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Personal Corporate Officer Liability under the Model Work Health and Safety Bill

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“Personal Corporate Officer Liability under the Model *Work Health and Safety Bill*”
Neil Foster¹

For many years it has been acknowledged that the possibility of personal criminal liability of company officers plays a key role in encouraging company compliance with OHS obligations. The area of personal liability is one of those where currently there is a wide divergence between different Australian jurisdictions. This paper will offer some comments on the suggested national model and an evaluation of whether the proposed model will be effective in seeing that companies pay closer attention to OHS responsibilities.

The Rationale for Personal Liability Provisions

The use of the company structure has been a key feature of the way business has been done since the early part of the 20th century. The “corporate veil”, shielding shareholders from liability for corporate decisions, has been seen as a key feature of this structure.

One of the problems with the “corporate veil”, however, excellent as it seems to have been for encouraging investment, is the shield that may be offered in some cases to incompetent or self-interested management decisions which harm others.

Company decisions, of course, are many and varied. Areas in which company officers may be held personally liable range from the “traditional” issues of corporate governance (such as trading when insolvent, or obtaining a personal advantage from transactions without due disclosure) through to a range of other laws relating to the impact that the actions of the company have on other players in the marketplace, its own employees, or the general public through, for example, environmental laws. In Australia in recent years the personal liability of directors in relation to misleading statements made about a company’s ability to fund a compensation scheme for injured workers has been a major topic of interest. Litigation involving the directors of companies related to James Hardie Industries Ltd has seen substantial fines and periods of disqualification imposed on those directors.²

The issue we are focussing on today, of course, is personal liability for workplace safety.

A number of serious workplace accidents in recent years have brought these issues to prominence. In the United Kingdom, incidents directing attention to workplace safety and company law issues include the sinking of the ferry *Herald of Free Enterprise* in 1987, the 1988 Piper Alpha oil rig disaster, and major rail accidents.³ In Australia, mine disasters offer a good example, and other major incidents such the Longford Gas explosion in Victoria. In many cases it is suggested, with good reason, that a board of directors and management who are concerned primarily with the interests of shareholders have failed to set up proper procedures and systems for workplace safety. In his detailed

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² See *Australian Securities and Investments Commission v Macdonald (No 11)* [2009] NSWSC 287 (23 April 2009) for the findings of liability against the directors, and *Australian Securities and Investments Commission v Macdonald (No 12)* [2009] NSWSC 714 (20 August 2009) for the imposition of penalties.

³ These are discussed in a number of articles dealing with corporate criminal responsibility. See, eg, Clarkson, CMV “Kicking Corporate Bodies and Damning Their Souls” (1996) 59 *Modern Law Rev* 557-572.

review of the factors behind the Longford Gas explosion, for example, Andrew Hopkins refers to a number of management failures which arguably contributed to the accident, and notes:

If culture, understood as mindset, is to be the key to preventing major accidents, it is management culture rather than the culture of the workforce in general which is most relevant.⁴

The Royal Commission into the Longford Gas explosion also identified a number of serious management failures which contributed directly to the accident, including a failure in training of workers to deal with an identified hazard, a decision to remove engineers from the plant to “head office” which led to a lack of expert advice “on site” when an emergency situation arose, and a failure to conduct a major hazard assessment of the plant involved which would have identified the danger of the accident happening.⁵

Increasingly it is being recognised that injuries in the workplace are more often related to overall management decisions about safety procedures, and a “culture” of concern or lack of concern for safety, rather than individual acts of carelessness. If board members were made aware that by participating in management and failing to adequately address safety issues, they may be personally liable for the consequence of injuries or fatalities, then this should provide great incentive for change. This would reinforce and support the current trend towards the introduction of “systems-based” safety regimes.⁶

There are a number of existing *corporate* incentives for improving safety. Common law actions for workplace negligence, as well as the statutory workers compensation schemes, have a financial impact. Even where insurance fully covers common law liability, insurance premiums under the workers compensation schemes rise with a bad industrial safety record. And criminal legislation in all Australian jurisdictions, as in most Western countries, provides for safety offences which, when committed by companies, now carry fairly hefty fines.⁷

But the nature of the company is that such financial burdens generally fall only upon *company* funds. Even given the strong incentives for directors to be seen to be conducting business profitably, in the end the worst that can happen in most cases is insolvency for the company. It has been accepted for a number of years that directors and

⁴ A Hopkins, *Lessons from Longford: The Esso Gas Plant Explosion* (Sydney: CCH, 2000), at 76; see also his earlier book *Managing Major Hazards: The Lessons of the Moura Mine Disaster* (Sydney: Allen & Unwin, 1999). Hopkins has also provided insightful and highly readable analyses of issues of risk and “safety culture” in relation to other incidents in his later books- see *Safety, Culture and Risk: The Organisational Causes of Disasters* (Sydney: CCH, 2005); *Lessons from Gretley: Mindful Leadership and the law* (Sydney: CCH, 2007); *Failure to learn: the BP Texas City Refinery disaster* (Sydney: CCH, 2008).

⁵ See generally *The Esso Longford Gas Plant Accident: Report of the Longford Royal Commission* (Commissioners, the Hon Sir DM Dawson & Mr BJ Brooks), June 1999 esp paras 13.7 (training deficiencies), 13.54 (failure to conduct a “HAZOP” [hazardous operations] risk assessment of the plant where the accident occurred, despite this being acknowledged as necessary by Esso’s own guidelines), 13.83 (removal of experienced engineers off-site to Melbourne). The Royal Commission at para 15.7 concluded that there had been a breach of the *Occupational Health and Safety Act* 1985 (Vic), a conclusion that was re-affirmed by the subsequent conviction of Esso and fine of \$2 million- see *DPP v Esso Australia Pty Ltd* (2001) 107 IR 285, [2001] VSC 263.

⁶ See, for example, the approaches discussed in N Gunningham & R Johnstone, *Regulating Workplace Safety: System and Sanctions* (Oxford: OUP, 1999).

⁷ See, for example, s 12 of the *Occupational Health and Safety Act* 2000 (NSW), which provides for a maximum penalty of 5000 penalty units in the case of a corporation. On the current “exchange rate” this amounts to \$550,000- see s 17 *Crimes (Sentencing Procedure) Act* 1999 (NSW). Fines for companies of course are due to be increased under the model Federal legislation.

managers, who are making decisions that affect safety, must be made to feel the impact of those decisions more personally.

Hopkins makes the point in his review of the causes of a mine disaster at Moura in Queensland:

The financial costs of disasters such as at Moura do not appear to be sufficient to provide the necessary incentives. The threat of personal legal consequences is probably the best way of concentrating the minds of senior managers on questions of health and safety.⁸

In his more recent study of the causes of the disastrous Texas City refinery explosion, Hopkins makes a similar point in the context of noting the incentives for senior managers to take short-cuts in spending money on safety:

Chief executive officers of companies like BP have a strong personal interest in cost cutting. Their remuneration consists (in part) of share options... So, all things being equal, a CEO can raise share prices by cutting costs. There is thus a powerful incentive for CEOs to drive cost cuts throughout an organisation. What is needed is some equally powerful incentive to ensure that these cost cuts are not at the expense of safety. Perhaps the law should be holding CEOs personally accountable in this respect.⁹

To the same effect is research by Gunningham. In a study commissioned by the National Occupational Health and Safety Commission, Gunningham comments:

In the literature review, regulation was identified by a large majority of studies as the single most important driver of corporations, and the **threat of personal criminal liability** (in particular of prosecutions brought against them as individuals) as the most powerful motivator of their CEOs to improve OHS... Prosecution of individuals within the corporate structure has both specific and general deterrent effects, particularly if the prosecution is widely publicised.¹⁰ (emphasis added)

He and Johnstone make a number of similar suggestions elsewhere:

A primary reason for imposing criminal liability for OHS contraventions on individual corporate officers is that the imposition of civil or criminal penalties on corporations for these offences can simply be seen by corporations as a cost of doing business, and passed on to consumers, shareholders, or employees. One solution is to impose criminal liability on corporate officers... OHS prosecutions should be targeted at individual corporate decision makers, not just the organization itself, because individuals who are vulnerable to personal sanctions have both a much greater incentive and a greater capacity to avoid these penalties than do fiduciaries.¹¹

More recently, in the context of sentencing a company for failure to comply with obligations to make disclosure to the stock market regulator in *Australian Securities and Investments Commission, in the matter of Chemeq v Chemeq Limited* [2006] FCA 936, the present Chief Justice of the High Court of Australia French CJ (when serving as a member of the Federal Court of Australia) commented at [98]:

⁸ A Hopkins "Repeat Disasters: The Lessons of the Moura Coal Mine" in C Mayhew & CL Peterson *Occupational Health and Safety in Australia* (St Leonards: Allen & Unwin, 1999) 140-157, at 157.

⁹ Hopkins, *Failure to Learn* (2008), above n 4 at 82.

¹⁰ N Gunningham, *CEO and Supervisor Drivers: Review of Literature and Current Practice* (Report prepared for the NOHSC, October 1999), at 39-40.

¹¹ N Gunningham & R Johnstone *Regulating Workplace Safety: System and Sanctions* (Oxford: OUP, 1999), 217-218, footnotes omitted. See generally the discussion at 217-223.

98 The penalties that count most are likely to be those imposed on the responsible individuals.¹²

Overview of Current Provisions in Australian Legislation

Given the need for such provisions, it is not surprising that OHS laws around Australia almost all currently provide for some form of personal liability. In this paper we do not have time for a detailed review of the current laws; I gave an overview in an article published in 2005,¹³ and the following table is adapted from that article and takes into account developments to date in the individual jurisdictions.

¹² I am grateful for the citation to this comment in P Herzfeld, “Still a troublesome area: Legislative and common law restrictions on indemnity and insurance arrangements effected by companies on behalf of officers and employees” (2009) 27 *Company and Securities Law Jnl* 267-298, at 292 n 173.

¹³ “Personal Liability of Company Officers for Corporate Occupational Health and Safety Breaches: section 26 of the *Occupational Health and Safety Act* 2000 (NSW)” (2005) 18 *Australian Journal of Labour Law* 107-135.

Table 1: Summary of Current State and Territory Provisions imposing personal liability for OHS offences

Jurisdiction	Provision	Directors alone, or Other Managers?	Separate Offence, or Accessorial Liability for Company's Offence?	Defence of "due diligence" or something similar?	Defence of "unable to influence" or another defence?	Onus of proof for defence
NSW	<i>OHS Act 2000</i> s 26	Directors and Managers	Accessorial Liability	Due Diligence	Not in a position to influence	Onus on accused to establish defences
Tasmania	<i>Workplace Health and Safety Act 1995</i> s 53	Directors only	Accessorial Liability	Due Diligence	Lack of knowledge not reasonably able to be acquired	Onus on accused to establish defences
Queensland	<i>Workplace Health and Safety Act 1995</i> s 167	Executive officers- includes lower-level	Separate offence	Reasonable diligence	Not in a position to influence	Onus on accused to establish defences
South Australia	<i>Occupational Health Safety and Welfare Act 1986</i> s 61	Designated "responsible officer"- in default every "officer"	Separate offence- take reasonable steps to ensure compliance	"Reasonable" steps	Lesser penalty if failure not causally related to company's offence	Onus on accused to establish "reasonable" steps; apparently onus on prosecution to argue for causal link
South Australia	<i>Occupational Health Safety and Welfare Act 1986</i> s 59C ¹⁴	"Officers" as defined	Separate offence	Reasonable care		Onus presumably on prosecution to prove lack of reasonable care.
Victoria	<i>Occupational Health and Safety Act 2004</i> s 144	Directors and managers	Separate offence, apparently	Reasonable care	Matters to be "taken into account" in s 144 (3)- officer's knowledge, ability to participate in decisions, responsibility of others	Onus presumably on prosecution to prove lack of reasonable care
Western Australia	<i>Occupational Safety and Health Act 1984</i> s 55 ¹⁵	Directors and "other officers", and even	Accessorial liability	No	"Consent", "connivance" or due to "wilful	Onus presumably on prosecution to prove consent,

¹⁴ Inserted by the the *Occupational Health, Safety and Welfare (Penalties) Amendment Act 2007* (SA), No 54 of 2007, which commenced operation on 1 January 2008. Oddly this means that the SA legislation now contains two different provisions imposing personal liability, operating in slightly different circumstances.

¹⁵ Note that s 55 now has specific provisions adapting personal officer liability to a series of newer provisions introduced into the legislation (such as, for example, s 19A) imposing higher penalties where an OHS offence is committed in circumstances of "gross negligence" or leads to death or serious injury. Under s 55(1a), for example, there can be personal officer liability for a "gross negligence" offence only where the prosecution can show that the officer either was negligent, or "consented or connived" at the

		members “in connection with” functions of management			neglect”	connivance or neglect
Northern Territory	<i>Workplace Health and Safety Act 2007</i> s 86	“Officers” as defined in <i>Corporations Act 2001</i> (Cth)	Accessorial liability, apparently	Defence of “reasonable care”		Presumably onus on prosecution to show reasonable care was possible
Australian Capital Territory	<i>Work Safety Act 2008</i> s 219 ¹⁶	“Officers”, though term is not defined	A separate offence, apparently; only exists for contravention of a relevant provision (specific provisions in subsection (1)), but the officer must also be shown to have been “reckless” as to the possible contravention.	Defence if it can be proved that the officer took reasonable steps to prevent the contravention	Defence if the officer was not in a position to influence the conduct of corporation	Presumably onus on prosecution to show “in a position to influence” and that reasonable steps were possible

Proposals for Harmonisation in the National Review

The two Reports of the National Review into Model Occupational Health and Safety Laws (the First Report of October 2008, and the Second Report of January 2009)¹⁷ when read together make a number of recommendations concerning the personal criminal liability of company officers, and the defence of “due diligence”. In a previous paper, building on the earlier article noted above, I reviewed the current law as to personal liability under Australian law, including recent court decisions.¹⁸ In this paper I will concentrate on the recommendations of the two Reports and the current proposal contained in the Model *Work Health and Safety Bill* which has been approved by the Workplace Relations Ministers’ Council (WRMC).¹⁹

It seems sensible, before turning to the Bill itself, to review some features of the recommendations of the National Review which led to the drafting of the Bill, even if, as we will see, not all of those recommendations were accepted by the WRMC.²⁰

offence, and *also* that the officer “knew that the contravention would be likely to cause the death of, or serious harm to, a person”.

¹⁶ Commenced operation on 1 October 2009.

¹⁷ Available at <http://www.nationalohsreview.gov.au/ohs/Reports/>.

¹⁸ N Foster, “Recent Developments in Personal Liability of Company Officers for Workplace Safety Breaches – Australian and UK decisions” (Paper presented to the *Seventh National OHS Regulatory Research Colloquium*, Canberra, Feb 4 & 5, 2009; published on the NRCOHSR website as Working Paper No 63- <http://ohs.anu.edu.au/publications/pdf/wp%2063%20-%20Foster.pdf>) – hereafter “Recent Developments”.

¹⁹ Approved on 11 December 2009; for a copy of the model legislation see <http://www.safeworkaustralia.gov.au/swa/ModelLegislation/Model+OHS+Legislation/>.

²⁰ Some of the following material is contained in a Working Paper on the NRCOHSR website, “The National Review into Model OHS Laws: A Paper Examining the Duties of Officers and Due Diligence”

The First Report

Chapter 8 of the *First Report* deals with “Duties of ‘Officers’”. The discussion at 1/[8.3]²¹ on the benefits of such duties in shaping the “values and culture” of the corporation “to encourage appropriate attitudes and behaviours for health and safety”, is valuable and eminently clear. In my view the differences between some of the options discussed at 1/[8.24]ff are not as stark as the authors of the Report suggest, the “device” of making the liability of an officer dependant on the liability of the company being mainly a way of ensuring that there does not need to be re-litigation of issues. However, as the *First Report* notes at 1/[8.29], there seems much to be said (even if simply from an educational perspective) for making it a positive duty of an officer to take steps to keep the company in compliance with OHS legislation, rather than the present situation which imposes a liability “after the event”.

Recommendation 40 is that a new Model Act should “place a positive duty on an officer to exercise due diligence to ensure the compliance by the entity of which they are an officer with the duties of care” under the Act.

This, then, is a very commendable recommendation, which I fully support. It is backed up by all the research noted above about the need for management to provide clear leadership on safety issues.

Other recommendations contained in chapter 8 (concerning the technical definition of “officer” and the type of entity covered) are mostly unexceptionable, and will be considered below in discussing the *Second Report*. The recommendation that a defence of “due diligence” be available is sensible. In particular 1/[8.42] correctly notes that

The due diligence qualifier also recognises the position of the officer in the organisation as being senior to workers and others and therefore is more stringent than that of ‘reasonable care’. The provision as recommended recognises that officers are key persons in an organisation.

But the key question, however, lies in the question of the onus of proof. Will it be up to the prosecution to prove a lack of care by an officer and a lack of “due diligence”? Or will that be a matter on which evidence must be produced by the officer? Chapter 13, sadly, reveals that the National Review took a wrong turning on this issue on the general duties (in this author’s opinion), recommending no reversal of onus for “offences relating to non-compliance with a duty of care”.²² In short, while recommendation 40 is supported, the implication of ch 13 of the *First Report* that the onus of proof in prosecution of officers will lie on the prosecution will unduly impede the proper operation of the recommendation.

(WP66, May 2009), which was delivered as part of a *Symposium on the National Review into Model OHS Laws* organised by NRCOHSR on 5 May 2009. I apologise to readers of the previous paper for the repetition. But I decided it was probably worth ensuring that the background material and the current model Act are considered together in the one paper for future reference. Courts, of course, regularly refer to background material such as law reform reports in interpreting legislation, at least where the legislation is unclear.

²¹ References of this sort are to paragraph numbers of the respective Reports, signalled by a number indicating which Report is intended.

²² The case in favour of continuing the current “reversal of onus” provisions contained in the NSW and Queensland legislation is noted, for example, in my submission to the National Review- see Public Submission No 30, <http://www.nationalohsreview.gov.au/NR/rdonlyres/7770D20A-185A-4A68-B43F-424E3FCA9C2B/0/030NeilFoster.pdf> at pp 3-6. See also the very persuasive submission No 42 by Professor McCallum and colleagues, arguing for continuation of the historically recognised reversal of onus in OHS prosecutions, and a more extensive discussion of this issue in WP No 66, above n 20.

The Second Report

The *Second Report* turns to related issues as it addresses the definition of “officer” in 2/[23.115]ff, and the definition of “due diligence” in 2/[23.148]ff.

Definition of “officer” (pp 51-57)

If obligations are to be imposed on “officers”, a definition of that term is obviously needed.²³

In my view the current NSW legislative reference in *OHS Act* 2000 s 26(1) to “each director of the corporation, and each person concerned in the management of the corporation” is a perfectly adequate definition. The Report authors state at 2/[23.120] that there is a difference of opinion among the commentators as to whether the scope of the phrase is sufficiently clear. But in the latest edition of one work cited to make this point,²⁴ the author has replaced a comment about the meaning being “not yet settled”, with a reference to two important cases which arguably do provide a fairly clear definition.²⁵ This is not a critique of the Report, which did not have the latest edition of the work available. But it demonstrates that a course of judicial decision has actually now clarified the operation of the provision.²⁶

The Report then goes on in the same paragraph to record that

the term has been given a wide meaning and has resulted in middle-level managers being found to fall within that description.

This comment is not further developed, but seems to be intended to be a condemnation of the provision. With respect to the authors of the Report, neither of these features of the definition is a problem. Only a term with a relatively “wide” meaning is appropriate to capture the range of arrangements that might be made for governance of a company which may lead to decisions impacting on safety. And to characterise someone as a “middle-level” manager does not automatically mean they ought to be immune from managerial personal liability. In particular, the larger the company, the more influence and scope to do harm will be enjoyed by “middle management”.

Of course it is true that it would be inappropriate for all “middle level” managers to be held personally liable, since such a term may apply to someone who may have minimal ability to influence working conditions or the safety policy of the company. But in that case a properly crafted defence will allow them to plead matters such as the exercise of “due diligence” (or, under the current NSW law, “inability to influence”), which in appropriate cases will exonerate them from personal liability. Arguably, however, the blanket exclusion of a whole class of “middle managers” is far too generous

²³ Although this perception does not seem to have been shared by the drafters of the new *Work Safety Act* 2008 (ACT). Obligations (of a fairly minimal sort, it has to be said) are imposed in s 219 of the new Act on “officers”, but so far as I can see the term is not defined, either in the WSA itself, or in the general *Legislation Act* 2001 (ACT). (The term “executive officer” is defined in s 246 of that Act, but only for the purposes of Part 19.5 of the Act, not for the purposes of Territory law generally.) See “Recent Developments”, above n 18, at pp 3-4, for other comments on the new ACT provision.

²⁴ See footnote 101 to 2/[23.120], citing the 2nd edition of *Tooma’s Annotated Occupational Health and Safety Act 2000* (Thompson Lawbook, 2004) at p 129, para [1.26.10].

²⁵ See the recently published 3rd edition of the above, Thompson Reuters, 2009, at p 142, para [A26.10], citing *Powercoal Pty Ltd v Industrial Relations Commission of NSW* (2005) 156 A Crim R 269, and the definition offered by Staunton J in *McMartin v Newcastle Wallsend Coal Company* [2004] NSWIRComm 202, at [885].

²⁶ For further comment on the meaning of the term see the 2005 article, above n 13, at 122-124, and “Recent Developments”, above n 18, at 5, 7-8 discussing the Gretley litigation and the *Powercoal* decision.

to those who may have substantial *de facto*, if not *de jure*, power and influence over matters impacting on the safety and lives of many workers.

Criteria that the Report suggests are appropriate for definition of an officer are that the person be “actively engaged in the governance” of the corporation (2/[23.135]) and “sufficiently empowered to affect the key decisions of a corporation” (2/[23.137].) In consideration of the options the Report concludes that the definition of an officer in s 9 of the *Corporations Act* 2001 (Cth) be adopted.

The section 9 definition is as follows (since the Report also suggests that the term applies to partnerships and unincorporated associations that definition is also included here):

"officer" of a corporation means:

- (a) a director or secretary of the corporation; or
- (b) a person:
 - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - (ii) who has the capacity to affect significantly the corporation's financial standing; or
 - (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or
- (c) a receiver, or receiver and manager, of the property of the corporation; or
- (d) an administrator of the corporation; or
- (e) an administrator of a deed of company arrangement executed by the corporation; or
- (f) a liquidator of the corporation; or
- (g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

Note: Section 201B contains rules about who is a director of a corporation.

"officer" of an entity that is neither an individual nor a corporation means:

- (a) a partner in the partnership if the entity is a partnership; or
- (b) an office holder of the unincorporated association if the entity is an unincorporated association; or
- (c) a person:
 - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity; or
 - (ii) who has the capacity to affect significantly the entity's financial standing.

It may immediately be noted that the definition is much more complex and wide-ranging than that currently contained in the NSW legislation. The Report is correct to note that this is a definition used in other contexts, and has the advantage, then, of not being completely new. But it may be questioned whether this is a real advantage. Elements of the definition above are clearly focussed, not just on “management” in general, but management as it relates to “financial affairs”. While this may be appropriate for legislation dealing with matters such as audits and financial accountability, it could be argued that it may be over-inclusive when forming a part of legislation dealing with safety. Ironically for a recommendation that seems apparently designed to *narrow* the scope of liability, it may well *expand* liability to pick up those involved in financial management who might not be regarded as currently encompassed by the definition in the NSW legislation when applied to safety issues.

In this context it is worth remembering the comments of Spigelman CJ in the NSW Court of Appeal decision in *Powercoal Pty Ltd & Foster v Industrial Relations Commission of NSW & Morrison*²⁷, where his Honour commented at [102] that the question of what “concerned in the management” means in the *OHS Act* cannot be resolved simply by consideration of cases dealing with the phrase as used in legislation governing companies; it must take its meaning from the context in which it is used. The relevant issue in considering the meaning of the phrase in the *OHS Act* is “any aspect of the operations of the company insofar as it raises safety considerations”.

Hence, while it may be true that the proposed definition is understood from company law and other contexts, whether those meanings would be always appropriate to the safety context is doubtful.

Another matter of concern is that the *Second Report* suggests at 2/[23.140] point 2 that adopting the s 9 definition “is less likely than (the NSW model) to have unintended application to middle managers or other workers”. The dubious value of excluding “middle management” as a class from personal liability was noted above.

In my view it would have been preferable to either retain the general terminology currently used in s 26 of the NSW legislation, or if some further clarification is required to craft a definition more closely related to the safety, than to the financial, context. An acceptable option might be to replace para (b)(ii) of the above definition by some such phrase as “who has the capacity to affect significantly the health and safety of those at work, or others who may be put at risk by the activities of those at work”.

Volunteer Officers

While not having a strong view on the matter, it seems to me that the discussion at paras 2/[23.142] on “volunteer officers” was sensible, and if the graduated penalty model recommended by the Reports were to be adopted, I would have supported recommendation 87 (which would restrict the penalty for a “volunteer” officer to a “Category 1” penalty).²⁸

Definition of “Due Diligence”

The *Second Report* commendably discusses the important issue of “due diligence” in the context of seeking some clarity about what a relevant officer is required to do. The Report suggests at 2/[23.155] that there is only “limited guidance” on the question of due diligence from the courts in NSW.

The Report correctly notes that the decision in *Inspector Kumar v David Aylmer Ritchie*²⁹ is a major discussion of the issue. Unfortunately, for reasons discussed in detail in “Recent Developments”, the decision on the “due diligence” point in *Ritchie* seems flawed.³⁰ I have suggested there that, while the legal analysis of what needs to be shown is impeccable, the application on the facts to Mr Ritchie seemed fairly harsh.

However, the Report does not really accurately summarise the current law when at 2/[23.164] it suggests that the law is that an officer should be “aware of and involved in the minutiae of the specific circumstances at a workplace” to make out the defence. Not even the judgment in *Kumar* states that as a necessary requirement (though it is conceded that the practical application of the test in that case came close to such a characterisation.)

²⁷ (2005) 145 IR 327, [2005] NSWCA 345.

²⁸ As it turns out the WHSA will give a broad immunity to volunteer officers- see the discussion below and in Appendix 1.

²⁹ [2006] NSWIRComm 323.

³⁰ See “Recent Developments”, above n 18, at 13-16.

When it comes to its conclusion in this area there is a curious inconsistency in the Report. The *Second Report* at 2/[23.167] says:

As we noted at paragraph 8.42 in our first report, the standard of due diligence should be **no more stringent** than that of ‘reasonable care’, except that due diligence would require the officer to be proactive and take reasonable steps to identify what the entity must do and ensure that it is done. Reasonable care (as required of a worker) may only require enquiries and action in relation to what is known, or ought to be known, by them about particular circumstances. {emphasis added}

However, the text of 1/[8.42] reads as follows:

The due diligence qualifier also recognises the position of the officer in the organisation as being senior to workers and others and therefore **is more stringent** than that of ‘reasonable care’. The provision as recommended recognises that officers are key persons in an organisation.

There is a clear formal contradiction between the two paragraphs. Whether this represents some difference of opinion among the authors is unclear. But perhaps the debate about whether something is or is not “more stringent” should be put to one side. Even the *Second Report* proposes that officers would have a “higher degree of responsibility” by “thinking ahead” to foresee possible problems (as one would have put it before “being proactive” entered the language!) So arguably in the end both Reports accept this responsibility.

While I would take the view that the phrase “due diligence” is reasonably clear already, I see no major problems from attempting to define it in legislation. It is heartening that the proposed definition does not seem to “water down” existing obligations. In particular, I would commend the authors of the *Second Report* for noting at 2/[23.174] that

The standard should be a high one, requiring ongoing enquiry and vigilance, to ensure that the resources and systems of the entity are adequate to comply with the duty of care of the entity—and are operating effectively. Where the officer relies on the expertise of a manager or other person, that expertise must be verified and the reliance must be reasonable.

In other words, mere appointment of an officer to take responsibility for safety issues does not alone exonerate the manager, unless there is reason to think that the officer has themselves been properly trained and equipped to do the job.³¹

Recommendation 88, then, seems subject to the following remarks a reasonable response to the issues of definition. It would be preferable, however, to make sure that it is not completely exhaustive, to allow consideration by a court of other matters that should have been taken into account in a particular case. In other words, the definition should be along the lines of “without limiting the scope of the words “due diligence”, the following matters should be taken into account...”

In addition to the matters currently noted in the recommended definition, it should also contain reference to the matters discussed in the important decision in *Universal Telecasters (Qld) Ltd v Guthrie*, where Bowen CJ referred to the need for an officer showing “due diligence” to demonstrate both that they had “laid down a proper system” for dealing with the issues, and “provided adequate supervision” to ensure the

³¹ Indeed, in the end considerations of this sort explain the conviction in the *Ritchie* case, where people had been appointed to undertake safety supervision with no real reason to think that they could do the job properly- see the decision, above n 29 , at [154].

system was carried out.³² In addition, the cases currently stress the need for an officer to personally respond to incidents which are drawn to his or her attention, and it would seem to be wise to incorporate this criterion as well.³³

The Model Legislation

To turn to the Model Bill (which we may call, anticipating its passage, the *Work Health and Safety Act* 2011, or WHSA), how are these recommendations reflected? It should be noted that there was an earlier version of the draft legislation, called the *Safe Work Act* (the “SWA”), which was released for public comment in October 2009; after public comment we now have a redrafted version of the legislation, with a different name and some slightly different drafting. Occasional reference will be made in the following discussion to differences between the SWA and the WHSA.

To allow comparison with current legislation, the next line of Table 1 (above) would read as follows if we incorporated the new Bill:

Jurisdiction	Provision	Directors alone, or Other Managers?	Separate Offence, or Accessorial Liability for Company's Offence?	Defence of “due diligence” or something similar?	Defence of “unable to influence” or another defence?	Onus of proof for defence
Model	<i>Work Health and Safety Act</i> 2011 s 26	“Officers” as defined	Separate offence	Due Diligence	None- but there is an immunity given to certain categories of officers	Onus on prosecution to show lack of due diligence

The provision of main interest is s 26 WHSA. Section 26(1) contains the primary duty, and reads as follows

26 Duty of officers

- (1) If a body has a duty or obligation³⁴ under this Act, an officer of that body must exercise due diligence to ensure that the body complies with that duty or obligation.

There have been some drafting changes from s 26 of the original SWA. The original s 26 cast the relevant obligation onto “a person other than an individual (the *body*)”. While the WHSA drafting is simpler, it is interesting to note that the Act does not now contain a definition of the word “body”. An unresolved question is, does the word include organisations like clubs and voluntary associations that are not actually given “corporate personality” by legislation? Resolution of this question is surprisingly

³² (1978) 32 FLR 360; the words quoted come from the judgment at 363.

³³ See *R v Bata Industries Ltd (No 2)* (1992) 70 CCC(3d) 394, referred to in the *Second Report* at 2/[23.161]. See also the helpful summary of “due diligence” issues in Tooma, 3rd ed, above n 25, at [A26.20], pp 144-146.

³⁴ The words “or obligation” have been added to the word “duty” here and at the end of the provision, in comparison to the previous draft SWA. As presently advised this does not seem to make any difference; perhaps the addition was made to cover not only what might be called major “duties” but all relevant statutory obligations under the Act.

difficult but perhaps of mainly specialist interest, and I have addressed it in Appendix 1 to this paper.

Other than the uncertainty just noted, this is a reasonably straightforward implementation of Recommendation 40 of the First Report. But other aspects of the Act raise some interesting questions. And in the end, for reasons noted previously, I still believe that the redefined duty here (in comparison to the current NSW model) is a “watering down” of the current provision, due to the fact that the onus of proof will lie with the prosecution.

Definition of “Officer”

The definition of this term has been a controversial issue.

The drafters of the initial model SWA chose not to follow the Second Report, Recommendation 86, which had suggested simply incorporating the definition of “officer” from the *Corporations Act 2001* (Cth).³⁵ A complex variation on the *Corporation Act* provision was included. Perhaps in response to public comment, however, the WHSA has now reverted to the Second Report recommendation. Section 4 now provides the following definition:

officer of a body corporate means officer within the meaning of section 9 of the *Corporations Act 2001* of the Commonwealth.

The above-noted concerns, as to whether the definition may be too inclusive, will have to be dealt with by the courts on a case-by-case basis.

(As noted above, there is a question whether this definition applies in s 26(1) as it is now drafted, since the obligation there applies to an officer of a “body”, not of a “body corporate”. Presumably it will at least work where the particular body in question is in fact a “body corporate”. See Appendix 1 for the problems in determining whether or not the Act is intended to apply to unincorporated associations, and if so how.)

In this context it is worthy of note that the first draft SWA, following a decision of the Workplace Ministers’ Council, initially included a specific immunity for certain classes of officers:

Previous SWA s 33 Exception for members of local authorities and volunteers

An elected member of a local authority or a volunteer is not liable for an offence under this Division for a failure to comply with a safety duty.

The new WHSA now provides a specific exception for “volunteers” as follows:

33 Exception for volunteers

A volunteer does not commit an offence under this Division for a failure to comply with a health or safety duty, except a duty under section 27 or 28.

Note See section 244 for exception in relation to elected members of local authorities.

³⁵ The response by the Workplace Relations Ministers’ Council of 18 May 2009 had broadly indicated agreement with Rec 86 but had proposed “qualifications”. The only qualification that seems to have been specifically indicated, however, was the agreement (perhaps not surprising at the *Ministers’ Council*) that Ministers should not be regarded as possibly liable!

This means that a volunteer cannot be prosecuted for an offence under s 26 as an “officer”, presumably even if the “body” of which he or she is an officer is itself to be classified as a “person conducting a business or undertaking”. Will this lead to commercial companies appointing board members who are not entitled to a fee or honorarium? The definition of “volunteer” in s 4 refers to “someone who is acting on a voluntary basis (irrespective of whether the person receives out-of-pocket expenses)”. It is to be hoped that regulators will be alert to any arrangements that might be made for so-called “out-of-pocket” expenses to be artificially inflated so as to amount to a salary, to allow board members to escape legal liability by purporting to be volunteers.

There are other interesting questions, worth pursuing elsewhere, as to whether the s 33 immunity to prosecution under Division 5 of Part 2, would completely protect a volunteer from, say, a *civil* action for breach of statutory duty. Section 26 remains applicable to such a person, despite their immunity from criminal prosecution, and clearly imposes a duty of due diligence.³⁶

To return to the immunity of volunteers under s 33: what of the situation of a charity or other “voluntary association” (assuming it is incorporated for the moment), where the organisation pays a manager? The salaried manager is not a “volunteer”. The organisation might be one that looks like a “volunteer association”. But under the definition in s 5(5), the immunity given by s 5(4) to “volunteer associations” only applies “where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to work for the... association”. Presumably this will apply even where an “incorporated association” otherwise made up of volunteers employs someone (as in some sense that employment will be “joint” employment by all the members.) So where anyone is engaged as a worker by a club, that club loses its immunity from prosecution under s 5(4). Hence the officer concerned may be prosecuted under s 26.

The immunity of local councillors is now provided under a later provision, s 244. It is worth extracting the whole provision, as it will be necessary to refer to it for other purposes:

244 Officers

(1) A person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of a Government department, public authority or local authority is taken to be an officer of the Crown or that authority for the purposes of this Act.

(2) A Minister of a State or the Commonwealth is not in that capacity an officer for the purposes of this Act.

(3) An elected member of a local authority is not in that capacity:

³⁶ Note that while s 249 of the Act now deals with the question of civil liability and whether or not it is created by the Act (an omission from the previous draft SWA), and s 249(a) excludes civil liability for breach of the Act itself, s 249(c) preserves a possible liability for breach of the regulations to be made under authority of the Act. This is the same model as currently found in s 32 of the NSW *OHS Act 2000*, and under that legislation it is fairly clear that civil liability for breach of the regulations is a possibility- see eg *Macey v Macquarie Generation & H I S Engineering Pty Ltd* [2007] NSWDC 242, *Irwin v Salvation Army (NSW) Property Trust* [2007] NSWDC 266, *Estate of the Late M T Mutton by its Executors & R W Mutton trading as Mutton Bros v Howard Haulage Pty Limited* [2007] NSWCA 340, *Fox v Leighton Contractors Pty Ltd* [2008] NSWCA 23 (decision overturned by the High Court in *Leighton Contractors Pty Ltd v Fox* [2009] HCA 35 though not on the breach of statutory duty point). If the yet-to-made regulations under the WHSA impose obligations on volunteer officers, the possibility of a civil action against such officers on the basis of a breach of the regulations could not be ruled out.

- (a) a person conducting a business or undertaking; or
- (b) an officer of the local authority,
- for the purposes of this Act.
- (4) The Crown is a body for the purposes of section 26

It will be seen that s 244(3) provides immunity for elected local councillors (an immunity already provided under, eg, the NSW legislation, in s 26(4) of the *OHS Act 2000*).

It is worth noting how other provisions of s 244 operate.

- S 244(1) makes it clear that, even though the usual *Corporations Act 2001* definition would not pick up public servants, senior public servants may now be taken to be “officers”.
- The result is that, since the “Crown” is now a “body” for the purposes of s 26, as provided by s 244(4), then a senior public servant may be held personally criminally liable for an offence committed by the Crown (ie by the government department for whom he or she works, presumably.) Under s 9 it is made clear that the Crown can be found to be liable for an offence. Presumably this means that the Crown may be regarded as a “person conducting a business or undertaking”, and hence guilty of offences against Divns 2 & 3 of Part 2. This is an interesting development- it may have been possible previously for senior public servants to be prosecuted for safety breaches committed by their Departments, but so far as I am aware there have been no such prosecutions. This legislation seems to make it clearer that such prosecutions will at least be possible in theory.
- On the other hand s 244(2) provides blanket immunity for Federal and State politicians in this regard. Arguably the decisions of a Minister in charge of a Department may be what leads to under-spending on safety and hence to an avoidable risk of injury or death. But under this Act the remedy for that will have to be political rather than legal.

Penalty structures for officers

Some features of the penalty structures under the WSHA are directly relevant to officer liability. The main “health and safety duties” are defined in ss 18-28, Divns 2, 3 and 4 of Part 2 of the Act. Penalties for breach are then dealt with in Division 5. There is a structured progression, and decline in severity of penalties, from offences involving “reckless conduct” and a risk of serious harm (“a risk of death or serious injury or illness”), under s 30; through to offences where there has been a less “reprehensible” breach which has still exposed someone to a risk of serious harm, under s 31, to a general category where there has simply been a failure to comply with the Act, under s 32. Under each option there is a further 3-fold division of penalty, with the highest penalty being reserved for a “body corporate”; a mid-range penalty for “an offence committed by an individual as a person conducting a business or undertaking or as an officer of a body corporate”, and the lowest penalty for an offence committed by an individual who does not fall into what we might loosely call this “managerial” category.

Penalties may be summarised as in the following table.

Table 2- Penalties prescribed for breach of health and safety duties under Division 5, Part 2 WHSA- offence committed by “manager”

S 30- reckless conduct without reasonable excuse exposing individual to risk of serious harm	S 31- Failure to comply with duty exposing individual to risk of serious harm	S 32- Failure to comply with duty
\$600,000 or 5 years	\$300,000	\$100,000

The imposition of a more severe penalty upon a “managerial” accused is a new feature of the WHSA, in comparison to existing State legislation. However, there may be seen to be some precedent in the current situation under the NSW *OHS Act* 2000, where an employee (even one with managerial responsibilities) under s 20 is subject to a maximum penalty of 30 penalty units (currently \$3,300) whereas an individual employer guilty of a breach of s 8, say, will be subject to a maximum penalty of 500 penalty units (see s 12(d)), currently \$55,000. Under the current Act a “person concerned in the management” of a corporation who is convicted under the present NSW s 26 would usually face the maximum penalty applicable to an individual employer, in other words, \$55,000.

How will the new law change things? For a NSW manager who might face a \$55,000 penalty at the moment, they will now face a potential \$600,000 penalty (or 5 years’ imprisonment) under s 31 if they have been reckless and if there was a risk of death or serious injury. Perhaps the better comparison, however, is with the current NSW s 32A, which provides a criminal penalty for manager who is personally “reckless” (the same word is used), and where death has actually resulted. (While in theory new s 30 could be applied where no actual death has occurred, it would probably be unlikely that a prosecution would be brought in those circumstances.) Under current NSW law the maximum financial penalty would be \$165,000 (1500 penalty units) or 5 years’ imprisonment. Hence there would be a substantial increase in possible penalty, though one that seems appropriate if recklessness has resulted in a worker’s death.

The comparison of the current NSW Act and the WHSA reveals a substantial theoretical difference, though whether this will amount to a difference in practice is less clear. Under s 32A(3) *OHS Act* 2000, it is a defence if the accused can show that there was a “reasonable excuse” for their conduct. Under s 30 WHSA, however, the offence is only committed where there is reckless conduct creating the risk which is “without reasonable excuse”, and amazingly s 30(2) provides that: “The prosecution bears the burden of proving that the conduct was engaged in without reasonable excuse”. If ever there were a case where the burden of proof should lie on the defendant, this would seem to be such a case. To cast upon the prosecution the burden of negating any possible “reasonable excuse” seems far too onerous. Presumably the courts will take the common-sense view that unless the defendant has at least flagged some sort of possible excuse (and it is hard to see what it might be, since it would have to be a justification that excuses not only the risk but also the recklessness!) the prosecution will not be obliged to address the issue.

In the more common case where recklessness is not present, then the difference between the current situation of a NSW manager and that under the new Act will hinge (apart from the previously noted issues about burden of proof) entirely on the nature of the risk to which the relevant individual has been exposed. If the officer’s failure of due

diligence has resulted in the company exposing someone to a risk of death or serious injury or illness, the possible liability of the officer will be increased from the current maximum of \$55,000 to a new level of \$300,000. In other case, where the risk is less serious, but there is still a breach of the Act, it will be now \$100,000. These seem to be reasonable levels given the differing elements of culpability and risk.

Meaning of “due diligence”

The standard adopted in s 26 WHSA is “due diligence”. This is already the standard adopted (albeit as a defence) in the current NSW legislation, and has been considered by NSW courts in recent years. As noted above, recommendation 88 of the Second Report was that the standard should be defined by setting out matters to be considered. The initial response of the WMRC was that there should be no formal definition, and instead that the current case law should be relied upon. But perhaps again in response to public comment on the draft SWA (which reflected the WMRC view by not defining the term), the current provision now attempts to provide a detailed definition of “due diligence”.

26 (2) In this section, *due diligence* means to take reasonable steps:

- (a) to acquire and keep up to date knowledge of work health and safety matters; and
- (b) to gain an understanding of the nature of the operations of the business or undertaking of the body and generally of the hazards and risks associated with those operations; and
- (c) to ensure that the body has available for use, and uses, appropriate resources and processes to enable hazards associated with the operations of the business or undertaking of the body to be identified and risks associated with those hazards to be eliminated or minimised; and
- (d) to ensure that the body has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and
- (e) to ensure that the body has, and implements, processes for complying with any duty or obligation of the body under this Act; and

Examples

A body's duties or obligations under this Act may include:

- reporting notifiable incidents.
- consulting with workers.
- ensuring compliance with notices issued under this Act.
- ensuring the provision of training and instruction to workers about work health and safety.
- ensuring that health and safety representatives receive their entitlements to training.

(f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).

It is difficult to predict whether this detailed list will be helpful or not. No objection can be taken to any of the individual items, but there is always a danger that when an attempt is made to be exhaustive in a list like this, that other matters may be omitted that have not been thought of. Along these lines, it is of some concern that the

definition is framed in an “exclusive”, rather than “inclusive”, way. By use of the word “means”, the definition makes this set of considerations the *sole* list of matters that can be taken into account in determining due diligence, and does not allow consideration of any other issues. An “inclusive” definition could have been framed, which might have provided that “without limiting the scope of sub-section (1), due diligence *includes*...”. This would have allowed the courts to take into account developments in understanding of what it would be appropriate for company officers to consider in making safety decisions, as society and community expectations change. Instead, we have a fixed list of matters which can only be amended by Parliament.

The statutory list may be compared to some of the key judicial discussions of “due diligence” over the last few years. As noted in the “Recent Developments” paper,

The “due diligence” defence requires consideration of a range of “proactive” activities whereby safety systems are not only established on paper, but also implemented on the ground, their operation regularly monitored, and specific issues responded to when they are drawn to attention.³⁷

Cases that provide a discussion of these matters include *Inspector Kumar v David Aylmer Ritchie*³⁸ and *Inspector Aldred v Herbert*.³⁹ There is a more recent discussion of what “due diligence” requires in *Inspector Hayes v Santos and Lorenzo*.⁴⁰

In *Ritchie*, Haylen J defined due diligence in this way, at para [177]:

the hallmark of this defence is that the defendant would need to show that he had laid down a proper system to provide against contravention of the Act and had provided adequate supervision to ensure that the system was properly carried out.

In that case his Honour approved the following summary of the requirements of due diligence as provided by the prosecution:

153 Having regard to these authorities, the prosecutor submitted that the statutory defence under s 26(1)(b) required the Court to be satisfied that:

- (a) there was in place a systematic approach designed to achieve compliance with a regulatory scheme established by the Act and to prevent its contravention;
 - (b) that the system so established was both proper and appropriate so as to achieve the regulatory requirements of the Act and, in particular, was not merely some paper scheme that paid lip service to the Act or merely exaggerated the reality of the system that was in place; and
 - (c) that the system was properly enforced and policed to achieve the regulatory outcome of preventing contraventions of the Act.
- It was submitted that, for the defendant to make out the defence, each of these elements had to be established.

In *Santos and Lorenzo* Boland P found that due diligence had not been made out where an employee was allowed to carry out certain work without having the relevant training, and where his qualifications had not been properly checked by the directors.

188 The defendants may not have been aware of the use of open hooks. However, they were unable to show that they had adopted a process of review and auditing that might enable

³⁷ Above, n 18 at 31.

³⁸ [2006] NSWIRComm 323.

³⁹ [2007] NSWIRComm 170.

⁴⁰ [2009] NSWIRComm 163 (1 October 2009).

them to ensure supervisors and managers were acting in compliance with S&L's written policy regarding the prohibition of using steel hooks to lift steel plates in the circumstances that occurred on 26 May 2006. The defendants placed much emphasis on the fact that they had written policies regarding the prohibition on open hooks, that they reiterated this policy regularly at tool box meetings and even advised individual employees not to use open hooks. The defendants obviously considered this to be an important safety issue. That being so, one would expect some form of auditing, even by way of casual inquiry, to ensure supervisors and managers were complying with the policy. But there was none.

The following table provides an overview of the matters referred to by the courts and compares them with the provisions in proposed s 26(2) WHSA.

Table 3- Comparison of Judicial Discussion of “Due Diligence” with Legislative Definition in s 26(2) WHSA

Judicial statements	Section 26(2)
	(a) to acquire and keep up to date knowledge of work health and safety matters;
	(b) to gain an understanding of the nature of the operations of the business or undertaking of the body and generally of the hazards and risks associated with those operations
	(c) to ensure that the body has available for use, and uses, appropriate resources and processes to enable hazards associated with the operations of the business or undertaking to be identified and risks associated with those hazards to be eliminated or minimised
“specific issues responded to when they are drawn to attention”	(d) to ensure that the body has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information
“there was in place a systematic approach designed to achieve compliance with a regulatory scheme established by the Act and to prevent its contravention”; “laid down a proper system to provide against contravention of the Act”	(e) to ensure that the body has, and implements, processes for complying with any duty or obligation of the body under this Act
“that the system so established was both proper and appropriate so as to achieve the regulatory requirements of the Act and, in particular, was not merely some paper scheme that paid lip service to the Act or merely exaggerated the reality of the system that was in place;” “that the system was properly enforced and policed to achieve the regulatory outcome of preventing contraventions of the Act”; “safety systems are not only established on paper, but also implemented on the ground, their operation regularly monitored”	(f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).
“had provided adequate supervision to ensure that the system was properly carried out”; “adopted a process of review and auditing that might enable them to ensure supervisors and managers were acting in compliance”	?

This brief and fairly cursory comparison shows that, while the new definition in s 26(2) does commendably direct attention to matters that have not been spelled out by the

courts previously, there is at least one matter to which the courts have directed attention which is not covered by s 26(2). This is the issue of the provision of appropriate supervision to ensure the carrying out of a system. It might be possible for a court to read “resources” in the various paragraphs of s 26(2) as dealing with the matter, but there would be at least some doubt. A detailed study of other cases where “due diligence” has been referred to may reveal other matters not touched on in s 26(2). In short, while the provisions of s 26(2) provide a good starting point, it is submitted that if they are viewed as an exhaustive list of matters to be taken into account the provision is too restrictive, and a more open-ended approach ought to be adopted.⁴¹

Meaning of “ensure”

An unusual (at least to my mind) feature of proposed s 26 is that the obligation is one to “exercise due diligence to **ensure**” compliance with the Act (emphasis added). The meaning of the word “ensure” in OHS legislation seems to have been settled for a number of years as imposing an “absolute” obligation on a duty holder. Thus, in an often quoted comment early in the history of the “Robens-style” legislation in Australia, Watson J of the NSW Industrial Commission, in *Carrington Slipways Pty Ltd v Inspector Callaghan* (1985) 11 IR 467, at 470, drew a sharp distinction between the common law duty (which is always the duty of “reasonable care”), and the statutory duty. He said:

Had the legislature intended to restate the common law obligations devolving on an employer to take reasonable care for the safety of his employees, it would have been open for it to have adopted wording such as... 'shall take all reasonable precautions to ensure'... In their context and purpose there would seem to be no reason to make any implication that the words 'to ensure' are to be construed in any way other than their ordinary meaning of guaranteeing, securing or making certain.

While using the word “ensure” in the WHSA, though, it seems that the drafters intend something much closer to the common law standard than to absolute liability. This can be seen clearly in s 16, which, while appearing to define “risk management”, in fact seems to be a definition of the word “ensure”:

16 Management of risks

A duty imposed on a person to ensure health or safety requires the person:

- (a) to eliminate⁴² risks to health and safety, so far as is reasonably practicable; and
- (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

The question is- does this unusual meaning of the word “ensure” apply in s 26? Technically the duty in s 26 is not to “ensure health or safety”, but rather to “ensure that the body complies with” a safety duty. Since the body’s “duty” will usually be one of the safety duties imposed under Part 2, such as s 18, then this means that the officer is to “exercise due diligence to ensure” that the body “ensures, so far as reasonably practicable” health and safety. But under s 16 this means “eliminate risks so far as reasonably practicable” or “if not reasonably practicable, minimise risks so far as

⁴¹ It may also be doubted why the list of “examples” of a body’s “duties or obligations” under para 26(2)(e) has been included. While all are correct, the list could be expanded greatly and by matters of perhaps more importance, and there may well be a tendency of managers to focus on this list as opposed to the full range of issues which should be attended to.

⁴² The previous draft SWA included the words “hazards, and” at this point, and in sub-para (b). I agree it is simpler just to refer to “risks”.

reasonably practicable”. Section 17 then provides a list of factors to be taken into account in determining what is “reasonably practicable”.

The detailed explication of all these steps is a joy awaiting the court required to apply this concatenation of “reasonable practicabilities”. It must be said that at each step in the lengthy chain (all, it should be remembered, required to be proved by the prosecution to the criminal standard of “beyond reasonable doubt”) there will be a number of exculpatory factors which can be relied on by officers. If the company can now argue that it “did its best”, the officer can now argue that all that was required was “due diligence” (which will no doubt be said to mean, “I did *my* best”) to see that *it* was “doing its best”. The word “ensure” is, in an Orwellian transformation, now denuded of meaning and comes to mean effectively “we gave it a go so long as it was not too expensive”⁴³ or “it appeared on the agenda”.

This may slightly overstate the problem. But it is unfortunate to see the strong “ensure” standard so watered-down, and to see the problems that will be created in obtaining convictions against officers under the new Act.

Onus of Proof

I have expressed my views previously on the way that the onus of proof has been shifted to the prosecution and the unfortunate effect this will have on the enforcement of the law. By dealing with the issue in the way that it does, the WHSA ensures that there will be a heavy burden to establish matters the details of which will mainly be known by the accused, and which will have to be proved to a very high degree of certainty.

Evaluation

In short, the WHSA meets the expectations created by the two Reports. There are some positive steps forward, in emphasising the positive duty for officers to exercise due diligence to see that their company complies with its duties under the Act, but unfortunately the way that those duties are defined, and the procedure that will be needed to obtain a conviction, can overall only be seen as a backwards step for safety in Australia.

It is probably no exaggeration to say that the response of Australian governments to the recommendations of the National Inquiry presents a unique opportunity to send a clear message about the importance of safety in the workplace, and in particular on this issue, about the key role that senior management plays in seeing that there is a culture of putting safety high on the list of priorities in a company’s operations. But it also presents a clear danger- that the goal of achieving “uniformity” of laws will lead to a watering down of safety provisions that have previously provided important protections for workers. It will be a very sad outcome if the message that the Australian business community receives out of this process is that safety is no longer so important, and that company officers can leave it to one side in making operational decisions. In my judgment there is a clear danger of this happening if the current model legislation is adopted as presently drafted.

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⁴³ See s 17(e) which requires the court to take into account “the cost associated with available ways of eliminating or minimising the risk”.

Appendix 1: Coverage of Unincorporated Associations

A question which the current form of s 26(1) raises is whether it applies to officers of unincorporated associations, such as clubs, which do not have full “legal personality” under State or Federal law.

It may be relevant that the Act regularly uses the longer phrase “body corporate” (as opposed to the simple word “body”) in later offence provisions (see eg s 37(1), 38(1) and many other instances where a higher penalty is imposed on a “body corporate”). This presumably refers to incorporated bodies such as companies and “incorporated associations” under the relevant State legislation.⁴⁴ The only further explanation of the word “body” alone is to be found in s 244(4), which provides that the Crown is a “body” for the purposes of s 26.

Given these facts it may be argued that the Act must intend the word “body” to mean something different to “body corporate”, and hence that the obligation under s 26 will apply to officers of clubs and other unincorporated associations.

{The fact that the definition of the word “officer” in s 4 WHSA reads “officer of a body corporate means...”, does not resolve the issue. The definition only refers to the phrase “officer of a body corporate”; it does not of itself resolve the ambiguity over the use of the phrase “officer of [a] body” in s 26.}

But are voluntary, unincorporated, associations subject to duties under the Act? This depends on the meaning to be given to the word “person”. Obligations under the Act are imposed on “persons”. The word is not defined in the Act,⁴⁵ but there is a definition in s 5 of “person conducting a business or undertaking”, and in s 5(4) we find an explicit *exemption* provision covering “volunteer associations”, defined in s 5(5) as a “group of volunteers” working together. If the exemption in s 5(4) was needed, then arguably we have to say that the word “person” includes a voluntary association or club. (In other words, there would have been no need for the exemption in s 5(4) if the word “person” did not pick up voluntary associations.)

The exemption in s 5(4) means that such an association will not be caught by provisions of the Act that only apply to persons “conducting a business or undertaking”. Hence it will not be subject to the main safety duties in ss 18-25, Divns 2 & 3 of Part 2 of the Act. However, it could be subject to the duty in s 28 (imposed on a “person at a workplace”- while it may be odd to determine how a voluntary association may be “at” a workplace, it is possible a court could give some meaning to the expression.)⁴⁶

It is worth noting that under s 33 “volunteers” may be guilty of offences against ss 27 and 28, which is consistent with the above analysis. It may be that the word “volunteer” itself could be read as referring to a voluntary association as well as the individual volunteers (the definition of “volunteer” in s 4 refers to “a person who is

⁴⁴ Such as, eg, the *Associations Incorporation Act* 1984 (NSW).

⁴⁵ Is it relevant that it **was** defined under the preliminary draft SWA, in s 4, to specifically include “an unincorporated body or association and a partnership”? Can it be said that the decision to remove the definition of “person” was a conscious decision to exclude such bodies from being bound under the legislation? While such a suggestion is possible, in the end the task of a court interpreting legislation is to refer to the terms of the legislation itself, not to speculate about the possible motives of law reform bodies in preparing drafts.

⁴⁶ For example, a choral society singing Christmas carols at a shopping centre- in which case the society may be said to have a duty under, eg, s 28(b) to take reasonable care not to adversely affect the health and safety of other persons such as shoppers or staff.

acting on a voluntary basis”, and if the word “person” refers to a club, it would be consistent to classify the club itself as a “volunteer”.)

There are a number of other duties under the Act which extend to parties other than those who “conduct a business or undertaking”. But whether those other duties could extend to voluntary associations is a difficult question at the moment. The regular pattern for these provisions is to impose a duty on a “person”, and then to specify penalties which are divided between “individuals” and “bodies corporate”. Take, for example, s 41:

41 Requirements for authorisation of plant or substance

(1) A person must not use plant or a substance at a workplace if: (a) the regulations require the plant or substance or its design to be authorised; and (b) the plant or substance or its design is not authorised in accordance with the regulations.

Maximum penalty:

In the case of an *individual*—\$20 000.

In the case of a *body corporate*—\$100 000.

The obligation is imposed on all “persons” (not “persons conducting a business or undertaking”) so the exemption in s 5(4) does not apply. Arguably a voluntary association might “use a plant or substance at a workplace” contrary to the provision. But the difficulty is that a voluntary association is neither an “individual” (the word invariably refers to a human being, a member of the species *homo sapiens*), nor is it a “body corporate”. So the conclusion may either be that Parliament does not intend this provision to apply to clubs, or else that while the club has a duty, it cannot be prosecuted as Parliament has determined no maximum penalty.

All in all it would seem preferable for some specific decisions to be made about the application of the Act to unincorporated associations, rather than leaving the matter in the current state of uncertainty.