



Small
Business
Commissioner

Submission to the NSW Department of Customer Service

Proposed amendments to the *Criminal Procedure Act 1986* to address the limitation on costs in criminal prosecutions under the *Work Health and Safety Act 2011*

February 2021

Table of contents

About us	1
Background	1
Context.....	2
Establishing the policy merits of the change.....	3
Small business considerations	4

List of recommendations

Recommendation 1 – Regulatory impact assessment

Regulatory impact should be examined more closely prior to any further consideration being given to removing s 257D(2)(b) of the CPA. Consideration of the proposed change should follow the principles set out in the NSW Government Guide to Better Regulation (TPP19-01).

Recommendation 2 – Small business needs

Small business needs should be considered in relation to options that would address policy objectives. In the event a decision is made to alter the status quo, further consideration should be given to alternative options such as (but not limited to):

- better targeting the change by considering an exemption for small businesses (for example, businesses with a turnover of under \$10 million or fewer than 20 employees) which are unlikely to incur legal expenses that threaten the regulator’s resolve to pursue a prosecution;
- considering funding arrangements for regulators and adjusting incentives that have the potential to impact decisions about whether to pursue a prosecution; and
- reviewing compliance and enforcement policies to identify how regulators engage with businesses.

Contact Information

For further Information or clarification on issues raised in this submission, please contact:

Megan Bennett

Executive Officer to the NSW Small Business Commissioner

Telephone: 02 9372 8767

Email: megan.bennett@smallbusiness.nsw.gov.au

About us

The NSW Small Business Commission (the Commission) is an independent statutory office of the NSW Government. It provides strategic advice, advocacy and affordable dispute resolution services to small businesses across NSW. The Commission's role includes:

- encouraging government agencies and larger businesses to enter productive working relationships with small businesses;
- facilitating and encouraging the fair treatment of small businesses; and
- promoting a fair operating environment in which small businesses can flourish.

Background

The Commission appreciates the opportunity to provide feedback to the NSW Department of Customer Service (Customer Service) which we understand is acting on behalf of the Department of Communities and Justice (Justice) to consult on potential changes to the *Criminal Procedure Act 1986* (CPA) as it relates to offences under the *Work Health and Safety Act 2011* (WHS Act). We understand that feedback is expected to be considered as part of a Stronger Communities Miscellaneous (Amendment) Bill (the Bill) expected to be developed by Justice in 2021.

The consultation paper discusses prosecutions in work health and safety (WHS) matters, which in NSW are generally brought by the regulators:

- NSW Resources Regulator (for mines and petroleum sites); and
- SafeWork NSW (for all other worksites).

In WHS matters costs can be ordered against regulators in unsuccessful prosecutions.¹ A concern highlighted is the potential for substantial professional costs awards which might deter regulators from bringing prosecutions.

Section 257D(2)(b) of the CPA specifies that the limit on award of professional costs against a prosecutor acting in a public capacity **does not apply** in relation to proceedings for an offence against the WHS Act or the regulations under that Act.

The consultation paper proposes amending the CPA to omit section 257D(2)(b) so that professional costs **would only be available** in WHS matters where the court is satisfied as to one or more of the following:

- a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner,
- b) that the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner,
- c) that the prosecutor unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought,

¹ Or against defendants in successful prosecutions.

- d) that, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award professional costs.

The paper notes this would bring WHS prosecutions in line with other criminal prosecutions and remove a risk to the NSW Government of costs being awarded in unsuccessful matters, notwithstanding proceedings having been commenced on a reasonable basis and conducted in good faith.

The consultation paper explains that section 257D of the CPA was inserted by the *Courts Legislation Amendment Act 2006* and that the policy rationale for excluding WHS prosecution is unclear, with no reasons canvassed in the second reading speech. It argues the effect of significant professional costs being awarded in unsuccessful WHS related prosecutions may deter regulators from bringing them and that NSW appears to be the only jurisdiction which distinguishes WHS prosecutions from other prosecutions for this purpose.

Context

The Commission enquired with Customer Service about any available data, such as data relating to costs being awarded in relevant unsuccessful prosecutions, case studies or rationales to support the proposed change.

Customer Service advises that in relation to prosecutions, since the WHS Act and its subordinate regulations commenced:

- SafeWork NSW has filed 803 charges against 619 defendants in 363 matters. To date it has been ordered to pay the defendant's costs in respect of eight² unsuccessful charges.³
- The NSW Resources Regulator has brought 33 prosecutions, including eight that are in progress and three that were unsuccessful. It has been ordered to pay the defendant's costs in respect of one prosecution.

Customer Service further advises that:

- SafeWork NSW has been required to pay costs in relation to four unsuccessful matters, with amounts awarded ranging between \$140,000 and \$915,000 per matter.⁴
- The Resources Regulator recently settled in one matter to pay costs of \$3.3 million.⁵

² Around one per cent of total charges (by count)

³ Unsuccessful charges are defined as those where the court finds the defendant not guilty of the relevant offence. In some matters where a charge was unsuccessful, other charges taken against the same defendant, or a co-defendant, resulted in a conviction and penalty by the court.

⁴ Two further unsuccessful matters are awaiting settlement of the costs amount.

⁵ Costs in two remaining cases were not fixed at time of writing.

Establishing the policy merits of the change

The Commission considers this limited consultation process and regulatory impact assessment does not establish the case for removing s 257D(2)(b) of the CPA and on this basis does not currently support s 257D(2)(b) of the CPA being removed.

While accepting there is a public interest in ensuring regulators are not discouraged from bringing prosecutions to protect worker safety, the proposed change would alter the current balance and a sufficient threshold of evidence is needed to understand how this might impact stakeholders.

The Commission believes further clarity over the problem, regulatory impact analysis, consultation with industry and further exploration of data relevant to the rationale for legislative amendment should be considered closely before introduction of the Bill. The Commission maintains it is good practice to follow the principles set out in the NSW Government Guide to Better Regulation⁶, notwithstanding that the proposed change relates to the CPA.

Data made available to the Commission in relation to costs orders or settlements does not appear, on the face of it, to suggest a widespread or egregious problem. It is unclear how this compares with costs awarded to the prosecutor in WHS related cases. It is also unclear how this compares with other regulators that may be ordered to pay costs for unsuccessful prosecutions.

While a small number of cases involving significant costs awards are noted, the Commission is interested to understand more about how this may impact the enforcement incentives of regulators. This includes evidence of how they impact the decisions of regulators when considering whether to prosecute matters in the public interest. This could be established as part of a clear statement of the problem.

Upon clarifying the precise nature and magnitude of the problem, consideration should be given to a range of options with an assessment of their costs and benefits. As part of this, any unintended consequences should be identified (informed by broad consultation with industry stakeholders).

The application of equivalent arrangements in other jurisdictions or areas of law may inform about the impacts of such a change but is not itself justification for altering the status quo.

Recommendation 1 – Regulatory impact assessment

Regulatory impact should be examined more closely prior to any further consideration being given to removing s 257D(2)(b) of the CPA. Consideration of the proposed change should follow the principles set out in the NSW Government Guide to Better Regulation (TPP19-01).

⁶ <https://www.treasury.nsw.gov.au/sites/default/files/2019-01/TPP19-01%20-%20Guide%20to%20Better%20Regulation.pdf>

Small business considerations

It is plausible that small businesses, on average, are less likely to incur legal costs of a magnitude capable of dissuading a regulator from pursuing a prosecution judged to be in the public interest. If this is accepted, then the application of the proposed amendment to small businesses may not be justified.

Reduced ability to recover professional costs in the event of non-conviction would tend to act as an additional pressure on defendants. The potential to have costs awarded provides additional flexibility to ensure a proper defence where they are confident about their legal standing. Small businesses may be particularly sensitive to the proposed change such as where the defendant has limited financial capacity to fund its defence and make provisions for potential fines and costs awarded to the prosecutor in the event of conviction.

A change of this nature could potentially enhance the probability of guilty pleadings, or pleadings earlier in proceedings, or discourage appeals of a conviction or sentence, to a greater extent than would otherwise have been the case.

From a regulator's perspective these effects may not be viewed as negative as they may enhance a regulator's litigating position and potential outcomes that it can achieve. Taken together, this has the potential to lead to a perception, or reality, of diminished procedural fairness available to defendants in WHS prosecutions.

In addition to fines, we understand costs are regularly awarded to the prosecutor in the event of conviction. To reduce the court's ability to mitigate a burden incurred by one party, but not that incurred by the other, might elicit some disputation about equity.

Noting the apparent ratio of successful prosecutions by WHS regulators, it seems probable that over time the regulators would be awarded professional costs well exceeding total costs awarded to the other parties.

Options analysis is an important component of best-practice policy development and helps to improve policy outcomes. Consideration of alternative options may support in mitigating potential negative impacts on small business while achieving the desired objectives. In this case further consideration should be given to alternative options such as (but not limited to):

- better targeting the change by considering an exemption for small businesses (for example, businesses with a turnover of under \$10 million or fewer than 20 employees) which are unlikely to incur legal expenses that threaten the regulator's resolve to pursue a prosecution;
- considering funding arrangements for regulators and adjusting incentives that have the potential to impact decisions about whether to pursue a prosecution; and
- reviewing compliance and enforcement policies to identify how regulators engage with businesses.

Recommendation 2 – Small business needs

Small business needs should be considered in relation to options that would address policy objectives. In the event a decision is made to alter the status quo, further consideration should be given to alternative options such as (but not limited to):

- better targeting the change by considering an exemption for small businesses (for example, businesses with a turnover of under \$10 million or fewer than 20 employees) which are unlikely to incur legal expenses that threaten the regulator's resolve to pursue a prosecution;
- considering funding arrangements for regulators and adjusting incentives that have the potential to impact decisions about whether to pursue a prosecution; and
- reviewing compliance and enforcement policies to identify how regulators engage with businesses.