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April 18, 2012

# Directors and Due Diligence in Workplace Safety

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**Safety in Action 2012**  
**April 17-19, 2012**

**DIRECTORS AND DUE DILIGENCE IN WORKPLACE SAFETY**

Neil Foster<sup>1</sup>

The duties of directors and other company officers under s 27 of the model Work Health and Safety Act will be explored, along with related duties. Issues considered will be: what level of company officer will be caught by the legislation? How will volunteer officers, and officers of nonprofit organisations, be dealt with? What are the courts likely to consider as “due diligence”? This question will be considered both in terms of the Act and published guidance, but also against the background of previous court decisions on the concept in the workplace safety area and elsewhere.

**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 20<sup>th</sup> 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 careless, 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.<sup>2</sup>

The issue we are focussing on today, of course, is personal liability for workplace safety. Academic writing on this area supports the view that one of the most important “drivers” of corporate change in relation to workplace safety, is the prospect of personal liability for company officers. This view has been accepted by the drafters of workplace safety legislation, which for many years has included specific provisions in different forms imposing criminal liability on company officers. The “harmonised” *Work Health and Safety Act*, which I will be discussing today, is no exception. (I will be referring to the version in force in NSW, but at this point the NSW legislation follows the recommended “model” exactly.)

Before turning to the WHSA, however, it seems worthwhile to make one important point. The law in civil matters allows a director to take out insurance against their liability to pay civil damages for harm, should such arise. But there is a very long-standing and important rule of public policy that it is not possible to take out a valid insurance policy covering possible criminal penalties exacted in criminal proceedings,

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<sup>2</sup> 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.

where there is any element of “personal fault” in the offence. Sadly, some insurance companies seem to be offering such policies which on their face purport to allow recovery of such penalties under the policy. But the better view is that any such insurance is not enforceable. Criminal penalties for personal failure to ensure due diligence will have to be paid out of a director’s personal funds.<sup>3</sup>

### A. General Provision

The provision of main interest is s 27 WHSA, which in part reads as follows:

#### 27 Duty of officers

(1) If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation.

To properly understand this section it is important to be aware of how the law of companies (or “corporations”, usually synonymous) operates. The key legal feature of a corporation is that it has a separate legal “identity” or “personality” from that of the members of the corporation. As a result a company, once brought into existence by the process of “incorporation”, can hold property, employ personnel, and commit offences. As an employer, or more generally a “person conducting a business or undertaking”, a company may be guilty of an offence against the Act. It is particularly important when considering problems in this area to note that if a **company** is the employer of someone, then a **board member** is not. Under s 27, then, an “officer” if the corporate PCBU has a separate and freestanding duty to exercise due diligence to see that the PCBU complies with its duties.

The model provided by s 26 of the *OHS Act* 2000 (NSW) until 7 June 2011 operated differently, deeming an officer to be liable if the company had contravened the legislation, unless defences of due diligence or lack of influence could be made out.<sup>4</sup> This current provision, by contrast, imposes a positive duty framed in terms of due diligence. This element of lack of due diligence will now need to be established by the prosecution.

The duty arises where a “person” conducts a business or undertaking, and while it sounds odd to speak about “an officer of the person”, interpretation legislation invariably includes companies when it uses the word “person”.<sup>5</sup>

This new provision is a reasonably straightforward implementation of recommendation 40 of the *First Report* of the National Review, which was that a new Model Act should “place a positive duty on an officer to exercise due diligence to ensure

<sup>3</sup> For detailed justification for these comments, see N Foster “Directors Insuring Against Criminal OHS Wrongdoing – the Common Law position” *Conference on Insurance Issues and Corporate Crime*; sponsored by the Corporate and White Collar Crime Network, Essex University, Freie University, Berlin, Germany, October 2010 (available at: [http://works.bepress.com/neil\\_foster/37](http://works.bepress.com/neil_foster/37)). As I note in that paper at p 11, whatever the situation may be with other “strict liability” offences, the UK decision in *R v Northumbrian Water, ex parte Newcastle and North Tyneside Health Authority* [1999] Env LR 715 makes it clear that public policy would invalidate an insurance arrangement to pay a penalty where part of the liability structure of the offence was a failure to exercise “due diligence”, the precise words used in s 27 WHSA 2011.

<sup>4</sup> Amendments, made by the *Occupational Health and Safety Amendment Act* 2011 (NSW) substituted a new s 26 into the NSW Act between 7 June 2011 and 1 Jan 2012, which was effectively (though not precisely) the same as that in the model legislation s 27.

<sup>5</sup> See, eg, s 21(1) of the *Interpretation Act* 1987 (NSW): “person” includes an individual, a corporation and a body corporate or politic”.

the compliance by the entity of which they are an officer with the duties of care” under the Act.<sup>6</sup> This is a very commendable change. It is backed up by all the research that stresses the need for management to provide clear leadership on safety issues.<sup>7</sup>

The elements of the offence under s 27 are fairly clear:

- That there is a corporate “PCBU” which has a duty or obligation under the WHSA;
- That the accused individual is an “officer” of that PCBU;
- That the accused has failed to exercise “due diligence” to ensure that the PCBU complies with that duty or obligation.

It is interesting to note that, unlike the previous NSW legislation, for example, which required that the relevant company actually contravene the legislation, it would seem to be possible for an officer to be guilty under s 27 WHSA simply by failing to exercise due diligence, even if the company itself has not (yet) been guilty of a breach.<sup>8</sup> That is, an inspector may charge a person even if there has been no corporate breach, simply because the person has not put in place any procedures to monitor and respond to safety risks.

### **B. Who is an “officer”?**

The obligation applies to an “officer” of the corporate person. The definition of this term has been a controversial issue.

Under the *OHS Act* 2000 (NSW) s 26 liability was imposed on “directors” and also on those “concerned in the management” of the corporation, for breaches committed by the company. It was necessary that the company be guilty, before the officer could be found to be guilty.

But one of the difficulties in applying s 26 was clarifying what exactly was meant by the phrase “**concerned in the management**”. How far down the chain of command in a company did possible liability extend? And how far was it desirable to impose a s 26 obligation on “middle management”, constrained as they may be by directions from above?

Under WHSA s 27 similar issues may arise. The provision imposes liability on “officers”, but that term is defined in terms that require reference to the *Corporations Act* 2001 (Cth), s 9 (with the exception of partners in a partnership, who are treated separately.)<sup>9</sup>

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<sup>6</sup> See <http://www.nationalohsreview.gov.au/> for copies of the two Reports of the *National Review into Model Occupational Health and Safety Laws* (2008-2009) which led to the adoption of the harmonised WHSA legislation.

<sup>7</sup> For a summary of some of this research see N Foster, “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, and material noted in Sheriff & Tooma, *Understanding the Model Work Health and Safety Act* (North Ryde; CCH, 2010), at 29-30. Chapter 3 of that book gives an excellent overview of directors’ liability provisions, including a good review of decisions under (the old form of) s 26 of the NSW OHS Act 2000 and suggestions as to how the new WHSA regime may work.

<sup>8</sup> A point made by R Johnstone, “Decriminalisation of Health and Safety at Work in Australia” (WP86, National Research Centre for OHS Regulation, March 2012) at 25; see <http://ohs.anu.edu.au/publications/pdf/WP.86.Decriminalisation.RJ.2.12.pdf>.

<sup>9</sup> Under s 5(3) WHSA, partners are explicitly deemed to be “persons conducting a business or undertaking”, and hence do not need to be included within the meaning of the word “officer” to be liable under the Act.

**S 4 WHSA- officer means:**

- (a) an officer within the meaning of section 9 of the Corporations Act 2001 of the Commonwealth other than a partner in a partnership; or
- (b) an officer of the Crown within the meaning of section 247; or
- (c) an officer of a public authority within the meaning of section 252, other than an elected member of a local authority acting in that capacity.

Section 9 of the *Corporations Act* provides in the definition of “officer” that, as well as the formally appointed directors, the word includes:

(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)...

Note that, since partners in firms are regarded as “persons conducting a business or undertaking”, the WHSA definition clarifies that they are not also regarded as “officers”. This may have been necessary as s 5(2) says that

**WHSA s 5(2)** A business or undertaking conducted by a person includes a business or undertaking conducted by a partnership or an unincorporated association.

While this provision does not directly deem a partnership to be a “person”, it might have suggested this unless the exclusion in para (a) of the definition of “officer” had been included.

Arguably the extended definition of “officer” will include at least some “middle managers”.<sup>10</sup> The previous definition in s 26 of the NSW Act referred broadly to persons “concerned in the management” of the corporation. While the extended definition of the term in s 9 does not use the phrase “concerned in the management of the corporation”, the definitions in paras (i) and (ii) are in fact taken from court decisions considering the meaning of that very phrase.<sup>11</sup> So the decisions of courts on the issue under s 26 of the former NSW Act are likely to be of interest to courts interpreting the word “officer” in s 27 of the WHSA. I will briefly touch on some of those earlier decisions.

While there were a number of prosecutions of directors under former (1983) s 50 (mostly in “one-man” companies) the precise reach of the phrase “concerned in the

<sup>10</sup> There is a very interesting discussion of the various types of “officers” and “directors” under the *Corporations Act* 2001 definition, in the decision of the Full Court of the Federal Court in *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 (21 February 2012), esp at [28]-[76].

<sup>11</sup> See, for example, *Commissioner for Corporate Affairs v Bracht* [1989] VR 821, noted below.

management” had not been addressed in the cases until the mid-1990’s.<sup>12</sup> Two English decisions on similar provisions in English law stressed that to be “involved in management” must carry with it some overall role in formulating company policy and strategy.

One was *R v Boal* [1992] 2 WLR 890. There an assistant manager in a bookshop was held not to within the category of management covered by the statute involved.<sup>13</sup> The phrase used in that Act was “director, manager, secretary or other similar officer”. The Court of Appeal followed an earlier decision on a similar phrase in corporate legislation to find that the Act was

intended... to fix with criminal liability only those who are in a position of real authority, the decision-makers within the company who have both the power and responsibility to decide corporate policy and strategy. [the Court, per Simon Brown J at 895F]<sup>14</sup>

As a result the assistant manager was relieved of responsibility. The decision, however, seems a very generous one: the evidence was that the bookshop concerned was the only major workplace of the company, and that the accused was the fourth-most senior decision-maker.

In *Woodhouse v Walsall Metropolitan Borough Council* [1994] 1 BCLC 435- the defendant was again acquitted because he

was (not) a decision-maker within the company having both the power and responsibility to decide corporate policy and strategy.

On the other hand, a Scottish decision under a section almost identical to former (1983) s 50 held that a “director of roads” for a Scottish municipality was able to be charged under the section: *Armour v Skeen* [1977] Scots Law Times 71.

Having regard to the position of the appellant in the organisation of the council and the duty which was imposed on him in connection with the provision of a general safety policy in respect of the work of his department I have no difficulty in holding that he came within the ambit of the class of persons referred to in s.37(1). [Lord Justice-Clerk Wheatley, at 74-75]

And in *R v The Mayor, Councillors and Citizens of the City of Dandenong and Noel Bailey*,<sup>15</sup> the County Court found that the City Engineer was sufficiently responsible to be regarded as someone “concerned in the management” of the City for the purposes of s 52 of the (then) Victorian *OHS Act* 1985.<sup>16</sup>

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<sup>12</sup> An article by Evan Smith, “Prosecutions of Directors and Others under Section 50 of the New South Wales Occupational Health and Safety Act 1983”, in Johnstone, R (ed) *New Directions in Occupational Health and Safety Prosecutions: The Individual Liability of Corporate Officers, and Prosecutions for Industrial Manslaughter and related offences* (Melbourne: Centre for Employment and Industrial Relations Law, 1996) 10-12 discussed some unreported cases.

<sup>13</sup> Not the primary UK statute, the *Health and Safety at Work etc Act* 1974, but the *Fire Precautions Act* 1971.

<sup>14</sup> The UK Law Commission Report, *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com No 237; London: HMSO, 1996), accepted the principle in this case as applying to s 37(1) of the *Health and Safety at Work etc Act* 1974 (UK), the equivalent of s 50 of the 1983 NSW Act- see para. 8.56, n.76.

<sup>15</sup> Unrep; County Court of Vic, Stott J, 8.11.91.

<sup>16</sup> See Creighton & Rozen, *Occupational Health and Safety Law in Victoria* (Sydney: Federation Press, 1997), [708]; also mentioned in Whalen, V “The Liability of Individual Officers and Liability for Manslaughter and Related Offences: Three Victorian Cases”, in Johnstone (1996) 13-15, at 14.

In a case involving general company law, *Commissioner for Corporate Affairs v Bracht* [1989] VR 821, Ormiston J of the Supreme Court of Victoria emphasised that the meaning of the phrase “concerned in the management of” must be determined by looking at the provision in which it occurs. In that case, which dealt with financial irregularities, he commented:

It may be difficult to draw the line in particular cases, but in my opinion the concept of ‘management’ for present purposes comprehends activities which involve policy and decision making, related to the business affairs of a corporation, affecting the corporation as a whole or a substantial part of the corporation, to the extent that the consequences of the formation of those policies or the making of those decisions may have some significant bearing on the financial standing of the corporation or the conduct of its affairs...

The similarity of the comments of Ormiston J here and the terminology used in the later-enacted *Corporations Act* 2001 (quoted above) is probably not coincidental.<sup>17</sup>

Clearer guidance on this issue was provided in the judgment of Staunton J in *McMartin v Newcastle Wallsend Coal Company Pty Ltd and ors* [2004] NSWIRComm 202. The prosecution flowed from an incident at the Gretley Colliery in which four miners were killed when they unwittingly broke through into a previously abandoned tunnel which had been filled with water and were drowned. The two main companies involved in running the mine, Newcastle Wallsend and its parent company Oakbridge Pty Ltd, were prosecuted, as well as eight individuals at various levels of management. Essentially the cause of the incident seems to have been the fact that the company was given an inaccurate plan of the situation of the old workings by the Department of Mineral Resources. Her Honour found, however, that the plan that was provided contained a number of unusual features which should have led managers and the Mine Surveyor to undertake further investigations to determine whether it was accurate or not. Accordingly, the corporations were convicted of offences against ss 15 and 16 of the 1983 Act, the s 53 defences of “reasonable practicability” not being made out.

The question then arose of the liability of managers under s 50. The judgement contains an extensive discussion of the liability of the individual managers, and in particular, as none of the individual defendants were formal “directors” of the companies concerned, the question of the meaning of “concerned in the management”. As her Honour comments at para [833], there had previously been no definitive authority of the IRC or any other court as the proper construction of the phrase.

The judgement discusses a number of corporate cases including the *Bracht* case mentioned above, and contains the following summary of the law:

885      What would appear to be a common and understandable factor in all the authorities to which I was taken was the person's *decision making powers and/or authority* going directly to the management of the corporation. That decision making role or authority on behalf of the corporation may involve advice given to management encompassing a participation in its decision making processes and the execution of those decisions going beyond the mere carrying out of directions as an employee. That decision making role or authority and the responsibilities inherent in them must be such as to *affect the corporation as a whole or a substantial part of the corporation*. In saying that, it does not mean that the person must be at the highest levels of management. The structure and size of the corporation is relevant as is the role of the person within the corporation relevant to his/her decision making powers on behalf of the corporation. Critically, in relation to s50(1), the *person's*

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<sup>17</sup> See N Foster, unpublished LLM thesis *The Personal Liability of Company Officers for Company Breach of Workplace Health and Safety Duties* (Feb 2004) pp 237-238 for a summary of my analysis of this and other cases on the meaning of “concerned in management”.

*decision making powers must be such as to directly influence the corporation in relation to the act or omission that constituted the offence of the corporation.* That much, I believe, is self evident given the nature of the defences available in s 50(1)(a) and (b)<sup>18</sup>. In other words, the determination of a person concerned in the management of the corporation in s 50(1) must be a person who was in a position to influence, by advice or decision making, the conduct of the corporation in relation to its contravention or whose decision making powers within the corporation comprehends activities the consequences of which have a significant bearing on the conduct of the corporation relevant to its contravention. [emphasis added]

In other words, a person was “concerned in management” for the purposes of s 50 (and no doubt for the purposes of s 26 of the 2000 Act) if they had

- Decision-making power and authority;
- Going beyond the mere carrying out of directions as an employee;
- Such as to effect the whole or a substantial part of the corporation;
- And which powers related to the matters which constituted the offence of the corporation under the legislation.

In the context of the Gretley litigation, the result of this analysis was that the two individual defendants, Messrs Porteous and Romcke, who held the position of Mine Manager at Gretley during relevant times were found to be clearly “concerned in the management” of the mine. In addition to these statutory obligations, however, her Honour found that they had held positions of “General Mine Manager” which involved them in having overall supervision of all matters relating to the management of the mine, including in particular safety issues- see paras [901]-[902].

In this case a number of other lower-level managers were found not to fall within the definition of “concerned in management”. These gentlemen held the statutory position of “Under Manager” or “Under Manager in charge”, referred to in s 41 of the CMRA. But while they were given specific responsibilities for certain shifts and certain areas, her Honour was not satisfied that they were concerned in the management, especially when account was taken of the fact that the corporations charged (especially Oakbridge) operated at sites other than Gretley. The Under Managers were not proved to have the broader overall responsibility required to fall within s 50: see the discussion at paras [910]-[935].

One other person was, however, found by Staunton J to be “concerned in management”. This was the Mine Surveyor, Mr Robinson. His role was obviously important because the effective cause of the deaths was a failure in the map available to the companies, and he was in charge of the survey and drafting staff for the mine. In addition, he was given a statutory responsibility under cl 8 of the *Coal Mines Regulation (Survey and Plan) Regulation 1984* (NSW) to certify to the accuracy of the plans used in the mine, and to draw to the attention of the manager of the mine any doubt he had about the accuracy of the plans. Due to the key role that this information played in management decision-making (see the discussion at para [942]) Mr Robinson was found to be “concerned in management” for the purposes of s 50.

This conviction was, however, overturned on appeal to the Full Bench of the Industrial Court.<sup>19</sup> The Full Bench ruled that he was not senior enough in management, did not attend management meetings, and only supervised 2 or 3 others.

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<sup>18</sup> Her Honour doubtless meant to refer to s 50(1)(b) and (c), para (a) having been repealed before the date of the incident in question.

<sup>19</sup> *Newcastle Wallsend Coal Company Pty Ltd v McMartin* [2006] NSWIRComm 339; at para [517]. See also N Foster, “Mining, maps and mindfulness: the Gretley appeal to the Full Bench of the Industrial Court



The Full Bench also offered comment on the definition of “concerned in management” in another case, *Morrison v Powercoal Pty Ltd and Anor*.<sup>20</sup> This was another prosecution of a Mine Manager, a Mr Foster, who had been in charge when a roof caved in and caused the death of a miner. The Full Bench overturned the acquittal of the company and hence had to determine the liability under s 50 of Mr Foster.<sup>21</sup> Unfortunately their Honours, in ruling on the question whether Mr Foster was “concerned in the management” of the corporation, seemed to not have been aware of the extensive analysis of the issue provided by Staunton J in *McMartin*.<sup>22</sup> However, they relied on very similar cases,<sup>23</sup> and in the end agreed that someone who was a mine manager fulfilled the statutory criteria for being concerned in management. In particular the fact that Mr Foster’s statutory obligations extended to OHS matters was considered important.<sup>24</sup>

The NSW Court of Appeal also offered guidance on this question. The Court (Spigelman CJ, Mason P & Handley JA) handed down two important decisions clarifying the operation of the provisions relating to company officers, and confirming the validity of the jurisdiction then conferred on the Industrial Relations Commission to hear prosecutions under the OHS Act 2000.

The decisions are *Powercoal Pty Ltd & Foster v Industrial Relations Commission of NSW & Morrison* [2005] NSWCA 345 and *Coal Operations Australia Ltd v Industrial Relations Commission of NSW & Morrison* [2005] NSWCA 346. Both cases involved a death in a coalmine due to a roof fall, and in both cases a first-instance decision by the trial judge to acquit the defendant company (and, in *Powercoal*, a manager) was overturned on appeal to the Full Bench of the IRC in Court Session.

While the decisions address the issues in terms of the previous, 1983, legislation (as the incidents concerned occurred before September 2001), the logic of the decisions applied completely to the 2000 legislation, and as we will see may be influential in interpreting the WHSA.

In *Powercoal* there was discussion of the argument put forward by Mr Foster that as mine manager at Awaba Colliery he was not of sufficient seniority to be caught by the provisions of s 50 of the *OHS Act* 1983 (equivalent of the later s 26). His argument was that the phrase “concerned in the management” in relation to a corporation meant that he would have to be involved in the overall management of the company as a whole, rather than simply as a local manager.

The Court of Appeal provided invaluable guidance on the meaning of this phrase. Spigelman CJ made the following points:

- The line of decisions flowing from *Tesco Supermarkets v Natrass* which deals with the question of which company officers will create liability for the company, is irrelevant to the issue of who is “concerned in the

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of NSW”, (2008) 24 *Journal of Occupational Health and Safety, Australia and New Zealand* 113-129 for further commentary on the appeal.

<sup>20</sup> [2004] NSWIRComm 297. The Full Bench consisted of Walton J (VP), Boland and Staff JJ.

<sup>21</sup> Having dismissed the charges against the company, the trial Judge did not go on to further consider Mr Foster’s liability under s 50, the precondition (company contravention) not being met.

<sup>22</sup> Discussed above. See the comment in *Powercoal* at [171] that “there are no authorities directly in point” on the issue, all the harder to understand since Staunton J’s judgement is cited previously at [159] on another point related to s 50.

<sup>23</sup> See the extensive quotes at [172] from *Bracht*, and *Griggs v Australian Securities Commission* (1999) 75 SASR 307, both referred to by Staunton J in *McMartin* at [848]-[854].

<sup>24</sup> However, in *Morrison v Powercoal (No 3)*, the Full Bench in sentencing applied s 10 of the *Crimes (Sentencing Procedure) Act* 1999 to Mr Foster and did not enter a conviction.

management” of a company for the purposes of the OHS Act- see para [95].<sup>25</sup>

- The question of what “concerned in the management” means 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 2000 is “any aspect of the operations of the company insofar as it raises safety considerations”- para [102].
- The fact that the same person might be both an employee (and hence liable under s 20 of the OHS Act 2000) and also a person “concerned in management” for the purposes of s 26, does not mean that s 26 should be “read down” to exclude employees. “The scope, purpose and object of the legislation is not such that one should read down the language of one section by reason of the possibility of an overlap”- para [105].
- The broad purposes of the Act, to encourage safety and apply to a range of possible defendants, lead to a conclusion that the phrase should not be interpreted narrowly.

116 The objects of the Act, and the general nature of the duties imposed by the Act, suggest that Parliament did not intend to give the language of s50(1) a narrow, let alone a technical, meaning. The purposive approach to interpretation required at common law, and now by s33 of the Interpretation Act 1987, suggests that the words “management of the corporation” should not be read down so as to apply only to central management.

- The decision of the Full Bench on the matter was not shown to be in error.

The judgment here provides a good foundation for a proper understanding of the reach of s 27 of the WHSA.

*Inspector James v Ryan* [2009] NSWIRComm 215 involved the interesting situation of someone who it was alleged had been appointed as a “director”, and yet when the matter came to trial his formal appointment could not be proved.<sup>26</sup>

The circumstances were that Mr Ryan was the CEO of a “holding company,” and the company which was the direct employer of the injured worker, Dekorform, was a subsidiary. The practice of the head company, Alesco, was to appoint its board members as directors of its subsidiary companies, and Mr Ryan had filed a “consent to appointment” form for Dekorform. But the constitution of Dekorform provided that, while a director could be appointed by a holding company, notice of the appointment had to be given- see [60]. While Mr Ryan had behaved *as if* he were a director, no-one could locate a formal resolution of Alesco appointing him, or a formal notice to Dekorform of the fact of appointment.

At trial Marks J ruled that the prosecution had not been able to satisfy him beyond reasonable doubt that Mr Ryan had in fact been properly appointed- see [94]. The

<sup>25</sup> A point made in N Foster, *The Personal Liability of Company Officers for Company Breach of Workplace Health and Safety Duties* (unpub LLM thesis, Feb 2004) at 225-226.

<sup>26</sup> While the judgment does not indicate this, there is no discussion of whether he might not have been charged as “concerned in management”; presumably it was so late in the day that the problems with the formal appointment arose, that it was too late for the prosecution to amend the charge (indeed, the defendant in [126] used this argument in support of his view that there was no need to “stretch” the legal meaning of “director” beyond its core meaning.)

prosecution claimed in the alternative that, even if not a validly appointed director, Mr Ryan fell within the definition of that term in s 9 of the *Corporations Act* 2001, para (b) of the definition of “director”, as he (i) acted in the position, or (ii) was someone in accordance with whose instructions the directors of Dekorform were accustomed to act. (This argument is of interest given the current definition of “officer” in the WHSA 2011, which picks up precisely these provisions.)

Marks J doubted whether “acting” as director by signing 3 resolutions for the company (which Mr Ryan had done) meant that he was thereby director for all purposes- [100]. Nor was he satisfied that Mr Ryan gave instructions to Dekorform- he was involved at higher levels and rarely interacted with Dekorform officers- [104]. In any event, Marks J referred to previous decisions which had held that the “extended” definition of “director” in companies legislation should not automatically be applied in legislation imposing a criminal penalty- see the discussion at [127]-[135], esp *Dean v Hiesler* [1942] 2 All ER 340, a very similar case to this one. He held that the word “director” in the legislation means “someone who has been duly appointed a director of that company in accordance with its constitution”- [148].<sup>27</sup>

On appeal, in *Inspector James v Ryan (No 3)* [2010] NSWIRComm 127 (3 Sept 2010), the Full Bench of the Industrial Court (Boland P, Kavanagh & Backman JJ) ruled that Marks J was in error in concluding that the word “director” in s 26 of the *OHS Act* 2000 did not include the extended meaning of the word to be found in s 9 of the *Corporations Act* 2001 (Cth). They held that the term was broad enough to include someone who had not been formally appointed as a director in accordance with the company’s constitution, but who was either a “de facto director” (someone who acts as a director), or a “shadow director” (someone in accordance with whose wishes the formally appointed directors act)- see [86].

They concluded that his Honour was correct in finding that it had not been established beyond reasonable doubt that Mr Ryan had been formally appointed as a director. On careful consideration of whether Mr Ryan was a “de facto director”, however, while he had intended to become a director, and while the company had held him out as a director (filing a document with ASIC saying he was a director), and while he had undertaken some functions as a director, there was a further criterion which had to be met, which was that he “exercised top-level management functions” in the particular company, Dekorform- see [189], citing *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 565 at 570, per Madgwick J- and did so at a relevant period of time- see [205]. In the end they concluded that Mr Ryan’s involvement with Dekorform at the relevant times was “marginal” and hence he could not be held to have been a “de facto director” at the time- see [222]. Nor was he a “shadow director” because there was no evidence that other directors of the company acted in accordance with his wishes- [229]. Hence Mr Ryan’s acquittal under s 26 was upheld (though for slightly different reasons than given by Marks J).

One further complication may arise under the WHSA definition, however. The reference to the *Corporations Act* 2001 definition picks up that Act’s reference to the company’s “financial standing” in sub-para (b)(ii). That is entirely appropriate for corporations legislation, a major purpose of which is to regulate the finances of companies. It may be queried, however, whether a person who has a major influence on

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<sup>27</sup> Note that this argument would not be available under the current s 27 WHSA, as the extension of the term “officer” is made explicitly by adopting the *Corporations Act* definition, unlike the former NSW *OHS Act* 2000, where this argument had to be made by inference (the term “director” not being defined.)

financial standing is always the best person to fix with personal liability for safety breaches. The two are of course related, but it might have been preferable to craft a definition of the term that refers, as Spigleman CJ did in the quote from *Powercoal* at [102] noted above, to “safety considerations”. Still, it is at least clear that all senior financial officers will have to pay special attention to safety issues under s 27, and this is not a bad outcome.

Under WHSA s 27, there is also an unresolved question as to whether one company can itself be “a person” with management responsibilities in *another* company, under the definition of “officer”. That is, is it possible for a *company* to commit an offence under s 27 in relation to another company, as opposed to an individual manager? It seems unlikely, and there have to my knowledge been no such prosecutions. It cannot be denied that s 27 uses the generic term “person”, which as we have seen elsewhere does usually include “company” unless there is a contrary intention. But I think one could argue that there is contrary intention here. The word “director”, for example, will only mean an “individual”- see s 201B(1) of the Corporations Act 2001 (Cth), where only individuals are capable of being appointed as directors. On the other hand, *Standard Chartered Bank of Australia Ltd v Antico* (1995) 13 ACLC 1,381 holds that for company law purposes one company can be a “shadow director” of another company. So the matter must be in some doubt until the courts resolve the issue.

### **The position of “Volunteer Officers”**

Can a person who is on the board of an organisation in a voluntary capacity be prosecuted under s 27? The Act provides a specific exception from liability for “volunteers” as follows:

#### **WHSA s 34 Exceptions**

(1) A volunteer does not commit an offence under this Division for a failure to comply with a health and safety duty, except a duty under section 28 or 29.

This presumably means that a volunteer cannot be prosecuted for an offence under s 27 (which is contained in the same Division as s 34) as an “officer”, even if they are a board member of an organization, and even if the organisation 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.

To return to the general immunity of volunteers under s 34: what of the situation of a charity or other “voluntary association” (assuming it is incorporated for the moment), where the organization pays a manager? The salaried manager would not be a “volunteer”. The organization might be one that looks like a “volunteer association”, and hence thought at first to be exempt from the duties imposed on PCBU’s by s 5(7): “A volunteer association does not conduct a business or undertaking for the purposes of this Act.”

But under the definition of the term “volunteer association” in s 5(8), the immunity given by s 5(7) 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 “unincorporated association” otherwise made up of volunteers employs someone (as in some sense that employment will be “joint” employment by all the members.)<sup>28</sup> So where anyone is engaged as a worker by a club, that club loses its immunity from prosecution under s 5(7). Hence the salaried officer concerned may be prosecuted under s 27.

Interestingly, the WHS Regulation 2011 (NSW) in reg 7(3) clarifies the situation of what might be called “volunteer incorporated associations” by confirming that the same rules apply to them: that if neither the association, nor the members themselves, employ anyone, they are not to be taken to be a PCBU. (The regulation may have been necessary because technically, when someone is engaged by an incorporated association, they are not engaged directly by the members, but rather under a contract with the “legal entity” constituted by the association. Hence it may have been thought that s 5(8) might not have been sufficient to provide immunity for incorporated associations.)

Other provisions of s 34 provide some further guidance on these issues.

**34 (2)** An unincorporated association does not commit an offence under this Act, and is not liable for a civil penalty under this Act, for a failure to comply with a duty or obligation imposed on the unincorporated association under this Act.

(3) However: (a) an officer of an unincorporated association (other than a volunteer) may be liable for a failure to comply with a duty under section 27, and (b) a member of an unincorporated association may be liable for failure to comply with a duty under section 28 or 29.

The effect of these provisions is that an unincorporated association cannot be prosecuted under the Act. But a salaried officer of the association, if they have failed in their duty of due diligence, may be personally prosecuted, and any member of the association may also be personally prosecuted for failing to comply with sections 28 or 29. (Carol singers sent by an unincorporated choir to a shopping centre, for example, might be prosecuted for distracting workers. The scope of s 29 is so broad that it applies to “a person at a workplace”, whether or not they are a worker.)

One odd thing about these provisions, however, is that they seem to assume that an unincorporated association might (if these provisions were not present) be liable under the Act. But why is this the case? The nature of such an association is that it is not a “person” for legal purposes. The answer seems to be the enigmatic s 5(2), which, as noted previously, provides that: “A business or undertaking conducted by a person includes a business or undertaking conducted by ... an unincorporated association.” While that provision looks like a definition of “business or undertaking”, rather than a definition of “person”, it may be that it would be read as including such associations

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<sup>28</sup> An “unincorporated association” is a group of people who get together for some purposes, but who have not “formalized” their group by having it “incorporated” into a legal entity. If the group is “incorporated” it is deemed to be a legal “person”. “Incorporation” may take place in the case of larger groups under the Commonwealth *Corporations Act* 2001, or in the case of smaller, non-profit groups often happens under State law such as, in NSW, the *Associations Incorporation Act* 2009. There are a number of legal problems generated where a group of people who regularly meet together are not incorporated, and in many cases such a group, if it requires insurance, will be required to incorporate.

within the meaning of “PCBU”. Hence the need for the clarifying exclusion of criminal liability under s 34(2).

We have seen that an elected local government councilor is not a business operator. Under the previous NSW *OHS Act* 2000 26(7),<sup>29</sup> they were also immune from prosecution as a company officer. This immunity of local councilors is provided for in the WHSA through the definition of “officer”, which appears above, the concluding words of which provide: “other than an elected member of a local authority acting in that capacity.”

Under a later provision of the WHSA, s 247, however, liability is imposed on some officers of the Crown as follows:

#### **247 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 the Crown is taken to be an officer of the Crown 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.

This would mean that some suggestions occasionally made that various Government Ministers responsible for programs that might have put safety of workers at risk, should be able to be prosecuted, will not be implemented by this legislation. It is, however, an interesting extension or clarification of possible liability of senior public servants. It is notable, however, that the current version differs from an earlier draft where individual Government departments were mentioned. Could a senior manager in a particular Government department (say, the Immigration Department), be said to be involved in decisions that affect “a substantial part of *the* business or undertaking of the Crown” (emphasis added)? One could always take the view that any one Department was only ever a small part of the overall business of Government in general. On the other hand, if the manager of any one Government Department could never be caught by the provision, then it would seem to be effectively useless. I suspect the courts will interpret the provision in a way which allows it to have *some* effective operation.

Section 252 makes a similar provision for those managing “public authorities”, a term which in the Model Law is to be left up to each State and Territory to define.<sup>30</sup>

### **C. Meaning of “due diligence”**

The standard of care prescribed for officers in s 27 WHSA is “due diligence”.

The *Oxford English Dictionary* defines the word “diligence” as, simply:

Constant and earnest effort to accomplish what is undertaken; persistent application and endeavour; industry, assiduity.<sup>31</sup>

<sup>29</sup> Prior to June 2011, the same result was achieved by s 26(4) as it then stood.

<sup>30</sup> Under the NSW WHSA 2011, s 4, the definition of “public authority” includes “(a) a Division of the Government Service, or (b) a NSW Government agency, or (c) a local authority, or (d) any other public or local authority constituted by or under an Act.”

<sup>31</sup> It gives the first printed use of the word as long ago as Chaucer (c1374) *Troilus & Criseyde* iii. 86 (135) “With al my wit and al my deligence.”

The word implies hard work, and thinking ahead! This was for some years the standard adopted (albeit as a defence) in the NSW legislation, and has been considered fairly regularly by NSW courts in recent years. Recommendation 88 of the *Second Report* of the National Inquiry was that the standard should be defined by setting out matters to be considered. Hence the provision now attempts to provide a detailed definition of “due diligence”.

**27 (5)** In this section, *due diligence* includes taking 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 person conducting the business or undertaking and generally of the hazards and risks associated with those operations; and
- (c) to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and
- (d) to ensure that the person conducting the business or undertaking 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 person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act; and
- (f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).

#### **Examples**

For the purposes of paragraph (e), the duties or obligations under this Act of a person conducting a business or undertaking 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.

It would repay every company officer to take this list as a regular agenda item for consideration.<sup>32</sup> However, it is important to realise there is always a danger that when an attempt is made to create a list like this, other matters may be omitted that have not been thought of. Note that the definition is framed in an “inclusive”, rather than “exclusive”, way. By use of the word “includes”, the definition makes this set of considerations not the sole list of matters that can be taken into account in determining due diligence, and

<sup>32</sup> Sherriff & Tooma, above n , at 33-35 offer some practical tips on dealing with the issues listed.

allows consideration of any other issues that are relevant. This will allow 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.

The statutory list may be compared to some of the key judicial discussions of “due diligence” over the last few years. As noted in a previous 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.<sup>33</sup>

Cases under previous legislation that provide a discussion of these matters will no doubt prove influential on future judicial consideration of the phrase.<sup>34</sup> The question of what constitutes “due diligence” in advertising, for example, was dealt with by the Full Court of the Federal Court in *Universal Telecasters (Qld) Ltd v Guthrie*,<sup>35</sup> where Bowen CJ and Nimmo J referred to the need to lay down an appropriate system, and to take measures to ensure that the system was working.<sup>36</sup> Another case where issues of “due diligence” by company officers was canvassed is *R v Bata Industries Ltd (No 2)*,<sup>37</sup> a Canadian decision concerning directors’ liability for breach of pollution legislation. Ormston PDJ identified a number of factors which were relevant to “due diligence” by officers:

- Whether or not the officers had established an ongoing system to monitor safety;
- Whether or not there were reporting mechanisms to ensure that the system was being complied with;
- While officers were entitled to place reasonable reliance on reports by responsible subordinates, whether they immediately addressed issues of which they became aware?<sup>38</sup>

The issue of “due diligence” under the OHS Act 1983 itself was considered by Maidment J in *Coster*.<sup>39</sup> The fact that Mr Coster had set up procedures for safety to be monitored and ensured compliance with those procedures, had devoted company resources to the issue, responded quickly to complaints which were brought to his attention, and demonstrated a personal commitment to safety by involvement in a safety committee and occasionally doing a personal inspection, all added up to “due diligence”.

A similar approach to the issue of due diligence was found in the judgment of Staunton J in *WorkCover v Daly Smith Corporation (Aust) Pty Ltd*.<sup>40</sup> While not directly adopting the reasoning in *Bata Industries*, her Honour seemed to accept the submission

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<sup>33</sup> 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; NRCOHSR WP No 63), at 31.

<sup>34</sup> See also the discussion of due diligence in Clough and Mulhern, *The Prosecution of Corporations* (Oxford: OUP, 2002), at pp 151–8.

<sup>35</sup> (1978) 32 FLR 360.

<sup>36</sup> *Ibid*, at 363, 383.

<sup>37</sup> (1992) 70 CCC (3d) 394.

<sup>38</sup> *Ibid*, at 429.

<sup>39</sup> *WorkCover Authority of NSW (Insp Dowling) v Barry John Coster* [1997] NSWIRComm 154.

<sup>40</sup> [2004] NSWIRComm 349.



that the factors referred to in that decision were relevant.<sup>41</sup> She ruled, however, that the director concerned, Mr Smith, had not met the standards set out in that judgment. While a written safety policy was in place in the company, her Honour commented on the need to ensure that the policy was not just on paper but became an “entrenched systemic process” and that steps were taken to supervise compliance with the policy.

“Due diligence” was also considered in some detail in *Insp Kumar v Ritchie* [2006] NSWIRComm 323, where 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 Mr Ritchie, a senior manager of the company, who actually lived in New Zealand, was found guilty under s 26 as he had not exercised sufficient care to set in place a safe system of work to respond to the hazards created by a dangerous chemical.

It is worth setting out the submissions of the prosecution on this point that Haylen J accepted, quoted from his Honour’s judgment:

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.

154 The defence was not advanced by the defendant emphasising how busy he was in the work of the Group, his geographical remoteness and his lack of daily involvement in the day-to-day operations of the business; precisely those factors made it imperative that the system he put in place or oversaw was proper and adequate to ensure compliance with the Act and that the means of ensuring the system was in force. The evidence showed a number of systems but the reality of the Race site was that there was no qualified or proper auditing, there was no appropriate training in occupational health and safety generally or in risk assessment specifically, and reliance was placed on a system of assumptions. Those administering the system had no means of effectively enforcing it and there was no evidence as to how the enforcement was achieved.

Emphasis in the end was placed on the fact that while there were paper systems in place, the actual auditing of compliance was not properly supervised, and there was also no evidence that those who had been appointed to supervise safety in the company had appropriate qualifications and experience. Mr Ritchie on a number of occasions said that he “assumed” that the people he had appointed were doing their jobs. The court obviously found that more was required. He received a personal penalty of \$22,500.<sup>42</sup>

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<sup>41</sup> Ibid, at [130].

<sup>42</sup> See [2006] NSWIRComm 384 for sentencing proceedings. It is perhaps worth noting that proceedings flowing from the same incident against another company officer, the Division General Manager, *Inspector Kumar v Rose* [2006] NSWIRComm 325, resulted in a fine of \$18,500 after a guilty plea at an early stage of the proceedings.

With respect, this seems a “line-ball” decision in a number of ways. Not only was Mr Ritchie’s conviction fairly harsh, he was unlucky not to have received the benefit of s 10 of the *Crimes (Sentencing Procedures) Act* 1999 (NSW) (which allows the court to find guilt but choose to enter no conviction where there are extenuating circumstances). The prosecutor here gave a good summary of matters that a court ought to take into account in considering “due diligence”, but on reading the facts it is hard to say why Mr Ritchie ought not to have been found to have exercised such diligence. Evidence was accepted that he received regular reports on safety matters from company officers, had given directions to his Divisional Managers to monitor safety, made personal inquiries about safety matters when conducting site visits, and appointed people to positions whose job descriptions included the need to monitor safety. There was no evidence, for example, that he was aware of regular problems in the Container Division, or failed to respond when issues were brought to his attention. Frankly, this is a conviction that seems to be at the very limit of what is acceptable.

On the other hand, the decision certainly sparked interest in professional circles,<sup>43</sup> and perhaps it will serve as a genuine reminder to senior executives of their responsibilities. But the courts do need to be careful not to apply the legislation to such an impossibly high standard that a reaction will set in, where those who are duty-holders simply “give up” trying to comply.

Would the result in this case have been different under WHSA s 27? The more detailed list of criteria in s 27(5) may reduce the chance that important activities that a director did undertake might be ignored. However, it is important to recognize that even under s 27, an officer who set up a subordinate as responsible for safety, but then did not see that the subordinate was provided with sufficient supervision, training, and resources to do their task, might be found to have failed to act with “due diligence”. Under s 27(5)(c) the officer may have failed to see that the company “has available for use, and uses, appropriate resources and processes” if they do not appoint an appropriately qualified safety officer (using the word “resources” to include “human resources” or “personnel”.) Under s 27(5)(f) a failure to supervise the carrying out of the safety job could be seen as a failure to “verify the provision and use of the resources”.<sup>44</sup>

Another example of a failure by a director to ensure that safety procedures are being implemented in practice, rather than simply “on paper”, can be found in a recent Western Australian case. In *Keating v Fry* [2012] WASC 15 (13 Jan 2012) two directors of a crane-manufacturing firm were found to be guilty under s 55 of the *Occupational Safety and Health Act* 1984 (WA). That provision, which is different in form but similar in effect to s 27 WHSA, provides that a company officer is guilty of an offence where the company has committed an offence and the offence is “attributable to any neglect on the part of” the officer. The directors were found guilty, not simply by virtue of being directors, but because they were actively involved in the day to day operations of the company, and ought to have known that an unsafe system of work had been adopted.

As well as “due diligence”, the other defence that was available under former s 26 was that the officer “was **not in a position to influence** the conduct of the corporation in

<sup>43</sup> See, commenting on the decision, J Catanzariti, “Danger at work: directors face strict OHS liability” (Dec 2006) *Law Society Journal* 52-54; S Nicol, “Directors beware: personal liability for occupational, health and safety breaches” (March 2007) *Keeping Good Companies* 98-100; S Nettleton “OHS due diligence- A guide for Directors and CEOs” (March 2007) *Company Law & Governance Update* 5-8, available at <http://www.blakedawson.com> in the “Publications” area.

<sup>44</sup> See B Sherriff & M Tooma, Sherriff, B & Tooma, M *Understanding the Model Work Health and Safety Act* (CCH, 2010) at 47 “Applying the new due diligence test, it is not clear that the Ritchie case would have been decided differently”.

relation to its contravention of the provision". There is no such separate defence under s 27 WHSA- presumably if someone is not in a position to bring influence to bear on company decision-making, they will be able to show that it was not "reasonably practicable" to do more.<sup>45</sup>

Another example of consideration of the "unable to influence" defence is found in *Inspector Nicholson v Mackey (No 2)* [2011] NSWIRComm 40 (11 April 2011). There evidence suggested that the director of a company found to have committed serious breaches of the Act had been overseas for some time. Marks J adjourned the proceedings to allow the director a chance to offer evidence going to the defence, but, the director not choosing to offer any such evidence, he was convicted and fined. Under s 27 WHSA a director who chose not to be present in Australia when his company was doing work would presumably find it hard to rebut prosecution evidence that he had not exercised "due diligence" to ensure that the company complied with its WHS obligations.

In *Inspector Aldred v Herbert and ors* [2007] NSWIRComm 170 a 13-year-old boy who was trespassing on the premises of a hotel was killed when electrocuted by standing on a pipe near the pool. The directors of the company claimed that they were not in a position to influence the safety procedures as they had appointed a manager to look after day-to-day issues. Backman J, however, ruled that this was not sufficient "due diligence"- that the directors had not specifically addressed safety issues at board meetings, and did not require the manager to report on safety issues, or monitor safety as an issue- see [25]. Submissions that the directors were not in a position to influence the company were also rejected. In subsequent sentencing proceedings, *Inspector Graeme Keith Aldred v Salamander Shores Hotel Pty Ltd and Others* [2008] NSWIRComm 102 the company was fined \$150,000 and the individual directors \$12,000 each.<sup>46</sup>

There was also a discussion of what "due diligence" requires in *Inspector Hayes v Santos and Lorenzo*.<sup>47</sup> In that decision 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 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.

Two prosecutions in relation to the one incident demonstrate that, while directors and officers will be liable in the circumstances mentioned, their differing involvement in the events that have caused a risk may lead to their receiving different sentences. In

<sup>45</sup> For a decision dealing with the "unable to influence" defence see the unusual situation in *Inspector James v Sunny Ngai and ors* [2007] NSWIRComm 203, where other directors were completely under the legal authority of the "Governing Director".

<sup>46</sup> Similar comments about the inability of directors to delegate away their responsibility to ensure that their company considers safety are to be found in *WorkCover v Akerman-Apache (Joint Venture) Pty Ltd and ors* [2006] NSWIRComm 370 at [43].

<sup>47</sup> [2009] NSWIRComm 163 (1 October 2009).

*WorkCover v Burn* [2005] NSWIRComm 206 the director of a company called Top Container Transport was found guilty pursuant to s 26 in relation to an incident that led to the death of a fork lift driver. He was fined \$17,500. In *WorkCover v Steel* [2005] NSWIRComm 215 the General Manager of the same company was also convicted, but was able to show in mitigation that he had a role which was mainly in the financial area, that he had only commenced work with the company 4 months prior to the accident, and that he had responded to any safety matters which were drawn specifically to his attention. He was fined \$5,000 in relation to the same incident.

In *WorkCover Authority v Anywhere Tower Cranes Pty Ltd and ors* [2007] NSWIRComm 44 the individuals charged after the collapse of a crane in the Sydney CBD included the sole director of a crane supply company, Ms Ghada Nouh, who testified that she was effectively a secretary in the office, who had no involvement on the ground with the cranes, and had agreed to be appointed as director. The court expressed sympathy for her position but noted that those who take on the management of companies in NSW do accept responsibility for seeing to the safety of company employees and others affected by the company's work.

In the circumstances Ms Nouh received a penalty of \$9,000. Another officer of the company, Mr Gabris, an on-site manager, received a similar penalty, although in his situation the size of the penalty was reduced from what would otherwise have been appropriate due to the provisions of the Fines Act 1996 (NSW) relating to his ability to pay.

A brief comparison, then, of the matters mentioned in s 27(5) with matters raised by previous court decisions shows that, while the new definition in s 27(5) does commendably direct attention to some matters that have not been spelled out explicitly by the courts previously, there is at least one matter to which the courts have directed attention which is not covered by s 27(5). 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 27(5) 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 27(5). Still, the provisions provide a good starting point, and so long they are not viewed as an exhaustive list of matters to be taken into account, a more open-ended approach by the courts will allow important issues to be considered.<sup>48</sup>

#### **D. Meaning of "ensure" in s 27**

An unusual feature of s 27 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 seemed 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. His Honour 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

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<sup>48</sup> It may also be queried why the list of "examples" of a body's "duties or obligations" under para 27(5)(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 that should be attended to.

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 17, which, while appearing to define “risk management”, in fact seems to be a definition of the word “ensure”:

#### 17 Management of risks

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

- (a) to eliminate 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 27? Technically the duty in s 27 is not to “ensure health or safety”, but rather to “ensure that the person conducting the business or undertaking 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 19, 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 17 this means “eliminate risks so far as reasonably practicable” or “if not reasonably practicable, minimise risks so far as reasonably practicable”. Section 18 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”)<sup>49</sup> 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 try to 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”. There is a danger that the word “ensure” will be, 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”<sup>50</sup> or “it appeared on the agenda”.

<sup>49</sup> As recently re-affirmed by the High Court of Australia in relation to the similarly worded Victorian legislation, in *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14 (30 March 2012).

<sup>50</sup> However, it is encouraging to see that under s 18(e) the court is required to take into account “the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk”. The reference to “**grossly** disproportionate” seems to capture the balance here reasonably well, not allowing a safety precaution to be ignored due to minor cost alone. For a recent reference to this test in interpreting “reasonably practicable” in a UK safety statute, see the comments of Lord Kerr in *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17 (13 April 2011) at [184]: “for the defence to succeed, the employer must establish a **gross** disproportion between the risk and the measures necessary to eliminate it. In the words of Asquith LJ in *Edwards v National Coal Board* [1949] 1 KB 704, 712, “the risk [must be] insignificant in relation to the sacrifice.” (emphasis added) (His Lordship was in dissent, but this comment seems to be perfectly consistent with the reasoning of the majority.)

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

### **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 31; through to offences where there has been a less “reprehensible” breach which has still exposed someone to a risk of serious harm, under s 32, to a general category where there has simply been a failure to comply with the Act, under s 33. 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.

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

S 31- reckless conduct without reasonable excuse exposing individual to risk of serious harm	S 32- Failure to comply with duty exposing individual to risk of serious harm	S 33- 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 previous State legislation. However, there may be seen to be some precedent in the previous situation under the NSW *OHS Act* 2000, where an employee (even one with managerial responsibilities) under s 20 was subject to a maximum penalty of 30 penalty units (\$3,300) whereas an individual employer guilty of a breach of former s 8, say, was subject to a maximum penalty of 500 penalty units (see s 12(d)), \$55,000. Under the former Act a “person concerned in the management” of a corporation who was convicted under the previous NSW s 26 would usually have faced the maximum penalty applicable to an individual employer, in other words, \$55,000.

How has the new law changed things? For a NSW manager who might have faced a \$55,000 penalty previously, they 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 previous NSW s 32A, which provided a criminal penalty for manager who was personally “reckless” (the same word was used), and where death 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 previous NSW law the maximum financial penalty was \$165,000 (1500 penalty units) or 5 years’ imprisonment. Hence there has now been substantial increase in possible penalty, though one that seems appropriate if recklessness has resulted in a worker’s death.

The comparison of the former 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 was a defence if the accused could show that there was a “reasonable excuse” for their conduct. Under s 31 WHSA, however, the offence is only committed where there is reckless conduct creating the risk, which is “without reasonable excuse”, and s 31(2) provides that: “The prosecution bears the burden of proving that the conduct was engaged in without reasonable excuse”. I have to say that 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 former situation of a NSW manager and that under the new Act will hinge (apart from 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 has been increased from the previous 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.

One final oddity about penalties for officers should be noted. Sub-sections 27(2) and (3) provide as follows:

- (2) Subject to subsection (3), the maximum penalty applicable under Division 5 of this Part for an offence relating to the duty of an officer under this section is the maximum penalty fixed for an officer of a person conducting a business or undertaking for that offence.
- (3) Despite anything to the contrary in section 33, if the duty or obligation of a person conducting a business or undertaking was imposed under a provision other than a provision of Division 2 or 3 of this Part or this Division, the maximum penalty under section 33 for an offence by an officer under section 33 in relation to the duty or obligation is the maximum penalty fixed under the provision creating the duty or obligation for an individual who fails to comply with the duty or obligation.

Subsection (2) seems straightforward- it simply reinforces the fact that there are differential “managerial” penalties in Divn 5. But subsection (3) seems odd. At first glance its purpose seems to be to say that, where other provisions of the Act outside Divns 2-4 are breached, and there is no penalty explicitly provided for an “officer” (such as, eg, s 42), then the officer will be subject to the penalty applicable to an individual. But this theory falls down because the subsection refers specifically to s 33. Section 33 is part of Division 5, and it deals with breach of a “health and safety duty”. This particular phrase is defined in s 30 (for the purposes of Divn 5) as meaning a breach of either Divisions 2, 3 or 4 of Part 2. So it seems that the class of obligations “imposed under a provision *other than* a provision of Division 2 or 3 or this Division (ie Div 4)” (emphasis added), *and* which are dealt with by s 33- is an empty class. It may be that the drafters of s 27(3) assumed that s 33 deals generally with offences under the Act. But this does not seem to be the case.

## Evaluation

The WHSA 2011 meets the expectations created by the two Reports which preceded it. 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. My own view is that the previous NSW model was perfectly adequate, but the operation of the new law may not be very different.<sup>51</sup> While the prosecution now bears the burden of proving the elements of the offence beyond reasonable doubt, in most cases it will not be too onerous for them to suggest ways in which “due diligence” could have been exercised to prevent harm. The onus will then lie on the accused officer to raise a reasonable doubt that due diligence would have been effective to deal with the risk.

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. It is to be hoped that the courts, in applying the new law, will keep the importance of these matters in mind.

## Some Suggested Further Reading

- N Foster “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
- N Foster “Directors Insuring Against Criminal OHS Wrongdoing – the Common Law position” *Conference on Insurance Issues and Corporate Crime; sponsored by the Corporate and White Collar Crime Network, Essex University, Freie University, Berlin, Germany, October 2010* (available at: [http://works.bepress.com/neil\\_foster/37](http://works.bepress.com/neil_foster/37)).
- Foster, N “Individual Liability of Company Officers” in J Gobert & A M Pascal *European Developments in Corporate Criminal Liability (Routledge Advances in Criminology)* Routledge, London, 2011, at 114-138
- Foster, N *Workplace Health and Safety Law in Australia* (forthcoming, LexisNexis Butterworths, 2012)
- Sherriff, B & Tooma, M *Understanding the Model Work Health and Safety Act* (CCH, 2010) ch 3
- Tooma, M *Due Diligence: Duty of Officers* (CCH, 2012)

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<sup>51</sup> For a comparison of the previous NSW model and that operating in the UK, see N Foster “Individual Liability of Company Officers” in J Gobert & A M Pascal *European Developments in Corporate Criminal Liability (Routledge Advances in Criminology)* Routledge, London, 2011, at 114-138.