food safety, compliance is the outcome of a "negotiation", however as SMEs lack trust in the regulator and legislation, this explains their lack of compliance, and the subsequent reliance on external enforcement of food safety requirements onto unconvinced proprietors. They go on to suggest that this indicates that the evidence does not support the "deterrence" theory of compliance. Rather, compliance is an outcome of a negotiation that draws in matters such as social norms and legitimacy. In the case of food safety, compliance is "heavily reactive" with the enforcer being the predominant driver, due to the lack of perceived legitimacy (and lack of deterrence).

Finally, on the point of deterrence they point to other research (Sholz and Gray 1990, Genn 1993) that indicates that people make decisions with 'bounded rationality', unaware of the cost of being caught for example, and to other research (Scholz, 1997) that indicates that there is a lack of evidence to support a simple model of deterrence as an explanation of why businesses comply.

The second part of the study examined the impact of alternative enforcement policies. The study involved screening 450 local authorities and selecting 8 'extreme cases'. Along with selecting areas on basis of level of deprivation and business survival rate, they select local authorities on the basis of whether they adopted an educative approach or a formal enforcement approach. They selected local authorities with 'extreme' levels of either formal enforcement or educative work. 100 randomly chosen high to medium risk food SMEs were chosen and contacted by letter and follow-up telephone call. The aim was to get 10 SMEs per local authority, with 81 SMEs actually taking part. In each case the local authority case history was examined, the proprietor was interviewed and a judgement made of the level of compliance. The inspection coverage was 95% to 100% in all local authorities but the approach differed with:

- 'Educative' local authorities that acted in an advisory role and attempting to change behaviour by providing information and tools to motivate and encourage change;
- 'Formal enforcement' local authorities who attempt to change behaviour by using formal threats (warning letters and threat of notices) to force change.

First, it was noted that businesses conceived compliance as "doing everything they were told to do by an inspector at the last inspection... irrespective of the length of time that had passed... changes that had occurred since, and obvious problems of compliance" (p20). Thus, once you have done what had been asked of you, compliance is achieved. The exception being where the proprietor did not understand the requirement, in which case the typical response was to ignore them. Also as with the first stage of work, most SME did not link the legal requirements to issues they perceived as important in preventing food poisoning.

With regard to the level of visits, the researchers suggested that the frequency of visits, every 18 months may have fostered a sense of reliance on the inspectors. They also suggested that the historically prescriptive nature of food safety regulations and enforcement may have contributed to the latter concept of compliance.

They also found that:

- Not one of the 81 SMEs actively sought information on requirements, and nearly all viewed compliance as something you did rather than chose to do;
- Once presented with requirements by an inspector, SMEs were more proactive with prescriptive ones with which they could relate and regard as simple, such as upgrading equipment, but had difficulty with hazard analysis;
- The SMEs had little knowledge about the nature or extent of enforcement action;

Table 10: Perceived impact of enforcement (% who agree or strongly agree)

	Micro	Small	Medium	Large	Very Large	All
If enforcement action was taken against us, the potential disruption to our business, time & trouble would be great	67%	67%	69%	64%	64%	68%
The cost of fines for health and safety offences worry us	51%	40%	46%	42%	42%	47%
Enforcement action would force health and safety up our list of priorities	52%	42%	49%	54%	54%	49%
Enforcement action has (or would if it occurred) a long term effect on the willingness of managers & directors to improve health and safety	41%	43%	54%	52%	52%	49%
Enforcement action forces organisations within our sector to do something they would not otherwise do	41%	35%	44%	46%	46%	42%
We must avoid enforcement action to keep trade unions & employees happy	40%	36%	30%	23%	23%	31%
It is necessary to comply with regulations to protect our reputation	84%	76%	83%	85%	85%	82%
It is essential to avoid enforcement to avoid increases in insurance premiums	53%	48%	64%	48%	48%	56%

The 2004 survey also found that the top three impacts of a serious H&S incident, rated as "possible" are:

- Reputational damage;
- An increase in insurance costs, and;
- A criminal prosecution.

Larger organisations tend to give these impacts a higher possibility.

Finally, it found that organisations rate being motivated by the wish to avoid enforcement only slightly more than the wish to avoid the bad publicity that poor health and safety could cause. The top rated reasons for managing H&S were avoiding being personally responsible for anyone being hurt or made ill and to fulfil moral obligations. The findings about the reputational aspect of enforcement contrast with the KPMG Consulting (2001) study, which concluded that corporate image was not considered to be a primary source of motivation, although a more significant concern for larger organisations. They did not find that inspections increased an organisation's sensitivity to corporate image. However, it should be noted that they asked a limited range of questions about the reputational impact of enforcement, and indeed referred to accidents rather than notices, fines or prosecution. Also, outside of the telephone survey they only consulted six organisations that had been prosecuted.

Nonetheless, KPMG Consulting did find that:

- Corporate image is important to organisations requiring community or government support to maintain or expand their business operations (p 113) and for organisations operating in high-risk industries;
- Approximately half of the organisations that reported some impact upon corporate image had experienced an incident or prosecution;

Scholz (1997) concluded from empirical tests that a simple deterrence model is not a helpful explanation of what motives organisations to comply with the law. Indeed, Scholz and Gray conclude that interventions that draw senior management attention, such as audits or penalties, can have the same focusing affect. Similarly, Karnon (2001) quotes quotes Paternoster and Simpson (1996) that the limited empirical evidence provides 'no or very weak and conditional support for the deterrence of corporate crime'.

These conclusions are supported by the research summarised here, including:

- A decline in UK service sector injury rates despite a large reduction in Local Authority enforcement in the 1990s;
- No consistent association between enforcement levels in Australian states and injury rates, despite very large increases in enforcement levels in some Australian states;
- Inconsistent associations between enforcement levels and injury rates in HSE enforced sectors in the UK;
- It is also unclear whether smaller organisations, are less deterred by the prospect of enforcement than larger organisations despite being far less likely to be inspected or the subject of enforcement,
- Many organisations appear unaware of the level of enforcement, regulations and nature of penalties;
- Little evidence that the size of penalties is linked to safety improvements.

On the other hand, there is evidence from recent UK employer surveys that:

- They do act on hearing of incidents in other organisations and that they are motivated to comply with the law;
- They do believe that enforcement would have a significant impact on their organisation;
- They need to comply with the law to protect their reputation;
- There is a split opinion on whether enforcement has a long-term impact on safety in the organisation.

There are a number of possible explanations for these findings.

First, it is possible that the cause and effect relationship is reversed, i.e. higher injury rates lead to higher levels of enforcement. The demand for enforcement might be greater in states or sectors with higher injury rates. Thus, the level of enforcement may reflect regulatory policy decisions. However, this fails to explain why major increases or reductions in enforcement levels (regardless of their basis) are not matched by changes in injury rates.

It is possible that there is a positive correlation between enforcement and injury rates. Indeed, a number of studies have suggested that enforcement may have adverse impacts on organisational commitment to health and safety and on their performance:

- Bluff (2003) raises the point that occupational health and safety management requires a systematic approach, and needs to be developed from the needs of the organisation. Therefore, enforcement needs to be applied with care, to ensure it does not focus overly on specific aspects and instead directs attention to the overall assessment and management of hazards;

- The Research International (1998) evaluation of Killing Field II campaign noted that whilst farmers thought increased prosecutions would be a driver for improvement, it would also reduce trust in the HSE;
- Pain (1995) in a review of the impact of environmental protection law, concluded that the application of criminal law to offences may cause a loss of trust, trust that is required for regulators to persuade and negotiate acceptable standards of behaviour for corporations;
- Hopkins (1995) makes a number of points having reviewed research and case studies of OHS prosecutions and other forms of enforcement:
    - First he quotes Rees (1988) and others as arguing that prosecution can, especially of every 'petty' violation, put the employer on the defensive and destroy the possibility of co-operation or open communication;
    - Hopkins (1995) also suggests that repeat prosecutions of a company do not have the same shock impact as first time prosecutions – where the fear of bad publicity are unknown and hence feared;
    - Finally he argues that prosecutions that focus on (say) guarding of machinery rather than the changes to the way the company is managed will not be effective.
- Johnstone (2002) review of Australian prosecutions found that they examine offences in close detail, focus on machinery accidents and focus on individual culpability – rather than the process/management failings leading to the event;
    - Prosecutions focus on individual liability and fault and hence do not prompt the "systems" approach to safety management recommended by OHS professionals;
    - Prosecutions focus on discrete actions (for the sake of proving fault) and hence do not reveal the wider context of causation needed to guide improvements to prevent re-occurrence.
- Pearce (2002) in a review of UK cases found that courts do not always support improvements to health and safety at the detailed level;
- Dunford and Ridley (1996) suggest that fines are less likely than other forms of punishment to act as a deterrent for other companies, and that they have uneven effects on large and small companies (affecting the latter to a larger degree). Large firms are also more likely to be able to pass costs onto employees or customers due to their market position, and in any case it may be less desirable to force large firms into liquidation because of the more wide-reaching social and economic effects;
- Braithwaite (as quoted by Karnon) argues that strategies of threat and sanctioning should be reserved for when persuasion fails, as psychological research has shown that voluntary compliance is more robust and enduring than forced compliance;
- Gunningham and Norberry (1993) suggest that prosecution does not tackle health and safety issues in the round, not fully addressing either individual or corporate accountabilities;

- Yapp and Fairman suggest that the traditionally prescriptive nature of food safety enforcement and the high level of inspection in the UK may have made proprietors dependent on the enforcement activity of EHPs. Higher levels of enforcement lead to employers depending in the regulator, leading to an ineffective reactive compliance process.
- KPMG Consulting suggested, in their Australian review, that it is possible that NSW and WA increased enforcement at the expense of other interventions or that enforcement was increased without a corresponding increase in other complimentary interventions such as additional guidance. However, NSW has a promotional and educative element to their work as well.

Thus, if the adopted approach to enforcement creates dependency on the regulator, leads to (say) active distrust by duty holders or fails to support better OHS management, then higher levels of enforcement may have a negative effect. In contrast, if the nature of the enforcement approach generates a more sustained level of compliance, then higher levels of enforcement could lead to higher standards. This may explain the conflicting findings on the link between enforcement activity and injury rates, in that the direction of the relationship between enforcement and injury rates may be a result of the nature of the enforcement process and employers' perception of the enforcer/regulations.

Finally, it has been argued that enforcement, especially prosecution, is meant to serve the purpose of securing justice and punishing offenders. In this context, there might be no expectation of deterrence as enforcement is meant to serve a different purpose.

Normative compliance

As discussed by the OECD (2000), another body of research shows that many enterprises are motivated to comply with the law, or at least appear to comply, in order to maintain their legitimacy in the eyes of government, industry peers and the public. It is suggested that rather than seeing organisations as amoral calculators that need deterrence to comply, organisations are motivated to maintain their legitimacy in the eyes of key stakeholders. In the terms of Hawkins, organisations act as 'political citizens'. The OECD goes on to suggest that:

..the possibility of fines, sanctions, and inspections acts less as a deterrent threat than as a way to focus management attention on institutional expectations that may affect the legitimacy and operation of their enterprise." (p70).

Whilst financial and legal considerations are not unimportant, they suggest that organisations:

- Copy practices and structures from other apparently successful organisations;
- Submit to demands of powerful external actors;
- Import practices of professionals and other organised value carriers.

The OECD suggests that it is the imperative of institutional legitimacy that explains how companies regulate themselves rather than a simple model of deterrence. The OECD points to examples of growth of employee rights and environmental issues in US companies as examples of institutional legitimacy.

The OECD also quote evidence that supports this view, including:

- Davidson et al (1995) found that the stock market value to OSHA announcements of sanctions, a stock market fall of 0.46%, was not linked to the size of the fine;

- Fisse and Braithwaite (1983) found in a study of 17 corporate offenders that adverse publicity was of concern due to the loss of corporate prestige.

This explanation of the role of enforcement is supported by the findings of studies summarised in this report, including the finding from Wright et al (in press) that the moral case is the top driver for occupational health and safety management along with the wish to avoid adverse publicity. The exploratory discussions completed in the latter study also found that:

- In general, respondents from within the public sector (bar one exception) reported that employers do not think of health and safety as a moral duty;
- In contrast, responses from organisations within the private sector considered that they did have a moral duty, although this tended to be driven by the fear of damage to their reputation and associated level of publicity any breach might attract.

Similarly, the work of Yapp and Fairman suggests that SME food proprietors complied reactively (to inspections) without a specific decision being taken once requirements were made, there was little evidence of compliance due to a deterrence affect. Rather proprietors complied, in the researchers' opinion, because they aimed to comply and because compliance is a norm to be achieved.

In this context, the OECD suggest that it is imperative that employers:

"..trust regulators as fair umpires who administer and enforce laws or regulations that have important substantive objectives, then the evidence is that compliance will be higher, resistance and challenges to regulatory action will be low." (p72)

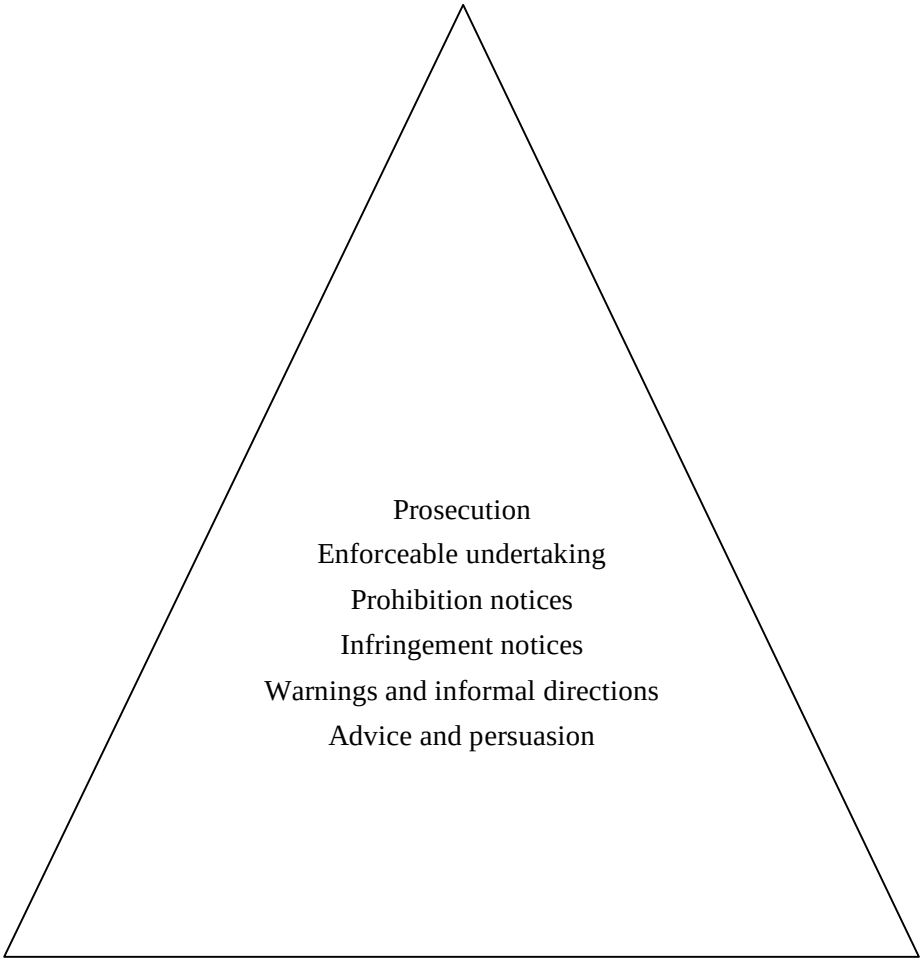
This perspective leads to the ideas that:

- A co-operative, persuasive regulatory enforcement strategy is appropriate for the majority of businesses that are ordinarily inclined to comply (where the law is perceived as legitimate, substantive, proportionate and effective), with punitive sanctions for the others;
- Enforcement acts as a 'wake up call' for managers rather than a deterrent;
- It is the informal ramifications of enforcement, such as negative publicity and internal loss of staff goodwill, that are more important consequences of enforcement than the penalties themselves.

This perspective also leads onto the idea that (1) enforcement should be proportionate and (2) should only enforce after persuasion has failed. Professor Johnstone presents an enforcement pyramid as per Figure 24. The pyramid is based on the idea that it is more effective to maximise self-regulatory possibilities by using co-operative measures first, and using more coercive measures only when persuasion fails. The OECD conclude that this is supported by an "impressive array of research" (p74).

Whilst the advantages and disadvantages of this model can be debated, such as the problem of the split pyramid where the regulator immediately takes action at the top of the pyramid if a death or serious injury occurs, it serves the purpose of presenting advice and persuasion as part of a stepped 'negotiated-persuasive-enforcement' strategy.

Figure 24: Enforcement pyramid



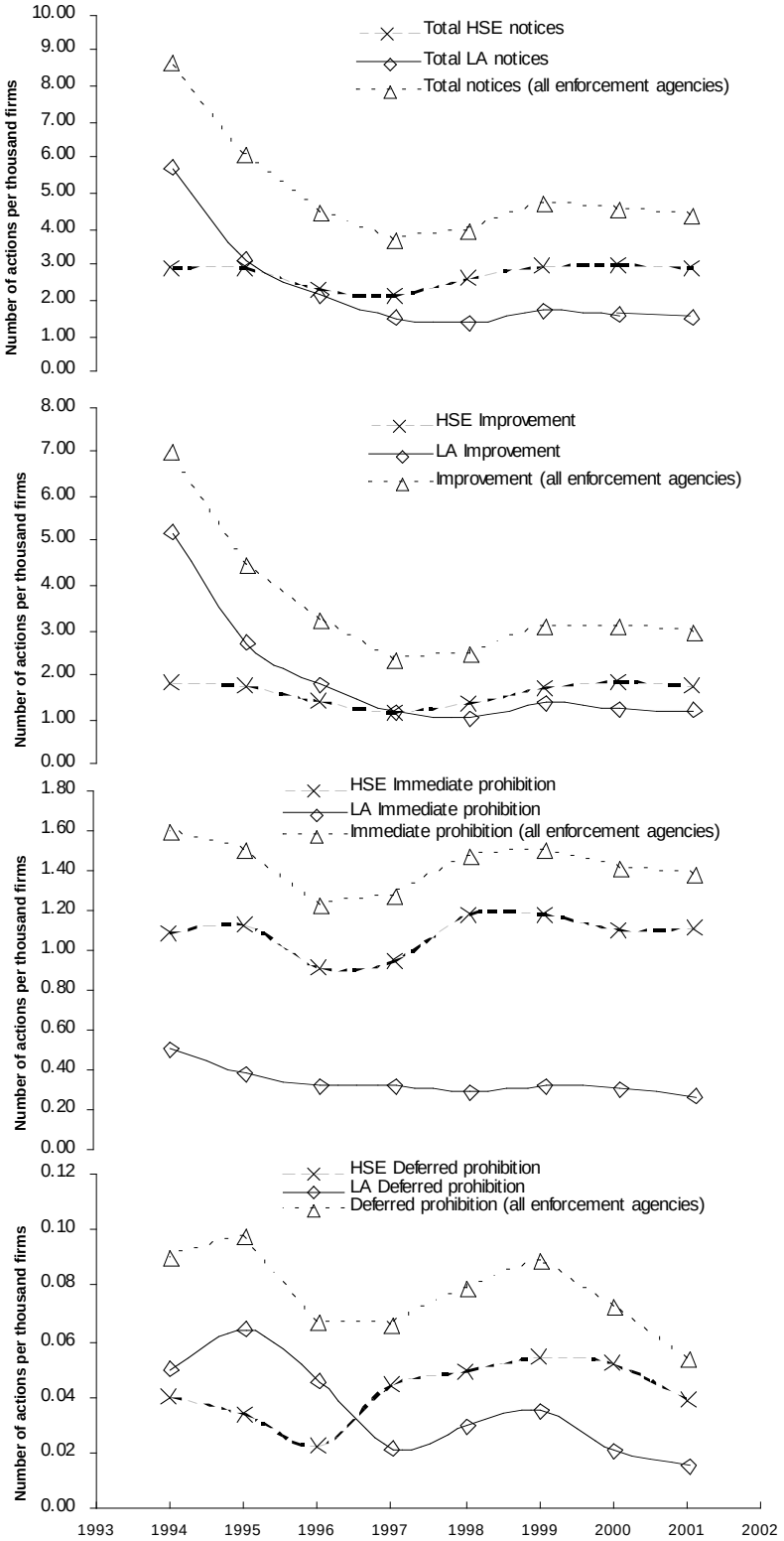
There is also evidence that compliance, and general organisational commitment to health and safety, is highly influenced by awareness and perception of risks. Indeed, Yapp and Fairman characterise UK food SMEs as organisationally incompetent. More generally, numerous studies have indicated that SMEs commonly argue that it is impractical for them to comply with regulations due to their complexity and the lack of internal health and safety expertise. If an organisation is unaware of hazard, does not perceive the risk to be significant, does not know how to manage it or does not believe it is practical for them to manage the hazard, the rational decision would be against taking preventive measures. Indeed, there is a large body of evidence that indicates that awareness of a risk is often a pre-requisite to taking action. There is also evidence that the presence of health and safety specialists in an organisation is associated with higher levels of awareness and action.

These findings lead to a slightly different regulatory concept wherein there is an interaction of education with enforcement. This leads to the development of integrated models of persuasion, education and enforcement. For example, the Australian (Worksafe Victoria) Constructive Compliance Model (Merrit, 2002) presents education, incentives and deterrence as all part of one compliance strategy, as per Figure 25. This model differs from the enforcement pyramid in so much that it sees advice and incentives as occurring alongside enforcement rather than seeing advice as the starting point that may be followed by enforcement.

Table 12: Summary of research into new enforcement penalties and options

	Pros	Cons
Adverse publicity	There is empirical evidence that adverse publicity is a strong motivator for many organisations and corporate executives. Harnesses reputational sensitivity of firms and individuals to societal shaming. Adverse publicity increases the internal costs of non-compliance and expected risk of enforcement. Acts a general deterrent across organisations (not limited to the offender). Can be linked to restorative justice.	Difficulty in attracting media attention at the time of prosecution was one of the largest barriers to the use of negative publicity – media attention is focused on the company at the time of the accident rather than at the time of the prosecution. The unpredictability of the public reaction to adverse publicity means that the "penalty" is uncertain and may not be proportion to the offence Adverse publicity may have limited impact on organisation that either lack a brand value or who enjoy a "monopolistic" position. Premature publicity (before liability or fault is established) is unfair and undermines legitimacy of the law Deterrent effects may be limited to senior management Publicity may be delayed to long after the offence due to need to establish fault. May stigmatise all employees for the wrongdoings of a few.
Restorative justice	May have a more positive, re-integrative affect on organisations than adverse publicity. Encourages the offender to rehabilitate. The OECD conclude that there is good evidence that the *restorative justice* is effective for *corporate* law breaking	Firms may fail to capitalise or care for their image. Firms may focus on restoring image rather than substantive improvements
On the spot fines	The 1998 Australian study into on the spot OHS fines' in Australia (Gunningham, 1998) concluded that 'on the spot fines':	Mendaloff (in Sullivan and Frank 2003) refers to the increase in inspection related penalties in US from 35% (inspections resulting in penalties) between 1979-87 to 75% between 1992-8, inferring that as

Figure 27: Example of tracking enforcement levels per 1000 firms



- What are the potential advantages and disadvantages of new penalties or enforcement tactics?
- How does the level of enforcement impact duty holders' attitudes and behaviours?
- To what extent do duty holders and enforcers accept the principle that health and safety offences are criminal actions that should be subject to criminal law (as opposed to civil), and how does this affect the relationship with the regulator?

Type of action

No systematic work has been done to investigate whether the particular type of action makes a difference, nor whether how a Notice or advice is framed impacts effectiveness. For instance, if an improvement notice requires a review of "organisation" (in HSG65/management regulations terms) would this have a longer-term impact on compliance of that duty holder than if a more specific risk control measure is required? Could the nature of the hazard addressed make a difference e.g. working at heights versus inhalation of a carcinogen? If this does make a difference, is it the same for all types and sizes of organisations?

Organisational factors

Also what organisational factors make a difference? Does, for instance, the presence of employee and/or safety representatives make a difference? How does the size or sector of an organisation affect responses and how they hear about enforcement and standards? Do health and safety targets for individual managers change the organisation's response? How does the culture and attitudes of an organisation affect responses?

Impact of the EMM

The use of the EMM as a framework to assist in decision-making is clearly relatively new in parts of HSE and in a number of local authorities and it is clearly a significant development in health and safety enforcement practice in the UK. As is to be expected so early in its implementation the literature does not cover the influence of this framework.

Pyramid of enforcement

There is a strong strand in the literature around the pyramid of enforcement, showing the link and potential steps in the escalation of enforcement action. Further practical evidence for this would add to the literature, and may help answer questions about whether extra steps in the escalation might be useful in increasing the efficacy of enforcement.

- However, not all were aware of it or the EMM;
- Employer representative bodies, particularly those with SME members thought that awareness of either document would be very low amongst members. This was found to be the case. Only one Duty Holder was explicitly aware of the EMM and EPS in detail, and was angry as their guidelines had been broken as retrospective Notices had been served.
- Another Duty Holder commented that recent letters from inspectors were following a standard model. This was seen as good in acting to increase consistency between inspectors;
- On being told what the EMM and EPS were, they were not generally felt to have had a major impact by duty holders;
- It was felt by some of the HSE interviewees that Local Authority investigations and enforcement activities did not match the EPS. This was seen as being due to the lower competence and lack of experience of many Environmental Health Officers in health and safety work as it was a lower priority task for them compared to food hygiene issues.

HSE interviewees generally described the EMM as being fully used for HSE prosecution decisions, and generally for Notices in terms of the decision- making process though not necessarily formally documented. Its use was seen to be increasing over time as a basis for thinking through enforcement decisions. Its use was less common in HID permissioning work.

Both the Local Authority inspector interviewees were aware of the EPS and EMM, and one had participated in a pilot trial using it. Both were unable to comment on how it had affected the work of local authority inspectors as it is was not being implemented within local authorities until April 2004.

The EMM was generally seen as beneficial by HSE interviewees. The key benefits were reported as being:

- Increased consistency in decision making process, ensuring consideration of relevant factors at appropriate time by inspectors;
- Increased confidence of inspectors in the robustness of decision made. This was also seen to encouraging inspectors who are “reluctant enforcers” as gives them more confidence in being able to defend their decisions;
- Providing a useful tool for discussion of the decision and justification of enforcement decisions within HSE and in discussion with Duty Holders and other stakeholders and ensuring transparency of the decision process and providing a formal audit trail;
- Being a very effective training tool/ guide for less experienced inspectors as to “good” decision process.

On the negative side:

- It was seen as possibly adding to bureaucracy, with some managers saying that they did not insist on full documentation for Notices to reduce the workload;

- A few interviewees referred to resistance of use of EMM by older, more experienced inspectors. This was seen as due to a perception that the EMM fettered individual inspector discretion. However, it was also felt that with increasing experience of use of the EMM this resistance was reducing.
- An issue raised was that inspectors would only learn to make decisions based on the EMM, rather than move on to enforce using internalised judgement;
- One employer representative raised the dilemma of welcoming the increase in consistency in decision making brought by the EMM, while noting that members valued the ability of inspectors to deviate from the EMM when it came to enforcement against them;
- It was commented that the EMM did not assist in resource allocation decisions.

There were areas where the EMM was less effective. These related to:

- Over-enforcement of large and/or multi-site duty holders;
- Relevance of "risk-gap" concept to permissioning work.

Over-enforcement

It was felt that the EMM could lead to over – enforcement, where the process led to an increasing level of enforcement over time for a company due to consideration of a Duty Holder's previous enforcement history. There were two main issues with this; the company size and whether it was a major Duty Holder in the sector.

Large companies tend to have multiple sites, and these sometime operate relatively autonomously. Interviewees expressed difficulty using the EMM as to the best way to enforce against these companies – site-specific or across all sites. Also here, what history should be taken into account; across the whole company or against an individual site? This was raised as a particular issue for construction companies, where action tended to be taken on temporary working sites, with multiple Duty Holders with overlapping responsibilities, and which only exist for limited periods of time.

Risk-gap concept in EMM

Generally the risk-gap concept was seen as helpful, where the risks were clear and definable. Two areas that were raised where this concept was less helpful were longer-term health risks and radiation risks. In both cases there is not exact knowledge of the effects of various exposures.

The EMM was also not seen as well suited for high-risk hazard work and permissioning activity due to its use of the "risk-gap" as a key decision criteria. Permissioning work concerns assessing activities that have not already started to take place. Therefore there is no existing risk to assess. Permissioning enforcers also have a wider range of enforcement tools and differing expectations of their duty holders than in other HSE areas, e.g. provision of safety case information. Therefore, while the principles of the EMM were felt to be correct, the application of the EMM in this specific enforcement context tended to be supported by locally produced guidelines. These are being developed as inspectors gain experience with the EMM. Some inspectors in HID said that the EMM was not generally used in the permissioning work.

One interviewee was part of a one site of a national organisation operating in the sector with a very high safety culture, aviation. health and safety standards are, in part, enforced by the CAA regulation. The site operated independently, but was advised and inspected on health and safety issues by a team from the organisation on a regular basis. There had not been a HSE site inspection since 1968. The company also circulates reports following monthly reporting of the accidents and near misses across all sites, and how they have been dealt with. This is used to identify if there is a need to act at her site and how to do it effectively. The interviewee was very comfortable using HSE inspectors and website for obtaining information about specific issues that she had to deal with following her internal site inspections and was highly satisfied with the service provided. Felt that guidance rather than exact requirements were given, and that the inspectors the interviewee had dealt with were confident that the interviewee understood what the interviewee had to do before ending the conversation. They also encouraged the interviewee to call back if required. The interviewee was not aware of the HSE Offenders Database, and was going to pass the information further up the organisation to ensure that they were aware of it.

The motivations for high levels of compliance with health and safety requirements were protecting employees, company reputation, and ensuring that the site insurance premium was kept as low as possible. This was the only mention of variable insurance rates as a factor in compliance behaviour.

The other two interviewees were from the construction sector, operating their own companies. Both felt that they would not ever be inspected as they were small contractors doing domestic work rather than working on commercial building sites. One worked independently, the other with a partner under the auspices of a national DIY store, fitting bathrooms. While both these interviewees stated that their primary motivation in terms of health and safety was insuring that their personal safety and ability to work, the one doing contract work had checks carried out by the national chain, and received safety briefings on a regular basis in addition to the information supplied by manufacturers to both interviewees.

Both described the various information sources they received as being helpful in raising their general awareness of the risks they were exposed to. They both talked about the practical steps they felt they took to minimise their risks; one, who worked alone, did not do ladder work, the other tried to ensure that he always worked with someone else.

Only one said that he would hear about enforcement actions through “word of mouth sources either when meeting other fitters working for the national organisation or in the trade shops. Neither was aware of the HSE Offenders Database. Neither had ever tried to contact the HSE for any reason.

All interviewees felt that enforcement, and the enforcing organisations were good and required, but that should only be used where required. The aviation interviewee had the most sophisticated understanding of what enforcement was, with the two construction interviewees seeing it as “inspectors stopping everything if they want to”.

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APPENDIX C: QUESTIONNAIRES

The questionnaires are shown here. Their format has been altered to fit the HSE research report.

ENFORCERS QUESTIONNAIRE

About this survey

This is an independent survey commissioned by Health and Safety Executive

The Health and Safety Executive (HSE) has commissioned Greenstreet Berman to evaluate the effectiveness of enforcement across HSE and Local Authorities (LAs). As inspectors and enforcement officers you have a unique view of how enforcement works and so a central part of this study is gathering information about your experience and opinions. We would like to explore your views about how you enforce, how duty holders respond to that enforcement and whether enforcement could be improved. It is anticipated that these views and opinions will inform the next review of the HSC Enforcement Policy Statement.

Who should respond

We would be pleased if anyone who **currently** enforces health and safety legislation amongst their duties responds. Our focus here is the Health and Safety at Work etc. Act 1974, legislation enacted under it and permissioning regimes, including COMAH regulations. Please note: the questionnaire uses 'inspector(s)' as a general term to include 'enforcement officer(s)' and all those who enforce health and safety legislation; your answers, however, should not be made in relation to other health-related legislation such as food hygiene, or that intended to control the nuisance of noise for instance.

Contact details & anonymity

We can assure you of complete anonymity.

We do not ask for personal details. Greenstreet Berman is an independent research and consultancy organisation. If would like to find out more about Greenstreet Berman or if you have any questions about this survey please visit our website at www.greenstreet.co.uk or contact Sara Marsden on tel. 0118-938-7702, e-mail sara.marsden@greenstreet.co.uk or David Pennie on tel. 0118-938-7711, e-mail david.pennie@greenstreet.co.uk. Alternatively you may wish to contact Geoff Brown, who is managing the project for HSE, on tel. 0121-607-6267, e-mail geoff.brown@hse.gsi.gov.uk.

The questionnaire should take between 30 and 60 minutes to complete. Please return it to Greenstreet Berman by the 19th of November in the reply paid envelope provided. Your help would be gratefully received.

Greenstreet Berman Ltd, Fulcrum House, 5 Southern Court, South Street, Reading, RG1 4QS Telephone: 0118-938-7700

5. How long have you worked:	**Not at all**	**Up to 2 years**	**2-5 years**	**6-10 years**	**>10 years**
a. As an inspector or enforcement officer		2	3	4	5
b. With the industry sectors or business activities you currently enforce		2	3	4	5
c. Before becoming an inspector or enforcement officer	1	2	3	4	5
d. Dealing with the industry sectors or business activities you currently enforce **BEFORE** becoming an inspector	1	2	3	4	5

6. How is your H & S enforcement work divided between different sizes of workplace?	**All** (90%+ of instances)	**Most** (51% to 90% of instances)	**Sometimes** (10% to 50% of instances)	**Never** (<10% of instances)
a. Micro – under 10 employees	1	2	3	4
b. Small – 10 to 50 employees	1	2	3	4
c. Medium – 51 to 250 employees	1	2	3	4
d. Large – over 250 employees	1	2	3	4

Section 2: Your last Improvement & Prohibition Notices

For Local Authority inspectors with solely Section 20 HSWA powers, please consider the last Improvement and Prohibition Notice that you initiated with the assistance of colleagues.

	Improvement Notice	Prohibition Notice
7. I have taken this type of enforcement action in the last 2 years?	True	True
If you have not taken either of these types of enforcement actions in the last 2 years please move to question 21.		

Please consider the following statements and questions in relation to your most recently complied with or cleared **improvement** and **prohibition** notice. If you have only served one type of notice, please fill in only the relevant column.

8. Who were the notices served on?	Improvement Notice	Prohibition Notice
a. An individual employee (e.g. HSW Section 7 type)	1	1
b. An individual "controlling mind" e.g. director, owner, partner	2	2
c. A company / other employer organisation	3	3

9. What size was the relevant organisation?		
a. Self-employed	1	1
b. Micro – under 10 employees	2	2
c. Small – 10 to 50 employees	3	3
d. Medium – 51 to 250 employees	4	4
e. Large – over 250 employees	5	5

Score the extent to which you agree with the following statements **0 = Not at all 1 = Partly 2 = Definitely D/K = Don't know**	**Improvement Notice**	**Prohibition Notice**
13. The visit/contact that led to the notice being served:		
a. Was triggered by a complaint or service request		
b. Was because of an investigation into a case of ill-health		
c. Was because of an investigation into an accident		
d. Was a routine preventive inspection		
e. Was triggered by a request for advice from the duty holder		
f. Was triggered by a contact from an employee or Trade Union safety representative		
14. The subject of the notice was primarily a:		
a. Management issue		
b. Health issue		
c. Safety issue		
d. Welfare issue		
e. Permissioning/safety case issue		
15. The requirements of the notice:		
a. Included carrying out a risk assessment (e.g. including COSHH, noise etc)		
b. Included specific improvements to risk control measures e.g. guarding, ventilation		
c. Included improvements to management arrangements		
d. It was relatively easy to word the notice & explain to the duty holder how to comply		
16. Serving the notice:		
a. I served the notice immediately / during the visit when I found the problem		
b. I served the notice after having sought technical, legal or policy guidance		
c. I explained why the notice had been served		

Score the extent to which you agree with the following statements **0 = Not at all 1 = Partly 2 = Definitely D/K = Don't know**	**Improvement Notice**	**Prohibition Notice**
d. I explained what needed to be done to discharge the notice		
e. I explained the legal consequences if the duty holder did not comply with the notice		
f. Exposure to risk outside work (e.g. noise, manual handling at home) made it more difficult to decide that formal enforcement on the duty holder was justified		
g. I discussed the notice with a director or equivalent		
h. I informed an employee or trade union safety representative of the notice		
i. The notice or covering letter referred to an Approved Code of Practice (ACoP) or recognised industry standard		
j. Following serving the notice I had contact with the duty holder to assist them to clear / comply with the notice		
k. My decision to take formal enforcement action was affected by potential or actual interest in the issue by the public, politicians or other external interest groups		
l. Did you use the EMM to inform your decision?		
m. Did you find the EMM relevant in informing your decision?		
n. My decision did take into account the impact on the business, on things other than on H&S conditions there		
17. I served the notice:		
a. In part because the duty holder was not willing to take my advice		
b. In part because the duty holder had a poor record		
c. In part to set an example to, or to deter, others		
d. Because my organisation expects me to serve an enforcement notice in these circumstances		
e. Because, at a different site or business unit, the duty holder had received advice or a letter from an inspector on a similar matter		