Individual Liability of Company Officers

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It has been recognised for some time that a key strategy in changing corporate behaviour is the possibility of personal liability being sheeted home to individual company officers. This paper will argue for the desirability of laws imposing personal liability, discusses the operation of law imposing such liability in the law of occupational health and safety in the UK, and compares that law with the operation of similar law in another common law jurisdiction, the Australian State of New South Wales. It is hoped that the comparison and review of the fairly extensive case law which has developed under the NSW provisions will produce some illumination for other jurisdictions in weighing up the best mix of corporate and personal responsibility in criminal legislation.

Corporate or Individual Officer Liability?

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.

My work has mostly focussed on the area of personal liability for workplace safety, and I will be focussing on that area in this paper. In a way it provides a “paradigm” example of a case where the community as a whole would agree that there has been clear harm to someone (a worker is either injured or killed as a result of company decisions), and there is a sense that justice requires, not just the “imaginary” corporate entity, but a real person, to bear responsibility for the harm. Principles developed in these cases may then have an impact in other areas where the general community perception of harm (anti-competitive behaviour, insider trading, and so on) is not so immediately apparent.

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

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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.

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1988 Piper Alpha oil rig disaster, and major rail accidents. In Australia, mine explosions offer a good example, and more recently the Longford Gas explosion, a major explosion at a natural gas plant in the State of 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 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.

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.

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.

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

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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.

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).
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. Suggestions have been growing over a number of years that directors and managers, who are making decisions that affect safety, must be made to feel the impact of those decisions more personally.

This of course is not the only solution to the problem of encouraging responsible corporate behaviour. Many writers over the years and recently have put forward creative models which aim at improving “corporate citizenship”\(^8\).

But a number of converging lines of research suggest that focussing on the individual responsibility of corporate officers is a primary way that corporate behaviour can be changed. Figure 1 is a “pyramid” representing the strength of various factors influencing decision-making by corporate officers, taken from a paper presented by Bryan Horrigan, Director of the National Centre for Corporate Law and Policy Research.\(^9\)

![Figure 1- Factors influencing corporate decision making (Horrigan, 2000)](image)

\(^7\) 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).

\(^8\) See, for example, the work of Ayers, Fisse and Braithwaite, discussed below, the study by Fiona Haines *Corporate Regulation: Beyond ’Punish or Persuade’* (Oxford: Clarendon, 1997) and Christine Parker, *The Open Corporation: Self-Regulation and Corporate Citizenship* (Cambridge: CUP, 2002).


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In the well-known Maslow “Hierarchy of Needs”, until the lowest level of needs are met, others will be deferred. In this pyramid the lowest level represents the strongest incentive to change corporate behaviour. Horrigan suggests that the foundational, primary concerns for directors are the issues of “Personal sanctions and liabilities”. Managers will primarily be concerned with making decisions that will avoid imposition of personal sanctions, before they start to attend to issues of institutional liability.

Hopkins makes a similar 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.10

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.11

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.12 (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.13

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

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11 Hopkins, Failure to Learn (2008), above n 4 at 82.
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]:

98 It may also be relevant to consider the impact, if any, on shareholders when a penalty is sought against a corporation. Penalties imposed on officers of the corporation for their part in such contraventions affect those officers alone. Penalties imposed on the corporation may affect shareholders including those who have become shareholders on a set of assumptions induced by the very non-disclosure complained of. In some cases it is possible also that creditors may be affected. Who then is being deterred when only the corporation is penalised? I am not sure that there is a satisfactory answer to this concern within the present statutory scheme. One might imagine that if a penalty is to be significant to a corporation it will also be significant to its shareholders in its impact on the capital which backs their shares. In a company with capitalisation as high as that of Chemeq, the impact on individual shareholders may be insignificant. **The penalties that count most are likely to be those imposed on the responsible individuals.** Nevertheless the law as presently framed requires the assumption that the contravening corporation is a person distinct from its shareholders and that it can be deterred by the imposition of appropriate penalties. {emphasis added}  

Suggestions for increasing the possible personal liability of company officers have not enjoyed universal support. Fisse and Braithwaite, for example, have argued that what they call the strategy of “individualism” is ineffective to improve compliance with workplace safety laws.  

In fact, however, when the arguments they present are analysed carefully, to a large extent the strategy of “individualism” as they define it seems to be a “straw man”. “Individualism” is defined as the view that corporate responsibility should be abolished, and individuals only prosecuted. While there may be some who have put forward this view, the vast majority of recent commentators (perhaps accepting Fisse & Braithwaite’s arguments) recognise that a variety of approaches is needed, including a willingness to prosecute individual company officers. In fact, in the end this is Fisse and Braithwaite’s position as well:

A more commendable approach is to adopt a mixed strategy, retaining corporate as well as individual liability, and improving the capacity of corporate liability to achieve accountability at the level of internal discipline.  

And the major “rule of action” which they use towards the end of their 1993 monograph is the following:

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14 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.  
16 See, for example, the summary of the position in Fisse & Braithwaite (1988) above, n 15, at 473: “The strategy of Individualism… is to abolish corporate criminal liability and to rely instead on individual criminal liability” [emphasis added]; and see Fisse & Braithwaite (1993), above, n 15, at 57.  
17 Perhaps in recent years T’sai comes closest when he argues that while corporate responsibility should still be enforced, “it should only apply where no individual can be said to be responsible for a crime”– see LW T’sai, “Corporations and the Devil’s Dictionary: The Problem of Individual Responsibility for Corporate Crimes” (1990) 12 Sydney Law Rev 311-345, at 344.  
18 Fisse and Braithwaite (1988), above, n 15, at 499.
Seek to publicly identify all who are responsible and hold them responsible, whether the responsible actors are individuals, corporations, corporate subunits, gatekeepers, industry associations or regulatory agencies themselves.\textsuperscript{19} [italics original, bold emphasis added]

Gunningham & Johnstone, supported by others such as Haines,\textsuperscript{20} have been successful in establishing that, if “individualism” (or, to be more accurate, individual managerial accountability) is not on its own the only prescription for the problem, it is at least a part, and a major part, of the overall solution.

We are not here arguing that OHS agencies should focus on either corporations or individual corporate officers at the exclusion of the other… Rather, our argument is that an effective OHS prosecution strategy should ensure a mix of prosecutions.\textsuperscript{21}

They persuasively point out that the “stigma” of a criminal conviction, and the possibility of a gaol sentence, are powerful deterrents which weigh heavily on the minds of company officers, and which cannot be “externalised” and passed on to the company through indemnities.\textsuperscript{22}

Ledermann, in a detailed review of models for company liability, warns that whatever the benefits of models which recognise “corporate culture” and the like for imposing criminal liability on companies, ignoring the personal liability of company officers would undercut fundamental principles of our legal system:

\begin{quote}
[I]ndividual autonomy, which is based on the principle of freedom of will and of choice (and, as a result, personal liability) are the cornerstones of criminal law. Violating this notion undermines the central foundation of criminal law.\textsuperscript{23}
\end{quote}

Smith, writing about prosecution for environmental crimes and comparing the situation in Australia with that in the United States, notes:

\begin{quote}
In my view, the sole advantage of criminal prosecutions over civil and administrative enforcement lies in the ability to throw someone in gaol. There is little point to criminal prosecution of corporations and other organisations except in conjunction with the prosecution of responsible corporate managers and directors.\textsuperscript{24}
\end{quote}

Smith responds to some of the objections to individual liability. To the objection that corporations will nominate officials as “scapegoats” she responds that careful investigation will usually be able to establish where the true responsibility lies. To the oft-repeated assertion that corporations will appoint a “vice-president for going to gaol” she responds that the existence of such a person is illusory.

\textsuperscript{19} Fisse and Braithwaite (1993), above, n 15, at 134. Their 20 “Desiderata” reflect the same principle: see Desiderata 1 and 7 which deal specifically with individual accountability, at pp135-136.
\textsuperscript{21} Gunningham & Johnstone (1999), above, n 13, at p 218.
\textsuperscript{22} For discussion of the extent to which indemnities against fines in this area may be offered by companies, see below. Whatever the resolution of this issue, though, imprisonment where available and the “stigma” of conviction will be borne by the individual officer.
I have never encountered anyone who was willing to be the vice president in charge of spending several years in a federal penitentiary. Indeed, there is strong, albeit anecdotal, evidence that corporate environmental managers are extremely concerned about potential environmental criminal liability and therefore are able to insist upon corporate actions, such as strong environmental auditing and remedial action, to avoid potential criminal liability.25

Wise puts it this way in summarising personal liability for environmental offences:

Punishment is more likely to have a deterrent effect when an individual such as a corporate officer, as compared to a legal entity like a corporation, is held responsible for violating the law. Being named in a pleading, put on trial, forced to make a public apology, required to pay a fine, or serve time in jail, are often expensive, professionally damning and personally humiliating consequences - results most individuals, including corporate officers, prefer to avoid.26

All of which is to reiterate the comments made in a seminal article on the subject of corporate criminal responsibility by Coffee as long ago as 1981:

[L]aw enforcement officials cannot afford to ignore either the individual or the firm in choosing their targets, but can realise important economies of scale by simultaneously pursuing both…Thus, a dual focus on the firm and the individual is necessary. Neither can be safely ignored.27

This dual focus helps to place the question to be considered in this paper in the context of other proposals flowing from workplace disasters, such as the call to prosecute companies for manslaughter.

From time to time the suggestion has been made that companies should be prosecuted for manslaughter rather than for offences under the specific workplace safety legislation.28 One basis for the suggestion is that this legislation is popularly viewed as “regulatory” and not “seriously criminal”, and that a manslaughter conviction will carry a greater public stigma.

But these proposals may have limited effect. The reason is simple: even a finding that a company is guilty of manslaughter will, as noted before, at worst result in insolvency for the company. It may leave individual directors still able to take advantage of the corporate veil, unless their personal liability is clarified.

Wells, who has written extensively in the area of corporate criminal liability, commented on public response to the Southall rail disaster in 1997:

The cultural [popular] understanding of “corporate manslaughter” actually conveyed a concern to blame individual directors as opposed to the sea-level, or train and track-level workers. Whereas I, with many others, have been struggling with “the company” as a separate concept from the individuals who comprise it, should the concern rather have been with the company’s management as manifested in the human personnel, rather than with the company as a juridical person?29

28 In the UK, of course, this has now become a reality in Corporate Manslaughter and Corporate Homicide Act 2007, noted further below.
The answer, as suggested above, is that both aspects (corporate and individual liability) need to be pursued. This indeed is a fundamental flaw in the Corporate Manslaughter and Corporate Homicide Act 2007 (UK) (“CMCHA”). The CMCHA explicitly provides in s 18(1) that: “An individual cannot be guilty of aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter.” Any “head” liability under the Act is imposed only on an “organisation”, defined in s 1 to clearly exclude individuals. Indeed, not only does the Act not apply its new provisions to individuals, by virtue of s 20 it immunises company officers from possible liability that previously clearly existed under the common law. That law prior to the commencement of the Act allowed an officer to be convicted of being an accessory to a company offence of common law manslaughter; but s 20 abolishes the common law of manslaughter insofar as it applies to companies, and hence any possible accessorital liability of an individual.

As Gobert comments:

The Act… is disappointing in its failure to provide for the criminal liability of directors, corporate executives and senior managers who significantly contribute to their organisation’s offence. To the contrary, these and other individuals are given immunity from accessorital liability.

As a matter of interest, it seems that the first prosecution under the CMCHA has now been set down for trial on 23 February, 2010. The company concerned, Cotswold Geotechnical Holdings Ltd, is being charged in relation to the death of an employee. But it is fascinating to note that a director of the company, Mr Eaton, has been charged in the same proceedings with both common law manslaughter, and an offence under s 37 of the Health and Safety at Work Act 1974 (UK) (discussed below). While Parliament may have been persuaded to omit personal liability from the CMCHA, it is still seen by the prosecution authorities as an appropriate tool.

Models for Individual Officer Liability

If personal officer liability for corporate OHS failings is to be used, there are a number of different models possible. This paper will not attempt to repeat the very helpful survey of models from around the world provided by the 2007 report commissioned for the

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31 With apologies to Scottish colleagues, I will refer for reasons of simplicity to the “manslaughter” provisions rather than those relating to the “Northern” offence of “corporate homicide”.


33 Above, n 30, at 414.


35 The fact the operation of the CMCHA on the common law is still not clear even to the legal profession can be seen in a quote in the previously noted web posting from one of the lawyers involved: “Andrew Stokes, head of the safety, health and environmental group at law firm Beachcroft LLP, commented: ‘it is questionable whether this is the right case to test the new law, given the fact that the defendant is a small family business which, arguably, could have been successfully prosecuted under the old common-law manslaughter rules.’” In fact, of course, since the commencement of s 20 of the CMCHA in April 2008, it is no longer possible to charge a company with gross negligence manslaughter in the UK.

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UK Health and Safety Executive from the Centre for Corporate Accountability, *International comparison of health and safety responsibilities of company directors*.36

In brief, it may be said that there is a wide spectrum of possibilities. At one end, as the CCA Report notes, some jurisdictions (notably Norway and the United States) make no specific provision for individual liability at all.37 Along the rest of the spectrum there are a range of provisions which vary widely in the circumstances under which liability may be imposed. The CCA Report classifies legislation according to whether it imposes a “clear and explicit positive duty” on directors, or whether it imposes a duty through the creation of offences which apply to directors indirectly (often as accessories in some way to commission of the offences by companies). Within these categories the legislation differs as to what duties are imposed, what defences are available to directors, and where the onus of proof lies in prosecutions. The UK legislation is characterised as imposing “minimal or no duties” on directors.38 As the subsequent analysis in this paper will attempt to show, this is an accurate description, in that while there is the possibility of prosecution, it is made difficult by the need to show specific elements of personal involvement by the relevant officer.

Which model is placed at the “harsh” end of the spectrum (or the “effective” end, depending on one’s perspective!) will depend on the criteria that are adopted for placement, of course. It is suggested, however, that many business commentators (at least in the Australian context) would place the Queensland and NSW versions of personal liability towards that end.39 Elements of these provisions that are seen as being “tough” on company officers include the fact that once there has been shown to be a company contravention of the law, the officer bears the onus of proving that one of the relevant defences applies. Presumably one could put at the very end of the spectrum a notional law which simply made every director of a company automatically liable to the full force of the law whenever their company had offended, with no defences available at all. There are no such laws in fact, to my knowledge.

It would be impossible in the time available for this paper to undertake an exhaustive review of all the various options. It is proposed in the rest of the paper to review two of the options, however, which may be seen to be at least in the general vicinity of different ends of the spectrum. The UK model will be considered, and then from the other end the NSW one. It is hoped that a review of issues which have arisen here will provide at least some general guidance about issues which will be relevant under any future model of individual liability in the safety area (and indeed, in most other areas as well.)

**Experience under the UK Model**

Section 37 of the *Health and Safety at Work etc Act 1974* (UK) (the *HSW Act*) imposes personal liability on a company officer where the company’s offence has “been committed with the consent or connivance of”, or “to have been attributable to any neglect on the part of”, the officer.

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37 See above, n 36, ch 7. Of course there are circumstances which might create liability, such as where a director is also an employee, or as noted in the Report, at 98 n 14, the very rare case where a sole director has in effect been held to “be” the employer by piercing the corporate veil. But there are no specific provisions in the health and safety legislation creating individual liability.
38 Above, n 36 at 99.

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s 37 Offences by bodies corporate.

(1) Where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

There had not been many decisions illuminating the interpretation of s 37 until recently, as I noted in an earlier article reviewing the state of the law in this area. But there is now some recent important guidance in a Court of Appeal decision and in the House of Lords.

1. R v P

The ruling of the Court of Appeal in R v P came by way of an appeal on a preliminary point of law from the decision of the trial judge. The facts involved an accident which led to the death of a six year old boy at the docks, when he was thrown from a forklift on which he was riding as it collided with another forklift which was unsafely loaded. The company “P Ltd” (presumably, though this is not clear from the judgment, either owner of the forklifts or manager of the docks) were charged with breaches of the HSW Act and a “Mr G”, the managing director of the company, was charged under s 37.

The specific issue that arose involved a very narrow question of what the prosecution needed to establish to show “neglect” under s 37. The trial judge had ruled that in order to show “neglect” it had to be shown, not only that Mr G “had a duty to inform himself of the facts” concerning the safety risk, but also that he “did know of the material facts”. In so ruling the judge was apparently following an (unreported) preliminary ruling of MacKay J in a prosecution following a railway accident at Hatfield. MacKay J in his ruling equated “neglect” with “turning a blind eye” to circumstances which the officer really knew about, and called it explicitly a “subjective test and not equivalent to inadvertence, laziness or even gross negligence”.

The Criminal Division of the Court of Appeal rejected this view of s 37. Latham LJ, for the Court, noted at [12] that this placed the burden of proof on the prosecution at too high a level. “Neglect” did not require showing a subjective awareness (otherwise there would have been no need to add the other elements of “consent” and “connivance”). His Lordship noted at [13] that the question will always be: whether …, where there is no actual knowledge of the state of facts, [that] nonetheless the officer in question of the company should have, by reason of the surrounding circumstances, been put on enquiry so as to require him to have taken steps to determine whether or not the appropriate safety procedures were in place.

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42 Above n 41 at [7], quoting from the trial judge.


44 See above n 41 at [11] for this quote from MacKay J.

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In adopting this more “objective” standard the Court at [8]-[9] affirmed very strongly some previous comments made in the Scottish decision of the High Court of Justiciary in Wotherspoon v HM Advocate. Some brief discussion of this decision may be helpful.

Wotherspoon was the director of Singer Co (UK) Ltd, and was charged in relation to a failure to fence some machinery in the factory. He was convicted by the jury of “neglect” under s 37 of the HSW Act. Emslie LJG made the following points in his judgement on behalf of the Court about the use of the word “neglect” in s 37:

1) the word presupposes some duty which the person concerned has failed to carry out;
2) “the section as a whole is concerned primarily to provide a penal sanction against those persons charged with functions of management who can be shown to have been responsible for the commission of a relevant offence by… a body corporate”;
3) Accordingly, a finding of “neglect” cannot be made without identification of a failure to take steps which the accused’s position within the company required him or her to take.
4) Issues of the knowledge of the accused of the need for action, or whether the accused should have been aware of the need, will be relevant.
5) Where the Act refers to the need for the company offence to be “attributable to” the officer’s neglect, this does not mean that the neglect must be the sole cause of the offence: “in our opinion any degree of attributability will suffice”.

In the circumstances the Court found that these issues were properly put to the jury by the Sheriff Principal, who had directed their attention to matters such as the extent of knowledge of the director (who was the overall managing director), about the state of the machines. However, the Court did note that in future cases a more extensive charge to the jury about these matters would be appropriate, and in particular commented that:

The more junior the officer charged and the more limited his role in the company’s affairs the greater will be the need to emphasise to the jury the importance of the scope of the proper functions of the accused in any consideration of alleged neglect on his part for the purposes of s 37.

The case seems, it is submitted, to illustrate the benefits of the “NSW-style” provision discussed below (making issues of personal culpability a matter of defence, rather than in the statement of the offence itself.) Those provisions, like s 37 HSWA, which require proof of “neglect” as a threshold issue, require complex evidence to be produced as to the role of the specific officer at the particular time.

An earlier case illustrating this problem is Huckerby v Elliott. This was a decision of the UK Queen’s Bench Division on appeal from a magistrate’s conviction of a company director for allowing premises to be used for gambling without a licence. The evidence showed that the particular director took no real interest in the running of the company and left the obtaining of licences to other directors. She was convicted under a provision analogous to the ones being considered here, on the basis that the failure to obtain the licence was attributable to her “neglect”.

On appeal the conviction was overturned, Lord Parker CJ for the court ruling that not every director had a duty to closely supervise the operation of the company. His Lordship specifically followed the decision of Romer J in Re City Equitable Fire Insurance Co Ltd. This case is familiar in the area of company law as stating the former standard of care required of directors, but if not actually yet overruled it should probably now be regarded as

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46 Above, n 45.
47 [1970] 1 All ER 189.
48 [1925] Ch 407.

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having been “overtaken” by a much higher standard of care. Accordingly, it seems likely that *Huckerby* would be decided differently today. In any event, attention to safety of employees is likely to be regarded as a more serious matter than attention to merely regulatory matters such as a licence.

In applying the decision in *Wotherspoon* the Court of Appeal in *P* certainly affirmed, as noted, the need for attention to be paid to the “objective” question of what a director “ought to have known”, rather than the subjective issue of their actual knowledge. As they said at [14], “if there were circumstances which ought to have put him on enquiry” as to dangerous practices being adopted by the forklift drivers, Mr G might still be found guilty of “neglect”.

2. *R v Chargent Ltd*

The second major decision giving guidance on s 37 came with the decision of the House of Lords on appeal in *R v Chargent Limited (t/a Contract Services)*. In that case an employee of Chargent, who had been assisting in works being carried out on a farm, was killed when a dump truck he was driving overturned and buried him. Mr Ruttle, who was apparently managing director of a group of companies including Chargent, and on the board of a contracting company which was also charged in relation to the incident, Ruttle Contracting Ltd, was charged under s 37 *HSW Act*. The trial judge having entered convictions and fines against both companies and Mr Ruttle, and an appeal to the Court of Appeal having failed, an appeal proceeded to the House of Lords. In a unanimous judgment the Appellate Committee of the House dismissed the appeal and affirmed the convictions of all the defendants.

A large part of the discussion in the judgment concerned the nature of the charges under ss 2 and 3 of the *HSW Act*, and the interaction of the duty to do what was “reasonably practicable” with the reversal of onus of proof provided by s 40 of the Act. The House affirmed that the UK legislation operates in precisely the way that the NSW *OHS Act* 2000 does- that once there is a risk to safety proved on the facts, then the onus falls on the company concerned to show that it was not reasonably practicable to do more. It is not necessary for the prosecutor to prove the precise particulars of the alleged risk. Their Lordships also confirmed the view that had been taken by the Court of Appeal in *R v Davies*, that this reversal of onus was not in breach of the obligations of the UK under article 6(1) of the *European Convention on Human Rights*, as it was a “proportionate” response to the social, legal and economic purposes of the law relating to workplace safety.

For present purposes, however, there were also some important comments made about the operation of s 37. Lord Hope noted at [32] that to establish a breach under s 37 the liability of the company must first be considered, and then “additional facts and circumstances” established. The officer can only be convicted if it is shown that offence involved his or her consent, connivance or neglect. His Lordship at [33] approved the decision in *R v P* noted above, and impliedly the approach taken in the *Wotherspoon* case.

49 For a more recent overview of a director’s duty of care in Australia, see the summary offered by Santow J in *ASIC v Adler* [2002] NSWSC 171, at para [372], referring to *Daniels v Deloitte Haskins & Sells v AWA Ltd* (1995) 37 NSWLR 438 and other recent decisions establishing that “directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company” (*Daniels* at 664).


52 See Lord Hope, above n 50 at [21].


54 See Lord Hope, above n 50, at [28]-[30].

55 Above, n 41.
that what is relevant is what the officer “ought to have known” not just his or her actual knowledge.

The distinction between “consent” and “neglect” was brought out by noting that in *Attorney-General’s Reference (No 1 of 1995)*\(^{56}\) Lord Taylor in the Court of Appeal had ruled that

where "consent" is alleged against him, a defendant has to be proved to know the material facts which constitute the offence by the body corporate and to have agreed to its conduct of the business on the basis of those facts (at 980).

Lord Hope in *Chargot* at [34] commented:

I agree, although I would add that consent can be established by inference as well as by proof of an express agreement.

“Neglect”, however, did not imply an agreement but a lack of attention to some duty that should have been performed. Lord Hope commented at [33] that what is necessary to show these respective mental elements of the offence will vary with the circumstances, but implied that it will usually be easier to show that they existed where the officer concerned was “in day to day contact with what was done”, than in circumstances where “the officer’s place of activity was remote from the work place or what was done there was not under his immediate direction and control”.

These comments bring out sharply another difference between the UK and the NSW models as far as personal officer liability is concerned. In the circumstances of *Ritchie*, considered below,\(^{57}\) it seems highly unlikely that a s 37 offence could have been proved, the officer there being geographically and in terms of the company structure far removed from the work place. But this does not mean that the UK model is to be preferred. It is submitted that there are important reasons why even (perhaps one might say, especially) officers whose decision-making processes shield them from observing what happens on the ground, should be required to make sure that there are proper procedures and processes in place to ensure safety.

In *Chargot*, though, Mr Ruttle was indeed a “hands on” director. Once the breach by the company had been demonstrated, the prosecution needed to show that the breach was due to his consent, connivance or neglect. For whatever reason, at the end of the prosecution case he chose not to give evidence. But, as Lord Hope commented at [37], the jury was then entitled to act on the evidence that had been led by the prosecution- “that he was directly involved in the works and that the way they were carried on was subject to his specific instructions and control”- and then to further conclude that the relevant mental state had been made out.

There is another issue arising under the *HSW Act* which may need to be further resolved in the future. Interestingly, it is similar to an issue which has troubled NSW courts. The question is that of the reversal of onus of proof in relation to the defence of “reasonable practicability”. If a director is charged under s 37, does the Act operate to allow them to make out a defence that it was not “reasonably practicable” to have done more? Or does the prosecution need to lead evidence to show that compliance was not “reasonable practicable”?

Or is this issue not relevant by the time that s 37 comes to be considered?

\(^{56}\) [1996] 1 WLR 970.

\(^{57}\) See below, near n 125.
The question was raised by MacKay J in the Hatfield prosecution mentioned previously, and is noted in an article by Wright:

It would be a quite unacceptable position for the jury to be told to consider reasonable practicability in the predicate offence… on one basis (namely that the onus of proof was on the defendant company) and then having done so and decided the company was guilty, told to reconsider anew the question of whether the predicate offence had been committed, this time as an ingredient of [a personal charge] and to do so on a different and opposite basis.

With respect to MacKay J, this comment seems as much in need of correction as his Honour’s previously noted remark which had to be corrected in R v P. Ultimately it seems clear that the legislative structure does not require separate re-consideration of the issue of “reasonable practicability” in a s 37 prosecution; the issue is considered at the stage when the tribunal of fact is considering the preliminary question whether or not the company has committed an offence. By the time s 37 falls to be considered there is no further need (or opportunity) to consider the “reasonably practicable” defence.

Support for this view can be found in the following propositions:

1. Section 37 is not subject to the “reversal of onus” provision in s 40, which is confined on its terms to sections 2-6. This is spelled out quite clearly in R v Davies at [27].

2. The Court of Appeal in Chargot had occasion to correct the trial judge on this point in the following comments:

16 The second respect in which it is said that the judge erred in the third appellant's case in his direction to the jury was that he gave to the jury a direction that if they were satisfied that he had caused the second appellant to commit the offence through his neglect, connivance or consent, they should then go on to consider whether he had proved that it was not reasonably practicable to do more than he did. In other words he imported section 40 of the Act into the consideration of the charge under section 37. This was clearly wrong; see R v Davies [2003] ICR 586. But it cannot affect the safety of the conviction. The judge directed the jury, albeit wrongly, to consider the reverse burden issue, but only after they had been satisfied that the elements of the offence under section 3 had been proved against the second appellant and that it had not discharged its burden under section 40, and that he had caused that breach by his connivance, consent and neglect. Once the jury had reached that conclusion, the third appellant's guilt had been established. The further direction was pure surplusage, and if anything favourable to the third appellant.

It is clear from these comments that the only issues that the jury ought to have considered were: (1) was the company guilty of an offence? and (2) had the defendant caused this by his consent, connivance or neglect? In making up its mind on the first question the jury would consider the question of “reasonable practicability”, but in doing so they were considering the application of either s 2 or s 3, which are subject to the s 40 reversal of onus. Once they had reached a decision on the guilt of the company, the question of “reasonable practicability” became irrelevant to s 37, and so did s 40.

3. While the House of Lords in Chargot made no direct comment on this issue, the careful analysis of the elements of the s 37 offence offered by their

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58 Above, n 43.
60 See above, n 44.
61 Above, n 53.
62 Above, n 51.

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Lordships reveals no need for an additional step involving “reasonably practicable” being considered again at the stage of the officer’s liability. Lord Hope’s analysis at [35]-[36] moves through the steps of determining the company’s failure to ensure safety, the need for the company at that stage to prove that they had done what was reasonable practicable, and then if it failed at that point the simple need for the prosecution to prove consent, connivance or neglect.

In short, the only sensible way of interpreting the provisions seems to be that in consideration of a s 37 offence, there is no further “reconsideration” of the “reasonably practicable” defence, which should already have been taken into account in dealing with the preliminary question of the company’s guilt. This, it will be noted below, is the same position that the NSW courts have reached on the analogous question of whether, in an offence charged under s 26, the general s 28 defences should again be used.  

**Experience under the NSW Model**

As the terms of the NSW legislation are likely to be less familiar to this audience, it is perhaps worth a slightly more detailed summary of their operation. The NSW legislation in question is the *Occupational Health and Safety Act 2000* (NSW) (“*OHS Act 2000*”), which, like most other Australian legislation on the topic, bears the marks of its origins in the Robens Report which led to the introduction of the *HSWA*, but has departed at this point from its model.

The legislation which operates in NSW at the moment is s 26 of the *OHS Act 2000* (NSW), the essential parts of which are as follows:

**26 Offences by corporations—liability of directors and managers**

(1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or person satisfies the court that:

(a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or

(b) he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.

(2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or been convicted under that provision.

Previously an almost identical provision was contained in s 50 of the now-repealed *OHS Act 1983*. Some features of s 26 which are worth highlighting include:

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63 Above, n 50.

64 See the discussion below near n 76.


66 Worth noticing because some post-2005 decisions still refer to the former provisions, where the relevant prosecution initially commenced prior to the commencement of the new Act on 1 September 2001.

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Before there can be personal liability the company concerned must itself have been guilty of a contravention of the legislation;\footnote{A recent example of a case where a s 50 charge was dismissed, because on careful examination of the evidence the company concerned had not breached the Act, is the decision in \textit{Morrison v Milner, Baldwin} [2008] NSWIRComm 77 (Haylen J). With respect to his Honour, it may be suggested that the approach noted at para [238] of the judgment- “there needs to be established, to the criminal standard, acts and/or omissions of the company that led to a risk”- may suffer from an approach which focuses too much on the specifics of the particular incident (see the discussion below on the \textit{Gretley} case). But it seems fairly clear that, given the other matters canvassed in the judgment, the company had done all that was “reasonably practicable” in its careful safety procedures, and the acquittal seems justified on that basis.}

The provision applies to both formal “directors” who are members of the Board, and also those “concerned in management”- we will see below that further clarification of this concept has been provided recently;

The essence of s 26 is that the officer is “deemed” to be guilty of a breach of the provision that the company breached, simply by virtue of their position, unless they can make out one of the two statutory defences, “unable to influence” or “due diligence”.

The onus of making out these defences clearly rests on the accused officer.

It is also worth noting that in recent years NSW, like some other Australian States, has introduced something like a “corporate manslaughter” provision, which may be breached by an individual officer. In NSW the provision is s 32A of the \textit{OHS Act} 2000, the main parts of which are as follows.

\begin{quote}
\textbf{32A Reckless conduct causing death at workplace by person with OHS duties}

(1) In this section: "conduct" includes acts or omissions.

(2) A person:
(a) whose conduct causes the death of another person at any place of work, and
(b) who owes a duty under Part 2 with respect to the health or safety of that person when engaging in that conduct, and
(c) who is reckless as to the danger of death or serious injury to any person to whom that duty is owed that arises from that conduct, is guilty of an offence.

Maximum penalty:
(a) in the case of a corporation-15,000 penalty units, or
(b) in the case of an individual-imprisonment for 5 years or 1,500 penalty units, or both.

(5) If a corporation owes a duty under Part 2 with respect to the health or safety of any person, any director or other person concerned in the management of the corporation is taken also to owe that duty for the purposes of subsection (2).

(6) Section 26 (Offences by corporations-liability of directors and managers) does not apply to an offence against this section. However, this does not prevent a director or other person concerned in the management of a corporation from being prosecuted under this section for an offence committed by the director or other person.
\end{quote}

As will be seen, the essence of the contravention is “recklessness” causing death. Unlike other provisions under the “general duties” part of the Act, the s 32A offence cannot
be “deemed” to be committed, but it can be made out if an officer is personally reckless. So far there have been no reported decisions on the scope of s 32A, but it does provide another example of a powerful personal liability provision.

There have been a number of decisions on the meaning and scope of s 26, however, which the next part of this paper will review.

1. The Gretley Appeal

The first one that should be mentioned is the Full Bench appeal in *Newcastle Wallsend Coal Company Pty Ltd & Ors v McMartin* (the “Gretley appeal”).68 The earlier stages of this litigation were noted in a previous article,69 but the subsequent appeal provided more clarification of the extent and meaning of s 26. Since the appeal decision was discussed in some detail in an article published in 2008,70 only brief comments will be provided here.

The case involved an inrush of water into an underground coal mine, which killed 4 of the miners. The water came from some abandoned workings that had been thought to be some distance away from where the digging at the time was going on. One reason for the error by management about the location of the previous workings was an ambiguous plan of the area that had been provided by the relevant Government Department. Prosecutions were instituted, not just against the relevant companies, but also against a number of senior and middle managers.

The *Gretley* case is important in the OHS policy area in Australia for a number of reasons that go beyond the legal reasoning necessary for the decision. It seems to have been one of the first cases where the general provisions of the *OHS Act 2000* (or indeed the mine-specific legislation which was in force for many years) were used in a formal court prosecution against a mining company. Since that time there have been many such prosecutions, so much so that some commentators are now suggesting that prosecution has become too heavily used in the mining sector in NSW.71 I do not necessarily share that view—it seems to me that the extent of prosecutions is now (in contrast to the previous situation) reflecting the extent of mining operations in the State, and the extreme danger always posed by work with high energy machinery in an enclosed space far underground.

Importantly for our present topic, however, the *Gretley* case was also one of the first cases where a prosecution was undertaken of managers who were (literally) not “at the coal-face”, but instead were making decisions at some remove from those which directly led to the specific accident. For some time prosecutions under the former s 50 of the 1983 Act had mostly been limited to officers who were “directly involved in the incident”, but I noted in 2005 that more recently there was a sign that prosecution of higher officers was starting to take place.72 The ramifications of the prosecution of two senior mine managers and a series of under-managers at *Gretley* are still being felt today. It is arguable, for example, that the *Gretley* case may have sparked a determination on the part of managers around Australia to mount a consistent campaign with the aim of reducing the effectiveness of the NSW provisions, and to seek to ensure that similar provisions were not put in place in other jurisdictions.73

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69 Above, n 40, at 122-123 where it was suggested that the initial conviction of the mine surveyor, Mr Robinson, was flawed. The Full Bench appeal overturned Mr Robinson’s conviction.
72 Above, n 40, at 114-116.
73 See, for example, the vociferous press campaigns aimed at characterising the NSW legislation as “draconian” and “anti-business”- for further details see A Hopkins *Lessons from Gretley: mindful leadership and the law*.
Whether or not this is so, it is worth noting here the purely legal consequences of the *Gretley Appeal* for personal liability under s 26.

(a) “Concerned in management”

The scope of the phrase “concerned in management” had to be considered, as none of the officers charged were formally members of the board of the relevant companies. Staunton J at first instance had given detailed consideration to this issue, and in short concluded that someone who was not on the board would be caught by s 26 where they had

1. decision-making power and authority,
2. going beyond the mere carrying out of directions as an employee,
3. such as to affect the whole or a substantial part of the corporation,
4. which powers relate to the matters which constituted the offence under the Act.\(^{74}\)

In general this interpretation of the phrase was adopted by the Full Bench, which referred in the *Gretley Appeal* to both the judgement of Staunton J and the decision of the NSW Court Appeal in *Powercoal Pty Ltd v IRC of NSW*.\(^{75}\) Staunton J’s comments were affirmed at [479]:

> in so far as the decision of Staunton J dealt with the meaning of the words “concerned in the management of the corporation” in s 50 of the OHS Act, there was no error.

The *Powercoal* decision is noted further below.

(b) Interaction of defences in ss 26 and 28

Another important issue is whether an officer, charged under s 26 or its former equivalent, can rely not only on the “internal” s 26 defences of “unable to influence” and “due diligence”, but also on the general s 28 defence of “reasonable practicability”.\(^{76}\) By way of background, the structure of the NSW legislation is to provide for *prima facie* offences of “absolute liability” in the “general duties” area of the Act, but to provide in s 28 for some general defences, the most important one of which is “reasonable practicability”. (This may be contrasted with the structure of the UK *HSWA*, the offences under which include an element of “reasonably practicable”. But in fact the resulting legal situation is the same, as under s 40 of the *HSWA*, where an element of an offence includes “reasonably practicable”, the onus lies on the accused to show that it was not “reasonably practicable” to have done more.)

In the *Gretley Appeal* at [498]-[499] the Full Bench confirmed the comments of a previous Full Bench in *Morrison v Powercoal Pty Ltd*\(^{77}\) denying the availability of s 28-type defences to a s 26-type prosecution, and noted that this comment was supported by the tenor

\(^{74}\) *McMartin v Newcastle Wallsend Coal Company Pty Ltd* [2004] NSWIRComm 202; see above n 40 at 122-123.


\(^{76}\) See the 2005 article, above n 40 at 130.

of the judgments in both the Court of Appeal in *Powercoal*,\(^78\) and the High Court in dismissing a special leave application in *Daly Smith Corporation (Aust) Pty Ltd & Anor v WorkCover Authority (NSW).*\(^79\)

The result of this is that an officer will be able to rely on the two specific s 26 defences, but will not be able to “relitigate” the general issues of “reasonable practicability”. In the end this should not be important, as before personal liability can arise the court will need to have been satisfied that the company had contravened the Act, and in doing so it will need to have considered the application of the s 28 “practicability” defence in relation to the company.\(^80\)

(c) Prosecutorial discretion and s 26

Finally on the *Gretley Appeal*, it is worth noting that the controversial nature of the proceedings in the public press were reflected in an unusually sharp exchange of views within the Industrial Court itself, some of which related to the decision to prosecute the officers. In his judgment in the case Marks J at [746] made a pointed criticism of the decision of the prosecutors to proceed with the s 50 prosecution against the company officers, where the company at a very early stage of the actual trial had offered to plead guilty if the personal charges were dropped. It is submitted that this criticism was unfounded; that for reasons already noted, it was well worthwhile pursuing the prosecution of officers who were not involved directly on the spot, not only for the sake of justice being done in these proceedings, but also by way of a message being sent to other company officers.\(^81\) It is worth noting that in later proceedings related to costs the other members of the Full Bench were in turn quite bluntly critical of the previous remarks of Marks J, calling them “unfair” and “immoderate”, and reinforcing the established view that the decision on who to prosecute is very much one that the courts must leave to the prosecution authorities.\(^82\)

2. Other NSW decisions

There have been a number of decisions since those noted in the 2005 article where liability has been imposed on the basis of s 26 (or former s 50).\(^83\) However, the purpose of this paper is not to provide a comprehensive discussion of all of these decisions, as many are cases where the personal defendant pleaded guilty and where well-established sentencing principles were simply applied to the particular facts. The following cases, however, represent those where some new legal elements involved in the interpretation and application of the provision were involved, or where the case has become one of interest for other reasons. For reasons of space, consideration of the facts of each case is necessarily highly abbreviated.

\(^{78}\) Above, n 75.

\(^{79}\) [2006] HCA Trans 475. See the discussion of the *Smith* proceedings below.

\(^{80}\) It will be recalled that a similar issue was resolved in a similar way in relation to s 37 *HSWA* in the *Chargot* case—see text near n 59 above.

\(^{81}\) See above, n 70 at 125 where this is discussed further.

\(^{82}\) See *Newcastle Wallsend Coal Company Pty Ltd and Ors v McMartin (No 2)* (2007) 164 IR 326, [2007] NSWIRComm 125 at [91], noted above n 70 at 126-127.

\(^{83}\) A search using the valuable “Noteup” facility on the www.austlii.edu.au database reveals that at the time of finalising this paper there are currently some 84 decisions of the Industrial Court referring to s 26, and 11 decisions of the Chief Industrial Magistrate. Some 64 of the Industrial Court decisions, and 6 of the CIM, were handed down since the beginning of 2006. (This may not be a complete list, but gives some idea of the extensive use of the provision.)
(a) Powercoal (Foster) 84

The Powercoal litigation has a complex history, but the element to be noted here is the prosecution of Mr Peter Foster. 85

Mr Foster was the manager of Awaba colliery on 17 July 1998 when a portion of the roof in the underground area collapsed, killing a Mr Barry Edwards who was operating mining machinery at the time. After an initial acquittal of the company (which automatically meant an acquittal of Mr Foster), 86 the Full Bench of the IRC in Court Session overturned both acquittals and entered guilty verdicts 87 and sentences. 88 The company and Mr Foster then attempted to seek review of the decision in the NSW Court of Appeal. In Powercoal Pty Ltd & Foster v Industrial Relations Commission of NSW & Morrison 89 the attempted review was refused.

Of interest for present purposes is the discussion in the Court of Appeal of the argument put forward by Mr Foster that as mine manager at Awaba he was not of sufficient seniority to be caught by the provisions of s 50 of the OHS Act 1983 (equivalent of the present 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. 90

The Court of Appeal gave invaluable guidance on the meaning of this phrase in dismissing the application for review. Spigelman CJ made the following points:

- 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.

85 Just to be clear, no relation to the present author, as far as I know!
87 Morrison v Powercoal Pty Ltd and anor (No 3) [2005] NSWIRComm 61 (7 March 2005); in fact on sentencing Mr Foster received the benefit of s 10 of the Crimes (Sentencing Procedure) Act 1999, which allowed the court to enter no conviction in “extenuating circumstances” - see [143]. But the application for review to the Court of Appeal still went ahead.
89 See the argument presented at [90] in the Court of Appeal proceedings, above n 89.
The judgment here provides a good foundation for a proper understanding of the reach of s 26 of the current Act. The only comment I would make is that it is a pity that, like the Full Bench, the Court of Appeal do not seem to have been taken to the detailed and extensive analysis of the issue by Staunton J in McMartin v Newcastle Wallsend Coal Company Pty Ltd [2004] NSWIRComm 202, where as noted above her Honour came to very similar conclusions.\(^{91}\)

The *Powercoal* decision is less clear on the question whether the general (s53, now s 28) defences can be relied on by an officer charged under s 50 (now s 26). While the failure of the Full Bench of the IRC to apply the s 53 defences was a ground on which Mr Foster had sought review of the decision, in the end the tenor of the judgement of Spigelman CJ in the Court of Appeal is that this ground could not succeed, simply because the Full Bench had in any event gone on to consider the s 53 defences and found against Mr Foster on that point.\(^{92}\)

But, as also noted previously, the consistent view of the Industrial Court as expressed in the *Gretley Appeal*, is against applying the general defences to the s 26 offence, and there seems no reason to suppose that the Court of Appeal would not support that view were it directly presented for decision.

**(b) Hitchcock**

In *Inspector Campbell v James Gordon Hitchcock*\(^{93}\) the defendant was the main director of a small trucking company which was prosecuted for allowing its drivers to drive dangerous lengths of time and to suffer fatigue, which had led to the death of one of the drivers. Perhaps the main point of legal interest is that, the company having been deregistered, Mr Hitchcock’s prosecution under s 50 continued, a situation clearly provided for in s 26(2). He received a significant penalty of $42,000.\(^{94}\)

**(c) Daoud**

*Inspector Jorgensen v Daoud*\(^{95}\) involved an interesting question of construction of s 26. The defendant, director of a construction company, had been charged on the basis of injuries caused to employees and subcontractors when formwork failed. The form of the charge alleged that he had “contravened s 26”. On the first day of the trial counsel for the defence objected to the jurisdiction of the Commission in Court Session to hear the charges, on the basis that s 26 as such could not be “contravened” and hence the charge was not valid.

While at first glance this seems a classic piece of legal “nit-picking”, the defence offered in support a sentence from the decision of the Full Bench in *Powercoal*,\(^{96}\) where at [163] it had been said (in the context of ruling that the s 53 defences were not available to a s 50 charge), that “a person facing prosecution by virtue of s 50 is not the subject of proceedings for an offence against the Act”. Hence, the defence argued, since the jurisdiction of the IRC only arose under s 107 of the *OHS Act* 2000 in relation to “proceedings for an offence against this Act”, the IRC had no jurisdiction to hear s 50 (or, by analogy, current s 26) proceedings.

The implication of this argument being accepted, of course, would be that no previous s 50 or s 26 prosecution had been valid! Not surprisingly, the argument was not accepted. The

\(^{91}\) See above, n 40, at 122-124.

\(^{92}\) See Spigelman CJ, above n 89, at [121]-[124].

\(^{93}\) [2004] NSWIRComm 87.

\(^{94}\) [2005] NSWIRComm 34, at [52].


\(^{96}\) Above, n 87.
Full Bench at [34] held that the defence were taking the comment made in *Powercoal* out of context, where it was a discussion of another point altogether.

The Full Bench accepted, however, the following points at paras [25]-[28]:

- Section 26 does not of itself create an offence. Where s 26 is used in connection with, say, s 8 because the company concerned is an employer, then where s 26 applies the accused officer will be “taken to have contravened” s 8, not s 26 as such.
- This is clearly reflected in the fact that the penalty provision in s 12 deals with offences listed in ss 8-12, and is not said to be applicable to s 26. But a person to whom s 26 applies will be fined pursuant to s 12, because they are taken to be in contravention of one of the other provisions.

They concluded with the following summary:

37 In summary, we consider that an offence is created by virtue of s 26 of the Act, but that the offence is a contravention of the actual provision contravened by the corporation (for example, a contravention of s 8(1)).

Even though, given the above logic, the precise wording of the charge in *Daoud* was in error, the error was a technical one which could be easily corrected, the “essential elements” of the offence clearly appearing in the charges. But the Full Bench noted at [40]-[41] that for the future the best way to plead a s 26 charge was to allege either that the defendant was “in breach of s 8 by virtue of s 26”, or that the charge be described as “a prosecution under s 26 for which the defendant is taken to have breached s 8”.

**(d) Kirk**

The proceedings involving Mr Kirk have been long and drawn-out. They flow from an incident where Mr Palmer, the manager of a farm owned by Kirk Group Holdings Pty Ltd, died when an “all-terrain vehicle” he was driving overturned while he was carrying a load of steel pipes. The company, and the main director Mr Kirk, were convicted of offences under the Act in 2004, and sentenced in 2005. They then sought to avoid the appeal process within the IRC by seeking judicial review of the conviction before the NSW Court of Appeal. That Court, in *Kirk Group Holdings Pty Ltd and anor v WorkCover Authority of NSW*, refused to allow the “bypassing” of the IRC appeal system.

One feature of the legislation governing *OHS Act* prosecutions in NSW at the moment is the fact that under s 179 of the *Industrial Relations Act* 1996 (NSW) there is no further appeal from the Full Bench of the Industrial Court. Hence the jurisdiction of the NSW Court of Appeal is excluded in most cases. Attempts to have the Court of Appeal review decisions of the Industrial Court, then, are rare, and as in this case have to be made using either the ancient “prerogative writs” of certiorari or prohibition, or other obscure statutory review avenues. These attempts failed here, although the Court of Appeal ruled that if there had been a genuine “jurisdictional error” in the way the Industrial Court had approached the hearing, they would have been prepared to deal with it. The attempt to use some other statutory avenues for appeal or an “inquiry” also failed due to the intractable provisions of s 179.

Mr Kirk and the company then applied for leave to appeal their conviction to the Full Bench of the Industrial Court. Leave was granted, but on the hearing of the final appeal the

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100 See *Kirk Group Holdings Pty Ltd and anor v WorkCover Authority of NSW* (2006) 158 IR 284, [2006] NSWIRComm 355- although leave to appeal was granted on only one, quite limited, point; see paras [51]-[55].

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appeal was dismissed. A further application for judicial review was made to the Court of Appeal, but this also failed. Mr Kirk’s determination to have his case reviewed, however, is seen by the fact that he then made a further application for special leave to appeal to the High Court of Australia, an application which was, somewhat surprisingly, successful. The High Court has not heard the appeal yet, and there are some interesting constitutional aspects to the case. But whether the merits of Mr Kirk’s conviction will be revisited is another question.

The point raised in the final appeal to the Industrial Court is of some interest. It was claimed by Mr Kirk, not that he had a defence under s 50, but rather that the decision to convict the company was in error. The basis for this error was said to be that on the day in question, it was the manager Mr Palmer (the deceased) who was “acting as the company”, and hence there could be no conviction of the company for harm to the person who was the company itself.

Actually the formulation of this proposition reveals the difficulties with it. If indeed Mr Palmer was “the company”, then there seems no doubt that he had created a risk to a company employee, ie himself. But in fact the Full Bench rejected the proposition that Mr Palmer could be identified with the company. They acknowledged the long line of authorities which holds that for some purposes a company may be deemed to have attributed to it, the behaviour or state of mind of one of its officers, whether regarded as someone who is the “controlling mind” of the company, or someone else selected for a particular purpose.

But the key problem with the asserted defence was the idea that a company which was an employer could delegate to some officer within the company responsibility for safety issues. They referred with approval to the comment of Steyn LJ (as he then was) in the UK decision of R v British Steel Plc, where his Lordship had commented:

[I]t would drive a juggernaut through the legislative scheme if corporate employers could avoid criminal liability where the potentially harmful event is committed by someone who is not the directing mind of the company… That would emasculate the legislation. (at 593)

The UK legislation was, of course, the precursor of and model for the NSW legislation, and the Court went on to also cite the words of the Court of Appeal in the prosecution in R v Gateway Foodmarkets Ltd that

[T]he company is liable in the event that there is a failure to ensure the safety, etc, of any employee, unless all reasonable precautions have been taken- as we would add, by the company or on its behalf… [I]t follows that the qualification places upon the company the onus of proving

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101 [2007] NSWIRComm 86.
102 Kirk v Industrial Relations Commission of New South Wales [2008] NSWCA 156.
104 The main one relating to the validity of the “privative clause” in s 179 of the IR Act 1996 (NSW), which purports to prevent appeals to the NSW Court of Appeal from decisions of the Industrial Court. The Federal constitutional issue at stake is that if there is no appeal to the NSW CA, then there is no opportunity of an application to appeal to the High Court, and there is a question as to whether any criminal conviction in Australia can be excluded in principle from such an appeal. It is apparently being argued by Mr Kirk’s counsel that when s 73(ii) of the Constitution gives the High Court ultimate appellate jurisdiction in relation to decisions of the “Supreme Court of any State”, that this phrase must refer to any body of a co-ordinate judicial status in the State, including the Industrial Court of NSW.
106 As in the more recent approach exemplified by the decision of the Privy Council in Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500.
that all reasonable precautions were taken both by it and by its servants and agents on its behalf.109 The concept of the “directing mind” of the company has no application here… (at 46)

The Industrial Court affirmed that both the UK and the NSW legislation had the same effect- that a company remains responsible for the safety of its employees, whether or not the work is delegated to a company employee or to a contractor. As the Full Bench noted at [53], in some circumstances it will be reasonable for the company officers to have placed reliance on the expertise of the delegate, and in those cases, where there has been a proper consideration of systems of work, along with monitoring and implementation of those systems, a defence of “reasonable practicability” will apply. But the overall legal duty remains with the company. In this situation Mr Kirk could not make out a s 53 defence (the “reasonable practicability” defence under the then-relevant 1983 legislation), because the evidence revealed that he had never taken any steps to determine whether Mr Palmer was competent to manage safety on the farm, nor had regular or systematic discussions about safety issues- see [62]-[63].

In fact in this case it was clear that, even if a “controlling mind” test were relevant, Mr Kirk had remained the “controlling mind” of the company. But as the court said, the question is not relevant to the obligation of the company to ensure a state of affairs, the safety of employees.110

To digress on this point- it is clear, with respect, that this is the correct approach to the legislation. The doctrine of “identification” of a specific company officer with the company may be necessary where there is a need to find a “guilty mind” (mens rea) for a criminal offence. But the OHS legislation is focused, not on the commission of a particular act, but on a failure to maintain a state of affairs (that is, safety of employees). In those circumstances proof of the prima facie offence by the company is established simply by proof that the company allowed a situation of lack of safety to occur.

The New Zealand Court of Appeal took a similar approach in Linework Ltd v Dept of Labour.111 The company there was held to be liable under the Health and Safety in Employment Act 1992 (NZ) for the actions of a line supervisor in not taking all practicable precautions for safety. The main judgement (Richardson P, Thomas, Blanchard and McGrath JJ) analyses the company’s liability generally in accordance with the Meridian decision, and holds that for the purposes of a statute concerned with safety in the workplace, “the acts and omissions of the person in effective charge of a work site, in this case the foreman who had a supervisory capacity, should be attributed to” the company.112 But the judgement also recognises that an alternative analysis is possible, simply focussing on the failure of the company “to do what the law required it to do”, for whatever reason.113 And Tipping J, who delivered a separate judgement agreeing with the result, argued that this approach was “more direct” than the Meridian approach, and hence “will therefore usually be the more helpful”.

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109 As previously noted, despite the wording of the UK legislation, which places into the main duty in s 2 of the Health and Safety at Work etc Act 1974 (UK) the qualification “so far as reasonably practicable”, the effect of s 40 of that Act is that the onus of proving that no “reasonably practicable” precautions could have been taken rests on the defendant, precisely the same legal situation as under the OHS Act 2000 (NSW).
110 In the final attempt at judicial review in the Court of Appeal, above n 102, the Court did not find it necessary to go into the details of this argument, simply concluding that there was no jurisdictional error in the way that the Industrial Court had dealt with the issues.
112 Above, n 111, at para [24].
113 Above, n 111, at para [25], citing in particular the comment by Smith on the British Steel case at [1995] Crim LR 655.

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If a prosecution of an employer for a breach of s6 is to succeed, the crucial thing to be established is that there was a practicable step which could have been taken and which, if taken, was likely to have prevented the harm suffered by the employee. In the present case several such steps were identified. If at least one such step is demonstrated it must follow that the employer has failed to take a step which, ex-hypothesi, was a practicable step which ought to have been taken. It does not matter on this analysis who omitted to take the step, provided some practicable step could have been taken by someone other than the injured employee… The simple fact is that all practicable steps to ensure Mr Thomson's safety were not taken. Both on the language of the Act and in accordance with its policy, Linework as his employer was thereby in breach of its statutory duty to him. As will be apparent, this analysis does not depend on Mr Mazur's status within the employer company, nor upon concepts of agency or vicarious liability. It relies simply upon the proposition that once there has been a failure to take a practicable step to ensure the employee's safety, the employer is responsible for that failure.114

Clough and Mulhern also comment on the fact that “direct” company liability may be found in a “failure to act” where legislation requires a company to have acted in a certain way.

With the development of the identification doctrine, this simple point has become obscured: where a corporation is under a legal duty to act it may be criminally liable for a failure to act with no resort to the identification doctrine. In many cases where corporate criminal liability is sought to be imposed, it is simpler to subject the corporation to a legal duty and consider whether it has failed to discharge that duty.115

This approach was also adopted by the Victorian Court of Appeal in *R v Commercial Industrial Construction Group Pty Ltd*116 (“CICG”) in relation to the Victorian OHS legislation, and later in *ABC Developmental Learning Centres Pty Ltd v Joanne Wallace*,117 dealing with similarly worded legislation governing child care centres.

In particular, in *CICG* the Court said at [25]:

“It is immaterial at what level in an organisation the safety breach occurs. Adapting what was said by the English Court of Appeal in *R v British Steel Plc*, an employee –

“... will only be exposed to the risk if the system (if any) designed to ensure his safety has broken down and it does not matter for the purposes of [s.21] at what level in the hierarchy of employees that breakdown has taken place.”118

In a commentary on *British Steel*, published in the *Criminal Law Review*,119 Professor Sir John Smith120 said:

“Where a statutory duty to do something is imposed on a particular person (here, an ‘employer’) and he does not do it, he commits the *actus reus* of an offence. It may be that he has failed to fulfil his duty because his employee or agent has failed to carry out his duties properly but this is not a case of vicarious liability. If the employer is held liable, it is because he, personally, has failed to do what the law requires him to do and he is personally, not vicariously, liable. There is no need to find someone – in the case of a company, the ‘brains’ and not merely the ‘hands’ –

114 Above, n111, at paras [44], [45].
118 [1995] 1 WLR at 1363D.
120 The author of *The Law of Theft*, joint author of Smith and Hogan’s *Criminal Law*, and a member of the editorial board of the *Criminal Law Review*.
for whose acts the person with the duty can be held liable. The duty on the company in this case was ‘to ensure’ – i.e. to make certain – that persons are not exposed to risk. They did not make certain. It does not matter how; they were in breach of their statutory duty and, in the absence of any requirement of mens rea, that is the end of the matter.” (Emphasis added) 121

The Court at [28]-[30] also made it clear that it supported the comments of Tipping J in the Linework decision noted above.

(e) Sayhoun

In Inspector Reynolds v Ocean Parade Pty Ltd and ors122 two company officers were prosecuted over an incident in which a young boy fell to his death after entering an unfinished building through a hole in the fence, and then falling into a hole which had been left in the 14th floor. Ron and John Sayhoun were directors of the company doing the work, with Ron being the site supervisor. The conviction itself was unremarkable once the factual issues were resolved, it being determined that the fence had been known to have a gap in it and it clearly being foreseeable that children might enter.123

In sentencing,124 the two directors were given fines that differed slightly- both were in charge of the company and should have ensured that safe systems were in place, but Ron Sayhoun conceded that he knew that there was a hole in the perimeter fence which was not repaired before the boys gained access, and he received a slightly higher fine ($8250, as opposed to John Sayhoun, $6600). The case illustrates the proposition that while directors will be equally deemed to share the “guilt” of the company, the level of penalty actually imposed may vary according to their precise role in the circumstances leading to the lack of safety.

(f) Ritchie and related proceedings

Rivalling the Gretley Appeal in its impact, the Ritchie case illustrates the far-reaching nature of the safety obligations imposed on senior managers. In Inspector Kumar v David Aylmer Ritchie125 an explosion occurred when a tank was being chemically cleaned in a workshop in Sydney. Mr Ritchie was the Chief Executive Officer of the company involved, Owens Container Services Australia Pty Ltd, a part of the multinational Owens Group which operated in a number of locations in Australia, New Zealand and around the Pacific. Mr Ritchie was a resident of New Zealand at the time of the incident concerned on 15 January 2003. He was prosecuted under s 26, in circumstances where the company pleaded guilty to a s 8 offence. He accepted at the beginning of the trial that the company had committed the relevant offence. The case is valuable, then, because it required detailed consideration of the two defences in s 26, “unable to influence” and “due diligence”.

Haylen J first considered the defence of “unable to influence”, para 26(1)(a). Counsel for Mr Ritchie conceded that in formal terms anyone who is a director has the legal ability to...
“influence” a company’s decision-making. But he argued that if this limb of s 26 were to apply at all to directors (as opposed to those “concerned in management”), then it must be interpreted to allow a director who was not “hands on”, and who only visited the site occasionally, to argue that in practical terms he had little opportunity to influence safety on the ground.

This interpretation was rejected. Haylen J commented that in legislation which imposed “strict or absolute” liability on employers, it was not surprising to find a high standard of care expected from directors. In normal circumstances the simple fact of being a member of the Board will amount to sufficient influence. His Honour accepted that there might be some rare cases where a formally appointed director could succeed in a defence of “unable to influence” - the examples he offered were where the director might be in a minority and be continually out-voted, or where the director was absent from board meetings due to illness for a long period, and uninformed of the relevant decision.126

With respect to his Honour, it seems arguable that even the acceptance of these limited exceptions to the “influence” of a formally appointed director could be said to be too generous. These two examples would both be prime candidates for an “due diligence” defence; in each case the legal power to influence is still there, the defendant would be able to claim that while having legal authority, in practice he or she had “done the best that they could”. It is submitted that a simpler and more obvious interpretation of the defence is that para (a) is not intended to be operative in relation to formally appointed directors, unless they can show that the instrument of their appointment somehow limits their legal power to influence decision-making.127

Whether or not this is correct, in the circumstances of the Ritchie case Mr Ritchie could not demonstrate any obstacle to his influencing the company’s decisions. In fact, he gave extensive evidence of his overall control over company policy, in addressing the question of “due diligence”. The irony is that a director who attempts to demonstrate the defence under para 26(1)(b) will usually find it hard to argue in the alternative that under para (a) he or she had insufficient influence over the company.128 Haylen J concluded his rejection of Mr Ritchie’s para (a) defence by noting at [176]:

In the present case, Mr Ritchie submits that regard should be had to the "real world" where directors of a number of companies with various operations, living and working remotely from the worksite, have no effective control or ability to influence the conduct of the corporation in relation to its contravention of the Act… [T]hat argument should be rejected and recognition given to the actual authority and control of Mr Ritchie to influence the conduct of the company in relation to the company's contravention of the Act… Mr Ritchie could actually influence the conduct of the company in relation to the breach but elected not to do so because he wished to concentrate on other matters. Mr Ritchie has therefore not made out a defence under s 26(1)(a).

The second defence of “due diligence” was then considered. 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.

126 Above, n 125 at [170].
127 An extremely rare situation, now, however, exemplified in the Ngai case discussed below.
128 See the comment by Haylen J, above n 125 at [179]: “In a sense the more evidence that the defendant calls to make out the s 26(1)(b) defence, the likelihood is that such evidence will diminish the case attempting to be established under s 26(1)(a).”
In this case Haylen J found that, while Mr Ritchie could not have been expected to be across the fine details of every process used by the company, more could have been done to ensure that systems were in place for safety, and those systems were put into practice.

With respect, it is submitted that his Honour’s consideration of the para (b) defence here is fairly cursory. However, the prosecutor had presented a very powerful case, and at [178] his Honour indicated that he accepted “the general thrust of the prosecutor’s submissions”. On this basis it seems worthwhile to set out here two paragraphs from the prosecutor’s detailed submissions on the question of “due diligence”, recorded earlier in the 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 $22,500.129

Again with respect, this seems an unsatisfactory 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 (which allows for no conviction to be recorded). 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

129 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.
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, it has certainly sparked interest in professional circles,\(^{1\text{30}}\) 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.

**(g) Burn and Steel**

Two prosecutions in relation to the one incident demonstrate the point noted above in *Sayhoun*, that, while directors and officers will be liable in the circumstances mentioned, their differing involvement in the events which have caused a risk may lead to their receiving different sentences. In *WorkCover v Burn*\(^ {1\text{31}}\) the director of a company called Top Container Transport was found guilty pursuant to s 26 in relation to an incident that lead to the death of a fork lift driver. He was fined $17,500. In *WorkCover v Steel*\(^ {1\text{32}}\) the General Manager of the same company was also convicted in relation to the same incident, but was able to show in mitigation that he had a role that 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 only fined $5,000 in relation to the same incident.

**(h) Smith**

There has been a long series of proceedings involving Mr Tom Smith, the course of which illustrates a number of aspects of the operation of s 26. In *WorkCover Authority v Daly Smith Corporation (Aust) Pty Ltd and anor*\(^ {1\text{33}}\) the company Daly Smith (DSCA) and its owner and managing director, Mr Smith, were prosecuted over an incident which saw a labour hire worker employed by DSCA, Mr Rowe, lose four fingers of one hand in a die stamping machine. Consistently with other decisions involving labour hire firms, DSCA were found to have been liable for a failure in relation to Mr Rowe despite the fact that he was working for a “host employer” at the time. DSCA were liable because they had not put in place steps to ensure that adequate training was provided (see paras [67]-[69], which rely in part on DSCA’s own policy documents referring to relevant training to be given to labour hire employees), nor had they arranged for a proper risk assessment to be undertaken- [97]. The court found that there were “reasonably practicable” steps that could have been taken to rectify these problems, and hence the s 53 defence did not apply- see eg [110].

In coming to the personal charge against Mr Smith, Staunton J at [124] issued what amounted to a very stern judicial rebuke to the prosecutor in the case, who had apparently assured Mr Smith at an initial interview that he (as opposed to the company) would not be prosecuted. Notwithstanding, the prosecution against Mr Smith had been instituted and needed to be dealt with. Her Honour found that Mr Smith as a director was *prima facie* guilty of the same offence as the company. She ruled that the defences under s 53 of the Act were

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\(^{1\text{31}}\) [2005] NSWIRComm 206.

\(^{1\text{32}}\) [2005] NSWIRComm 215.

\(^{1\text{33}}\) [2004] NSWIRComm 349 (Staunton J).

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not applicable to the s 50 charge.134 She also ruled that Mr Smith was not able to establish the defence of “due diligence”- while there was a paper policy on safety, he did not “ensure that the policy became the basis for an entrenched systemic process” within the company, and “took no proactive steps to ‘adequately supervise compliance’ with the company’s policy”- paras [131]-[132].

On sentencing Mr Smith received a penalty of $5000.135 It is worth noting that his particular attitude in the trial and at the sentencing hearing seems to have weighed against him with the judge. He seems to have denied all the way through that the company should have done any more than it had actually done. In the sentencing proceedings Stauton J commented at [57], [59]:

Mr Smith clearly formed, and still holds, the opinion that his obligations arising under s 15(1) and s 50 of the Act were and are properly satisfied by the delegation of his authority to Mr Teahan…. In addressing the principle of specific deterrence in relation to DSC, I drew attention to the lack of remedial steps taken since the incident as indicated in the evidence of Mr Smith. That evidence suggested a complete misapprehension of the obligations imposed by s 15(1) of the Act in order to ensure a safe system of work, not merely a comprehensive policy structure. The failure of Mr Smith, on his evidence, to acknowledge his obligation to compel a systemic adoption of DSC’s policy into overall safe systems of work renders specific deterrence particularly relevant in my considerations.

An appeal to the Full Bench in Daly Smith Corporation (Aust) Pty Ltd and anor v WorkCover136 was unsuccessful. For present purposes it is worth noting the grounds of appeal relating to s 50. It was argued again that s 53 defences were applicable to offence charged by means of s 50. The Full Bench referred to its own previous judgments in Morrison v Powercoal137 and Inspector Jorgenson v Daoud138 in rejecting this argument. It implicitly accepted at [66] that Stauton J’s reference, in considering “due diligence”, to the Canadian decision of R v Bata Industries Ltd (No 2)139 was correct.

Unlike most other convictions under the OHS Act 2000, Mr Smith’s litigation did not stop at the Full Bench. He applied to the High Court of Australia for special leave to appeal the Full Bench’s decision. Special leave was denied- see Daly Smith Corporation (Aust) Pty Ltd v WorkCover.140

The transcript of argument reveals that there were two legal issues at stake. Clearly the most important from the constitutional perspective was the claim that, even though s 179 of the Industrial Relations Act 1996 (NSW) prevented a further appeal beyond the Full Bench of the Industrial Relations Commission, the Federal Constitution required there to be a process of appeal reaching all the way to the High Court. This argument required the court to read the provisions of s 73 of the Constitution, in providing for appeals from State Supreme Courts to the High Court, as if the words “Supreme Court” included other superior tribunals established by the States. The other legal issue was whether the Full Bench had been correct to rule that s 53 defences were not available in proceedings under s 50.

As the High Court noted, the Constitutional issue was so important that it would have required a much more detailed hearing. But the application was refused on the basis that,

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134 At [126], following her Honour’s own previous decision in McMartin v Newcastle Wallsend Coal Co [2004] NSWIRComm 202.
137 Above, n 87.
138 Above, n
139 (1992) 7 CELR (NS) 245, noted in the 2005 article above n Error! Bookmark not defined. at 130.
140 [2006] HCATrans 475.

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even if Mr Smith’s counsel were successful on the constitutional issue, the merits of his appeal were not sufficient to take up the time of the Court. In the language adopted in these matters, special leave was refused because “there are insufficient prospects of success”. This ruling does not amount to a binding precedent for the future; but since the inter-relationship between s 53 and s 50 was the main topic of submissions by counsel for WorkCover, it seems fairly likely that these arguments were the ones which seemed to have the greater weight in the eyes of the two Justices of the High Court who were hearing the application.\(^{141}\)

(i) Herbert and Walker (Akerman-Apache)

Comments about the inability of directors to delegate away their responsibility to ensure that safety is considered by their company are to be found in *WorkCover v Akerman-Apache (Joint Venture) Pty Ltd and ors*\(^{142}\) at [43]. In that case a large piece of machinery was being towed without proper brakes, killing one of the employees, who was driving. The operation was a joint venture between Australian and American companies, and the evidence of the two Australian directors was that they had left the safety procedures to be looked after by the American director, who was to be the “hands on” manager. As Staunton J found at [37], “they were content to leave all operational matters, including safety, to Mr Akerman.” In doing this, her Honour commented at [44], they made a “serious misjudgement … as to the legal obligations that arise for directors of a company”. Both were fined $10,250.

(j) Herbert (Salamander Shores)

As noted in the previous case, and of course the *Ritchie* case, where directors have legal responsibility to manage the company, they will not be able to avoid liability under s 26 by claiming that they in fact played no part in the safety monitoring that should go on. This is further dramatically illustrated by *Inspector Aldred v Herbert*.\(^{143}\) In that case 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. (While he was a trespasser, it was clear of course that any of the guests of the hotel, or their children, might have done the same thing.) 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 rejected. In subsequent sentencing proceedings, *Inspector Graeme Keith Aldred v Salamander Shores Hotel Pty Ltd and Others*\(^{144}\) the company was fined $150,000 and the individual directors $12,000 each.

(k) Ngai

As well as “due diligence”, the other defence that is available under s 26 is that the officer “was not in a position to influence the conduct of the corporation in relation to its contravention of the provision”. It has been suggested above that it is very rare that someone who has actually been appointed as a formal member of the board will be able to rely on this defence, as by its very nature appointment as a “director” automatically means that someone has legal authority to influence the conduct of the company. The only exception to this

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\(^{141}\) Callinan and Heydon JJ. As noted above at n 104, it seems that the constitutional issues which did not receive a full hearing in Mr Smith’s case will be ventilated in the forthcoming appeal in Mr Kirk’s case.

\(^{142}\) [2006] NSWIRComm 370.

\(^{143}\) [2007] NSWIRComm 170.

\(^{144}\) [2008] NSWIRComm 102.
principle involving an actual director would seem to arise in the very unusual situation illustrated by the decision in Inspector James v Sunny Ngai and ors.\textsuperscript{145} In that case a very odd company structure existed, where under the Articles of Association all the directors other than Mr Henry Ngai, the Governing Director, were said to be “under his control and shall be bound to conform to his directions in regard to the Company's business”. As a result the accused here (other members of the board) were able to make out the defence that they were not in a position to influence the corporation’s conduct- see para [127].

\textbf{(l) Nouh}

In \textit{WorkCover Authority v Anywhere Tower Cranes Pty Ltd and ors}\textsuperscript{146} 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. Marks J commented:

28 I would recommend that the WorkCover Authority of New South Wales, as part of its educational role, ensure that both executive and non-executive directors of corporations throughout New South Wales understand their exposure to prosecution by reason of the provisions of s26 of the Act in the event that any company of which they are a director commits a breach of the Act, save only for the defences available to them under s26. Such exposure to a criminal conviction is even more compelling where a director has no shareholding in, or any day-to-day involvement in the operations of, a corporation.

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 the provisions of the \textit{Fines Act} 1996 relating to his ability to pay.

\textbf{(m) Cahill}

In \textit{Morrison v Barry John Cahill}\textsuperscript{147} Mr Cahill, who was the Director of Operations of a smallish mine in Broken Hill, pleaded guilty to a breach of s 8 of the \textit{OHS Act} 2000 by virtue of s 26, flowing from the death of a miner. But the court applied s 10 of the \textit{Crimes (Sentencing Procedures) Act} 1999 to his case, entering no conviction. Matters that led to this decision included the fact that Mr Cahill had not been working on the actual site at the time; and that he had undertaken a number of measures while in charge of operations to improve safety, including shutting down mining operations for 4 weeks to address some issues. In addition he had implemented a system to deal with the specific problem that led to the death of the worker, although the system had not been operating properly on the day- see para [32].

\textbf{The Future of Personal Liability Provisions in OHS Law in Australia}

The question of whether Australia’s 7 or 8 different jurisdictions should “harmonise” their differing occupational health and safety laws has recently been the subject of two

\textsuperscript{145} [2007] NSWIRComm 203.
\textsuperscript{146} [2007] NSWIRComm 44.
\textsuperscript{147} [2007] NSWIRComm 114.
Individual Liability of Company Officers

Reports by a panel commissioned by the incoming Rudd Labour government.\textsuperscript{148} For present purposes I refer those who are interested in the details of the National Inquiry’s recommendations on personal liability provisions, and my critique of those recommendations, to a paper presented earlier this year.\textsuperscript{149}

Suffice it to say that I applaud the recommendation made by the Panel 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.\textsuperscript{150} But I oppose the recommendation that in any obligation creating personal liability the onus of proof that there has been a lack of due diligence will lie on the prosecution. This proposal is contrary to the situation that has been in place in NSW and Queensland for some year, to the historical situation under safety laws in the UK, and to common sense.

In NSW the provisions noted above have been working effectively for some time. Of course the mere fact of a number of successful prosecutions does not of itself indicate that the provision is good. But it does indicate that the provision is workable, and in this case the provision has been used in a number of cases to bring to account company officers where there have been serious safety breaches. In each case the officers have had the opportunity to explain to the court why they had actually done all that they reasonably could do- that they had exercised due diligence, or else why they had been unable to influence the company’s decision-making. But since the information about what they could, and could not, have done, lay with them, it is reasonable that they were required to produce the evidence to the court. It does not seem at all reasonable to impose on the prosecution the burden of establishing that, beyond a reasonable doubt, something more could have been done, especially where the prosecution will need access to confidential board records or decision-making.

I also have some concern about the definition of “officer” proposed by the Reports, which seems to me to not be appropriately targeted at safety issues.\textsuperscript{151} The proposals put forward in the Reports have been approved in principle by a “peak” body representing the States and Territories, and a new national body called “Safe Work Australia” is apparently currently at work to produce a draft of “uniform legislation” which would be adopted by the various jurisdictions.\textsuperscript{152} Whether or not the various Parliaments will put aside concerns about the recommendations that have been expressed by various parties, and agree on the final form of the legislation, remains to be seen.

**Insurance and Indemnity Provisions for Officers**

The practical result of personal liability provisions, of course, is the impact on the persons concerned, and in particular one important question is whether it is possible for those people, or the companies that they work for, to obtain insurance for, or an indemnity in relation to, the possibility of criminal penalties.\textsuperscript{153}


\textsuperscript{150} Recommendation 40, in the *First Report*.

\textsuperscript{151} For more details see the paper at n 149.


\textsuperscript{153} On this topic generally, as well as the Herzfeld article noted below, see V Finch, “Personal Accountability and Corporate Control: the Role of Directors’ and Officers’ Liability Insurance” (1994) 57 Modern L Rev 880-
In an earlier work on this topic I devoted a chapter to this matter. But I can do no better now than refer the reader to an excellent and carefully reasoned article on the topic recently published by Herzfeld. After a review of the Australian common law and statutory provisions on the topic, he notes that (on issues relevant to personal criminal liability)

1. Legal restrictions applying to companies in this area differ in approach between those dealing with an “indemnity” and those dealing with “insurance”. Logically an insurance policy will usually involve some sort of “indemnity”, but the difference seems to lie in the question whether the source of a promised payment is from company general funds, or from a general policy provided by an insurer and paid for by the company.

2. A company is unable to “indemnify” an officer for legal costs arising in “criminal proceedings” in which the person is found guilty (s 199A(3)(b), Corporations Act 2001). Herzfeld notes that due to their so-called “regulatory” character there may be a question as to whether occupational health and safety law proceedings fall within this description, but concludes on balance that they probably do.

3. While the legislation is silent on the point, it seems fairly clear that as a matter of common law public policy a company cannot indemnify an officer for (or provide insurance against) payment of a criminal penalty. While there is some doubt about criminal penalties for “strict liability” offences, the better view is that where an offence involves any element of personal fault insurance against payment of the penalty will not be available.

4. The question of whether the costs of defending a criminal prosecution, as opposed to the penalty itself, should be insurable is less clear, and Herzberg recommends that Australian legislation should be clarified to allow such costs to be the subject of insurance.

Conclusions

What can be seen from a comparison of the operation of the UK and NSW OHS personal liability provisions?

One noticeable fact is that there are far more reported court decisions under the NSW law, than are available for discussion under the UK legislation. In part this may be an artefact


154 See N Foster, The Personal Liability of Company Officers for Company Breach of Workplace Health and Safety Duties (February, 2004)- thesis accepted for award of degree of Master of Laws at the University of Newcastle (copy available on request); ch 5.

155 P Herzfeld, “Troublesome area” (2009), above n 14.

156 Above n 155 at 281.

157 Above n 155 at 293. In fact Herzfeld indicates that this should be the case even for offences where fault is no part of the offence. But at least where there is a “defence” of “due diligence” which would have been available, the courts are reluctant to allow insurance to be available- see R v Northumbrian Water, ex parte Newcastle and North Tyneside Health Authority [1999] Env LR 715, discussed in Foster Personal Liability (2004), above n 154 at 262-263. Since the personal liability provisions in NSW do have such a defence, insurance against payment of a fine is probably not available.

158 Above n 155 at 294.
of the different databases that are available for research. In NSW all decisions of the Industrial Relations Commission, the “court arm” of which hears OHS prosecutions, are available on the AUSTLII database (www.austlii.edu.au). But other factors are clearly in operation. It seems that the NSW regulator, WorkCover NSW, has adopted a far more active role in instituting prosecutions against individual officers, than has been adopted in the UK. This in turn may be due to a number of factors, but it is at least worth asking the question whether the different forms of legal liability have had a role to play.

A clear difference between the UK provision and the NSW is that s 26 of the NSW OHS Act 2000 is prima facie conditioned only on the guilt of the company. Once the guilt of the company has been determined, and the position of the officer (as either a formal director, or otherwise “concerned in management”), then the onus lies on the director to make out the relevant defences—either “no influence” or “due diligence”.

By contrast, establishing an offence under s 37 requires the prosecution to show, beyond reasonable doubt, either “consent”, “connivance” or “neglect”. As was noted above, this will involve the prosecution being able to present some evidence of what the duties of the relevant officer ought to have been, and at least some evidence of what he or she ought to have been aware of. The decision in R v P at least clarifies now that there is no need to lead evidence of the actual, subjective, knowledge of the officer. But the onus on the prosecution is still a potentially difficult one.

Perhaps the difference between the two models can be illustrated by an Australian example. A recent press report records a Victorian OHS prosecution undertaken of a company which ran a “go-kart” centre, which was fined a record amount of $1.4million for an incident in which a patron was killed. Yet the press also reports the trial judge expressing regret that the fine would not be paid, as the company had gone into liquidation. What about a prosecution of one of the company directors? The press report goes on to say that: “Worksafe Victoria executive director John Merritt said there was not enough evidence to charge the individual AAA Auscarts Imports directors for their roles in the incident.”

This, it should be noted, is the State of Victoria. In that State s 144 of the Occupational Health and Safety Act 2004 provides that

(1) If a body corporate… contravenes a provision of this Act or the regulations and the contravention is attributable to an officer of the body corporate failing to take reasonable care, the officer is guilty of an offence....

In other words, a provision similar to UK s 37, where the prosecution bears the onus of presenting evidence about the internal decision-making of the company before a charge can be pressed. It is apparent from a long history of prosecutions in NSW, however, that a charge could easily have been laid against one of the directors of the company in that State, leaving it up to the director to come forward with evidence (which they should have easy access to, if it exists) of how they had taken due care to provide for the safety of customers.

The law on the operation of s 26 of the OHS Act 2000 (NSW) has been clarified by further judicial comment over recent years. It seems fairly clear now that-

- The term “concerned in management” is not restricted to those in the “central” management of a large firm, but extends to a wider group of managers who have decision-making power and authority, going beyond the mere carrying out of directions as an employee, such as to affect the whole or a substantial

159 Above, n 41.
part of the corporation, which powers relate to the matters which constituted the offence under the Act.\textsuperscript{161}

-o The general defences under s 28 of the Act are not applicable to the specific charge under s 26, which contains its own defences of “unable to influence” or “due diligence”.\textsuperscript{162}

-o The “unable to influence” defence will be narrowly construed, possibly so that where a formally appointed board member is involved it can only apply where the articles of association of the company impose some unusual limitation on the member’s powers.\textsuperscript{163}

-o 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.\textsuperscript{164}

-o It is perfectly possible for a senior manager who only visits a workplace occasionally to be held not to have exercised “due diligence” and to receive a personal fine.\textsuperscript{165}

-o Where more than one manager is convicted under s 26, differential fines may be imposed depending on the culpability of the individual.\textsuperscript{166} In some (though by no means all) cases, no conviction might be entered where a manager, while technically guilty, had little involvement in decisions which led to the incident, and had made a genuine effort to introduce and monitor safety systems.\textsuperscript{167}

It is submitted that the NSW provisions provide an example of a workable personal liability provision in an important area of company operations, the health and safety of its workers. Even if not all the decisions under the legislation would be supported, the information available there provides a rich database of material highlighting important issues that policy-makers should take into account in framing laws as to individual liability of company officers.

\textsuperscript{161} McMartin v Newcastle Wallsend Coal Company Pty Ltd [2004] NSWIRComm 202; see also the Powercoal decision in the Court of Appeal, text above near n 89.

\textsuperscript{162} The Gretley Appeal, discussion above near n 76, and see also the outcome of the Daly Smith litigation above n 140. It has also been seen that the UK courts are apparently adopting a similar approach under the HSW Act.

\textsuperscript{163} See the discussion in Ritchie, text near n 126, and Ngai, text near n 145.

\textsuperscript{164} See for example Herbert (Salamander Shores) at n 143.

\textsuperscript{165} See Ritchie, above n 125; and Smith, n 133.

\textsuperscript{166} See Sayhoun, near n 122; and Burn and Steel, near n 131

\textsuperscript{167} See Cahill, n 147.

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