NATIONAL RESEARCH CENTRE FOR
OCCUPATIONAL HEALTH AND SAFETY REGULATION

REGULATION AT WORK

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News from the Centre

Inside this issue:

This is the eighteenth edition of the Centre's Newsletter which is produced as part of its mission to monitor and report on developments in OHS regulation. This edition includes the regular updates on OHS regulatory developments, important new research and reports, and significant recent cases.

The **Feature** article in this edition is about the recent decision of the Full Bench of the Industrial Court of New South Wales on the appeal in *Newcastle Wallsend Coal Company Pty Ltd & Ors v McMartin* [2006] NSWIRComm 339 (5 December 2006), the Gretley appeal. This article was written for *Regulation at Work* by OHS Regulation Research Consortium Member Neil Foster, Lecturer in the Faculty of Business and Law at The University of Newcastle. The analysis of the Gretley appeal complements the analysis of **Key Cases** prepared, in each edition of the Newsletter, by the Centre's Adjunct Professor Richard Johnstone.

An issue of importance in both the Gretley appeal and some of the other decisions discussed in the **Key Cases** is the personal liability of corporate officers, with particular reference to section 26 of the NSW *Occupational Health and Safety Act* 2000 (OHSA (NSW)) (section 50 in the 1983 Act). Section 26 (and the former section 50) impose criminal liability on each director of a corporation and each person concerned in the management of a corporation, where the corporation contravenes OHSA (NSW) or the regulation. The section allows two defences. Liability is imposed unless the officer can show that they were not in a position to influence the conduct of the corporation in relation to the contravention, or that they exercised "all due diligence" to prevent the contravention by the corporation. Two Centre **working** papers are also relevant to OHSA (NSW), s26 and the issue of personal liability. They are:

- NRCOHSR working paper 50, also by Neil Foster, which examines the report of the Federal Government's Corporations and Markets Advisory Committee (the CAMAC report) on *Personal Liability for Corporate Fault*. This report considered personal liability more widely than OHS but the report's recommendations, if adopted, have implications in the OHS arena. As Neil Foster observes, the CAMAC report is critical of a particular approach to personal liability, which is reflected in section 26 of OHSA (NSW), and the report recommends that the Australian states change their laws away from the section 26 model. However, as Neil Foster explains, there is cause concern about the foundations of the report's findings.

- NRCOHSR working paper 49, *The Impact of the Gretley Prosecution,* in which Centre Professor Andrew Hopkins discusses his findings from interviews with NSW coal mine managers about their awareness of the Gretley case, and whether (or not) it had deterred them from taking on responsible positions in mine management or impacted upon their activities with regard to OHS.

The working papers are online at: http://ohs.anu.edu.au/publications/index.php

News from the Centre

Further information about the Centre and this newsletter

As always we welcome readers' suggestions on articles, books and reports that might be included in forthcoming newsletters. If you have any suggestions, please email us at nrcohsr@anu.edu.au.

You can find further information about the Centre at: http://www.ohs.anu.edu.au/

If you are not a subscriber to this newsletter, you can subscribe on http://www.ohs.anu.edu.au/publications/subscribe.php

Readers interested in the Regulatory Institutions Network, of which this Centre is part, can explore the RegNet website at http://regnet.anu.edu.au.

Developments in regulation

International – A new series of measures titled *Strategies and Practice for Labour Inspection* (GB.297/ESP/3) was presented to the International Labour Organisation (ILO) Committee on Employment and Social Policy in November. The strategies are designed to strengthen the role of labour inspectorates worldwide in promoting decent work, preventing accidents and diseases and implementing labour standards at the workplace, More information is online at:
http://www.ilo.org/public/english/bureau/inf/features/06/labour_inspection.htm

United Kingdom - The *Corporate Manslaughter and Homicide Bill* 2006 passed its second reading in the House of Commons and was referred to parliamentary committee for further consideration. The Bill would create a new offence that, in England and Wales or Northern Ireland, is to be called corporate manslaughter and, in Scotland, is to be called corporate homicide. Further information is online at: http://www.publications.parliament.uk/pa/pabills/200607/corporate_manslaughter_and_corporate_homicide.htm; and at: http://www.corporateaccountability.org/manslaughter/reformprops/main.htm

Australia – the Australian Safety and Compensation Council (ASCC) has released for public comment the *Draft National Code of Practice for the Labelling of Workplace Hazardous Chemicals* and the *Draft National Code of Practice for the Preparation of Safety Data Sheets*. Both codes are part of the development of the new Workplace Hazardous Chemicals Framework and are based on the principles of the Globally Harmonised System of Classification and Labelling of Chemicals (GHS). Further information on the proposed labelling and safety data sheet systems is presented in the *Public Discussion Paper for the Draft National Code of Practice for the Labelling of Workplace Hazardous Chemicals and the Draft National Code of Practice for the Preparation of Safety Data Sheets*. The public comment period for all documents associated with the Workplace Hazardous Chemicals framework closes on 1 March 2007. (This is an extension also for the *Draft National Standard and Code of Practice for the Control of Workplace Hazardous Chemicals*, as reported in the last edition of *Regulation at* Work).

The ASCC has also agreed to declare the *National Code of Practice for Falls in General Construction* and intends to finalise the *National Code of Practice for Manual Tasks* early in 2007.

These documents are online at: http://www.ascc.gov.au

Australia – The *Occupational Health and Safety (Commonwealth Employment) Act* 2006 received assent in October. The Act revises the provisions relating to the employer's duty of care; replaces the provisions requiring an employer to develop an OHS policy and agreement, with a requirement to develop written OHS "management arrangements" in consultation with employees; removes the right of unions to be involved in determining OHS arrangements; gives control of the election of health and safety representatives to employers; enables HSRs to request an investigation by Comcare into an alleged contravention of the Act where a

Developments in regulation (continued)

provisional improvement notice has been issued; and replaces all references to "unions" with the term "employee representatives" who must now be invited into the workplace by an employee). The Act is online at:http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/46A7563564F1D8D9CA25721200125F37?OpenDocument

Australia – The Council for the Australian Federation was established, comprising the eight state/territory labor leaders. The inaugural meeting agreed to implement a common set of principles to harmonise state/territory OHS and workers' compensation systems. OHS harmonisation matters agreed to be addressed include: implementing mutual recognition of plant and machinery and a uniform system of accreditation of verifiers of pieces of plant and machinery; aligning regulatory approaches in the domestic construction industry; sharing OHS advertising campaigns; using common OHS guidance material; and implementing a common audit tool to assess OHS performance of self-insuring organisations. The communiqué from the inaugural meeting is online at: http://www.thepremier.qld.gov.au

Also in Australia – The federal government's Corporations and Markets Advisory Committee (CAMAC) produced a report on *Personal Liability for Corporate Fault*. The report reviews the ways in which directors and other individuals involved in companies may incur personal liability as a consequence of corporate misconduct. The report is online at http://www.camac.gov.au.

Australia and New Zealand – OHS authorities have joined together in a campaign that targets manual handling in the manufacturing industry. The national intervention campaign will focus on improving the capability of employers to effectively identify and manage their manual handling risks in consultation with workers. The safety campaign will be implemented in a series of phases that include consultation, industry workshops and worksite visits. More information is online at: http://www.workcover.nsw.gov.au

Australian Capital Territory – ACT WorkCover has released for public comment the draft *Work in Hot or Cold Environments Code of Practice*. The draft code is online at: http://www.workcover.act.gov.au

Also in the ACT - The Asbestos Task Force called for submissions on draft *Asbestos Regulations for the Non-Residential Sector.* The draft regulations are online at:
http://www.asbestos.act.gov.au/keyfacts_laws_nonresident.html

New South Wales – A further report on the review of the *NSW Occupational Health and Safety Act* 2000 is due in April 2007. This review is in response to the earlier review of the NSW OHS Act tabled in the NSW Parliament in May 2006. The intention is to address a range of matters on which statekholders were unable to reach agreement in discussion on the earlier report. Contentious issues include strict liability, defences available to employers, OHS recommendation notices, unions' right to prosecute, standards of proof and duties of employees. Further information is online at: http://www.workcover.nsw.gov.au

New South Wales – WorkCover sought public comment on a draft *Occupational Health and Safety Amendment (Major Hazard Facilities) Regulation* 2006 which would implement the main provisions of the *National Standard for the Control of Major Hazard Facilities.* The draft regulation is online at: http://www.workcover.nsw.gov.au

The Authority also issued the *Work Near Overhead Power Lines: Code of Practice* with the aim of protecting the OHS of persons working near overhead power lines and associated electrical apparatus. The new code is online at: http://www.workcover.nsw.gov.au

Also in New South Wales – As part of a legal settlement of prosecution proceedings by WorkCover against CNH Australia Pty Ltd and Davibray Pty Ltd, the Authority agreed to withdraw its OHS prosecution in return for a commitment that CNH will design, test and install a device that will make its harvesters safer. Proceedings had been initiated after a farm worker received serious injuries while working near the screw augers of a combine harvester. More information is online at: http://www.workcover.nsw.gov.au

Developments in regulation (continued)

South Australia - The *Draft South Australian Clothing Outworker Code* was released for public consultation. The code strengthens the protections for clothing outworkers by creating greater transparency in the supply and production chain. The draft code is online at: http://www.safework.sa.gov.au/

Victoria - The report of the 2006 inquiry into OHS regulation in the earth resource industries (the Pope report) was released. The Victorian government has accepted the key recommendation of the inquiry, to transfer responsibility for OHS regulation of the earth resource industries (mining, quarrying and offshore petroleum) from the Department of Primary Industries (DPI) to the Victorian Workcover Authority (VWA). The new arrangements will commence in January 2008. The report of the inquiry is online at: http://www.dse.vic.gov.au

Western Australia – The *Final report of the Review of the Occupational Safety and Health Act 1984* was released. The review was undertaken in accordance with the requirement of the WA OSH Act for such a review every five years. The report includes discussion of: OHS developments since the 2002 Laing review; independent contracting and OHS; impacts of Work Choices legislation; the role of the OHS tribunal; consultation and dispute resolution; enforcement matters; and specific issues relating to chains of responsibility, occupational health and disease. The report is online at: http://www.docep.wa.gov.au

Key research & reports

OHS regulatory policy

P James, 'The changing world of work: an exploration of its implications for work-related harm' (2006) *Policy and Practice in Health and Safety* 4(1), 3-15. This article examines the relationship between changes in the nature of work and its organisation, and incidence of work-related injury and ill-health, and the implications for OHS regulatory policy.

Evaluation of OHS interventions

G Baril-Gingras, M Bellemare and J Brun, 'The contribution of qualitative analyses of occupational health and safety interventions: an example through a study of external advisory interventions' (2006) *Safety Science* 44, 851-874. This article reports on qualitative case study research examining the processes leading to preventive changes in OHS interventions by external OHS advisers. The research suggests the potential value of such research in explaining the effect of workplace context and other conditions influencing the effectiveness of interventions.

Enforcement

S Bittle and L Snider, 'From manslaughter to preventable accident: shaping corporate criminal liability' (2006) *Law and Policy* 28 (4), 470-496. This article looks at the influences shaping Bill C-45, the revisions to the Criminal Code of Canada aimed at strengthening corporate criminal liability. The Bill, passed in 2003, originated in response to the deaths of twenty-six workers at the Westray mine in 1993. Through an examination of Parliamentary Committee hearings, this article explores how conceptions of corporate criminal liability were shaped and modified, and examines the implications for challenging the structural conditions that underlie workplace injury and death. The article is online at: http://papers.ssrn.com/=928999

J Ayling and P Grabosky, 'Policing by command: enhancing law enforcement capacity through coercion' (2006) *Law and Policy* 28(4), 420-443. This article addresses the ways coercion is used by the state in law enforcement, through interactions with both the targets of law enforcement and third parties. Examples are given and the benefits of using coercion are discussed, as well as unintended consequences costs. With these effects in mind, the authors suggest a set of guidelines for evaluating the appropriateness of coercive measures. The article is online at: http://ssrn.com/abstract=928997

Key research & reports (continued)

D Kahan, *What's really wrong with shaming sanctions*, Yale Law School, Public Law Working Paper No. 116, 2006. In earlier writing on shaming this author argued that shaming penalties are a politically viable substitute for imprisonment for a range of offenses because unlike fines, community service, and other alternative sanctions, shaming unambiguously expresses moral denunciation of criminal wrongdoers. In this paper, the author discusses some problems with shaming penalties and suggests restorative justice as an alternative. The paper is online at: http://ssrn.com/abstract=914503

C Lobel, 'Beyond experimentation: governing occupational safety in the United States (or - core and periphery in regulation governance)', in G Burca and J Scott (eds), New governance and constitutionalism in Europe and the United States, Hart Publishing, 2006. This chapter presents a critical assessment of a range of regulatory tools in the context of OHS regulation. It explores the US Occupational Safety and Health Administration's (OHSA) cooperative programs and considers the effectiveness of new governance approaches that rely on stakeholder involvement, self-regulation, beyond compliance certification, and cooperative incentives. The chapter is online at: http://ssrn.com/abstract=874837

V Nielsen, 'Are regulators responsive?' (2006) *Law and Policy* 28(3), 395-416. This article presents the results of research in four regulatory arenas. Using 2,500 legal breaches, the author examines the extent to which regulators apply a responsive, "tit-for-tat" strategy to enforcement. Formal and informal institutional settings are highlighted as important influences on responsiveness.

OHS management and business performance

S Sheikh, B Gardiner and S Brettel, *Health and safety management and business economic performance*, HSE Research Report RR 510, HMSO, Norwich, 2006. This study explores the relationship between the scale of OHS activity undertaken by businesses, and their productivity and economic performance. The study finds that the underlying process and linkage between OHS activity and sectoral performance is complex. It finds that some OHS regulation and enforcement activities have a positive effect on productivity, while others are associated with lower activity. The report is online at: http://www.hse.gov.uk

R Cummings, *Effective health and safety management research,* HSL/2006/109, Health and Safety Laboratory, Derbyshire, 2006. With a view to considering the relevance of the HSE's guidance publication *Successful health and safety management*, and the extent that it fulfils developing requirements, this report presents findings from semi-structured interviews with persons with expertise in OHS management on features associated with effective OHS management. The report is online at: http://www.hse.gov.uk

A McMahon et al, *Case studies that identify and exemplify Boards of Directors who provide leadership and direction on occupational health and safety*, HSE Research Report RR 499, HMSO, Norwich, 2006. This report presents eight case studies of Boards of Directors who provide leadership and direction in OHS, outlining what they do and the benefits to their organisations. The report is online at: http://www.hse.gov.uk

OHS risk management

I Glendon, S Clarke and E McKenna, *Human safety and risk management*, CRC Press, Taylor and Francis, London, 2006. This is the second edition of this book which examines a range of concepts central to OHS risk management including: risk models; perception, motivation and behaviour; human error and human factors; attitudes and behaviours; stress; safety culture; and managing, leading and supervising for OHS performance.

Quantitative risk assessment for major hazards facilities

M Abrahamsson and H Johannsson, 'Risk preferences regarding multiple fatalities and some implications for societal risk decision making – an empirical study' (2006) *Journal of Risk Research* 9(7), 703-715. This article discusses approaches to assessing the significance of fatalities in the process of quantitative risk assessment. The paper presents the results of a Swedish investigation of 87 people regarding concerns about multiple fatalities, as well as discussing the application of N^{β} models in public decision making about major hazards.

Organisational culture

A Hopkins, 'Studying organisational cultures and their effects on safety' (2006) *Safety Science* 44, 875-889. This article discusses different approaches to studying organisational culture and its influence on

Key research & reports (continued)

safety, focusing particularly on information assembled for inquiries into major accidents and drawing on specific examples of major accidents.

Procurement and OHS

S Peckitt and S Coppin, 'Revitalising environmental, health and safety management in public sector construction projects – a case study' (2006) *Policy and Practice in Health and Safety* 3(2), 63-76. This article describes how excellent performance was achieved in a large, public sector construction project in the UK through partnering, integrated teams, gateway management, enhancing planning supervision and setting contractual standards.

Labour hire workers

E Underhill, 'Labour hire employment and independent contracting in Australia: two inquiries, how much change?' (2006) *Australian Journal of Labour Law* 19(3). This article discusses the Victorian and federal inquiries into labour hire employment (both reporting in 2005) and the extent to which they have contributed, or may contribute, to improving protection for workers in labour hire.

Illegal immigrants

R Guthrie and M Quinlan, 'The occupational safety and health rights and workers' compensation entitlements of illegal immigrants' (2006) *Policy and Practice in Health and Safety* 3(2), 41-62. This articles examines the OHS and workers' compensation obligations of employers who engage illegal entrants or persons working contrary to visa requirements. It compares the situation in Australia, the US and Europe.

Hazardous substances

D Walters, 'The efficacy of strategies for chemical risk management in small enterprises in Europe: evidence for success?' *Policy and Practice in Health and Safety* 4(1), 81-116. This article examines current national and sectoral approaches to improving chemical risk management in small firms in several European countries, pointing to the need for strategies and tools to address specific needs with regard to knowledge, understanding and support, and evaluation of these.

Nanotechnology

A Lin, 'Size matters: regulating nanotechnology' (2007) *Harvard Environmental Law Review* 31 (*forthcoming*). This article argues that in view of nanomaterials' unique abilities to penetrate the body's defenses or to persist in the environment, existing health and environmental statutes are not adequate for addressing potential risks and that rather, nanotechnology warrants legislation specific to its manufacture and use. The article proposes notification and labeling requirements for all products containing nanomaterials. For products containing nanomaterials in a "free" form, which pose potentially greater health and environmental risks, the article also proposes a screening process, post-marketing monitoring, and a requirement that nanotechnology companies post a bond to cover potential liabilities. The author argues that the proposal creates an incentive to perform much-needed research, establishes funding to redress adverse effects, and sets the stage for further public consideration of nanotechnology. The article is online at: http://ssrn.com/abstract=934635

R Sequeira et al, 'The nano enterprise: a survey of health and safety concerns, considerations, and proposed improvement strategies to reduce potential adverse effects' (2006) *Human Factors and Ergonomics in Manufacturing* 16(4), 343-368. This article reviews articles from scientific journals, project studies, environmental and worker protection agency reports with the aim of identifying risks arising from manufacture and research in nanotechnology, and strategies to minimise risks.

Major hazards

J Bell and N Healey, *The causes of major hazards incidents*, HSL/2006/117, Health and Safety Laboratory, Derbyshire, 2006. This report reviews existing literature on the causes of major hazard incidents, relevant control measures and behaviours that can prevent incidents occurring. The review was undertaken to take stock of the existing evidence base, identify gaps and suggest how these gaps might be addressed by further research. The report is online at http://www.hse.gov.uk

Key research & reports (continued)

Asbestos

(2006) *Journal of Occupational Health and Safety – Australia and New Zealand* 22(5). A series of articles in the October edition of this journal discuss: the shift in global production and use of asbestos products away from developed to industrialising nations; trends in compensation of asbestos-related disease; the epidemiology of mesothelioma; causation of and compensation for asbestos-related lung cancer; Australian asbestos codes of practice; and union campaigns for asbestos legislation reform.

Mining

N Gunningham and D Sinclair, 'Overcoming the disconnect between corporate OHS commitment and site level performance', in Proceedings of NSW Minerals Industry OHS Conference, Leura, NSW, 2006. Drawing from work undertaken with a number of mining companies in NSW, this paper examines the nature of the disconnect, how it might be overcome, and how companies can best "regulate from the inside". It explores the role of process based safety (systems, standards and procedures); of measuring, monitoring and oversight; and industrial relations. The paper is online at:
http://www.nswmin.com.au/about_nswmc/publications/2006_ohs_conference

Return to work

E MacEachen et al, 'Systematic review of the qualitative literature on return to work after injury' (2006) *Scandinavian Journal of Work Environment and Health* 32(4), 257-269. This article reports on a systematic review of the qualitative research literature on return to work, with the aim of better understanding the dimensions, processes and practices of return to work. The review found that over and above managing physical function, successful return to work requires goodwill and trust.

Other developments

Workplace fatalities – The Australian Safety and Compensation Council (ASCC) report titled *2004-05 Notified Fatalities* provides details and analysis of the 139 fatalities notified to state and territory OHS authorities during 2004-05. The report is online at: http://www.ascc.gov.au

Formaldehyde – the National Industrial Chemicals Notification and Assessment Scheme (NICNAS) released its report into the priority existing chemical formaldehyde. The report examines the uses, exposure and health effects of formaldehyde, and makes recommendations for its hazard classification, exposure standards, use, hazard communication and risk control in specific industries. The report is online at: http://www.nicnas.gov.au

Workplace violence – A new report from the US National Institute for Occupational Safety and Health (NIOSH) titled *Workplace violence prevention strategies and research needs* (publication number 2006-144), summarises discussions from the conference *Partnering in Workplace Violence Prevention: Translating Research to Practice*. The report presents the information, ideas, and professional judgments emerging from the conference, covering: definitional issues, barriers to prevention practice, gaps in prevention research, prevention programs and strategies for criminal intent violence, customer/client violence, worker-on-worker violence and personal relationship violence, as well as the role of a wide range of potential stakeholders and advocates. The report is online at: http://www.cdc.gov/niosh/docs/2006-144/

International news

European working conditions survey - The Dublin based European Foundation for the Improvement of Living and Working Conditions conducts working conditions surveys every five years. The surveys provide valuable insights into quality-of-work issues. The first survey was conducted in 1990 and preliminary results of the fourth survey, conducted in 2005, are now available. The survey presents the views of workers on a wide range of issues including work organisation, working time, equal opportunities, training, health and well-being, and job satisfaction. Nearly 30,000 workers were interviewed face-to-face for the 2005 survey. The preliminary results suggest that exposure to risks has stayed broadly unchanged or gone up slightly since the first survey. However, the survey found a rise in work intensification, with more people working at high speeds and to tight deadlines. The pace of work is also a concern as it is frequently influenced by factors over which the worker has no control. The full *European Working Conditions Survey* report will be published in February 2007. A summary of the results of the survey is online at: http://www.eurofound.eu.int/ewco/surveys/EWCS2005/index.htm

Key Cases

***New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* [2006] HCA 52**

In mid-November 2006 the High Court of Australia, by a 5:2 majority, dismissed challenges by unions and the states to the constitutional validity of the federal government's *Work Choices* legislation, which amended the federal *Workplace Relations Act 1996*. The majority of the High Court (Gleeson CJ and Gummow, Hayne, Heydon and Crennan JJ) found that the whole of the *Work Choices* legislation was valid. Justices Kirby and Callinan dissented and, for different reasons, found the entire *Work Choices* law invalid.

The majority gave a very broad interpretation to the corporations power in placitum 51(xx) of the Constitution. It rejected the argument put by the NSW State government that the corporations power did not extend to regulate the internal relationship between trading or financial corporations and their officers and employees, but only regulated their "external" activities, that is their trading, financial or foreign activities. It also rejected various arguments by Victoria, NSW and the Australian Workers Union in Queensland about the relationship between placitum 51(xx) and the placitum 51(xxxv) (the conciliation and arbitration power) and determined that (at paragraph [223]):

> The course of authority in the Court denies to par (xxxv) a negative implication of exclusivity which would deny the validity of laws with respect to other heads of power which also had the character of laws regulating industrial relations in a fashion other than as required by par (xxxv).

The majority decision also upheld the validity of *Work Choices*' exclusion, in section 16 of the *Work Choices* legislation, of State laws. It stated (paragraph [370]) that the arguments for the invalidity of section 16

> pointed to nothing in s109 [of the Constitution] itself or in the case law on s109 suggesting that s109 will not cause Commonwealth law to prevail over an inconsistent State law and render it invalid to the extent of the inconsistency unless the Commonwealth law provides some regime for regulating each particular aspect of the topics dealt with by the State law.

One consequence of the decision is that federal legislators no longer have to rely on the conciliation and arbitration power in placitum 51(xxxv) when regulating industrial relations. While the decision made very little mention of OHS, it does suggest that the federal government now can use the corporations power to regulate OHS - at least for corporations.

The majority decision did address one aspect of OHS regulation. The majority rejected an argument that rights of entry under the NSW and Western Australian OHS statutes are not affected by the federal law,

Key Cases (continued)

because these statutes gave rights of entry to officials of organisations registered under State laws (which cannot be registered under Schedule 1 to the *Work Choices* legislation). The majority rejected this argument and stated (at paragraph [283]) that:

> it is not necessary to consider whether it is right to say that an organisation registered under a State industrial system cannot be registered under Sched 1. It is enough to decide that, as the Commonwealth submitted, s 756 does not require that the right of entry under an OHS law be derived from the holding of office in an organisation registered under Sched 1.

The majority held that section 756 bound everyone who had a right of entry, regardless of whether their organisation was state or federally registered.

Transport Industry—Mutual Responsibility for Road Safety (State) Award and Contract Determination (No. 2), Re [2006] NSWIRComm 328

In these proceedings before the Full Bench of the New South Wales Industrial Relations Commission, the Transport Workers Union of NSW argued for the incorporation of safe driving plans into a truck driving award in NSW. The Union argued that the newly made provisions in the *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005* were not sufficient to deal with the issue of linking remuneration to distance travelled, which led to widespread drug use and fatigue affecting the health and safety of drivers. Employers and retail and transport groups opposed the application, arguing that the *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation* addressed OHS and that further regulation would give rise to confusion in the industry to the detriment of OHS. It was also argued that that only Acts of Parliament could create obligations relating to OHS.

The Full Bench accepted the Union argument, and held that it was dealing with OHS as the subject matter, and not with specific legislation. It found that OHS provisions served an important social purpose, and that the legislature had sought to preserve existing regulation in the area. It determined that under section 10 of the *Industrial Relations Act* 1996 (NSW), it could include provisions regulating OHS matters. Further, it found that the 2005 Regulation did not link driver fatigue with remuneration, and that the Union's proposal addressed this omission. The proposed safe driving plan requires the name and address of the relevant transport operator and the period in which work is required; details of how the work to be performed is remunerated and measured; details of how the remuneration method can monitor and measure driver fatigue; how rest breaks will be taken; and the means by which drivers can be tested for drugs and alcohol. The transport operator and the consignor of a delivery would be required to keep the plan for a minimum of six years.

The Full Bench adopted the Union's proposal for a new Award (*Transport Industry - Mutual Responsibility for Road Safety (State) Award*) and Contract Determination (*Transport Industry - Mutual Responsibility for Road Safety (State) Contract Determination)* for a 12-month trial period, finding that OHS would be assisted and that it was in the public interest to have further regulation. The Full Bench also made a ruling that transport companies must have a testing procedure for drug and alcohol abuse, and a ruling on a specific "Bluecard" training program.

Inspector Ken Kumar v Owens Container Services Australia Pty Ltd [2006] NSWIRComm 324; *Inspector Ken Kumar v John Julian Rose* [2006] NSWIRComm 325; *Inspector Ken Kumar v David Aylmer Ritchie* [2006] NSWIRComm 323

In this case, a depot manager was fatally injured in an explosion while cleaning a tank using a highly combustible solvent at a tank washing facility operated by Owens Container Services Australia Pty Ltd, which at that time was part of the Owens Group which comprised approximately 30 companies, operating in Australia, New Zealand and Fiji.

NSW WorkCover brought charges under the *Occupational Health and Safety Act* 2000 (NSW) against Owens Containers and, under section 26 of the Act, against its division general manager and the Group's CEO. The charges alleged that the parties failed to provide a safe system of work, failed to ensure plant was safe, failed to provide adequate information, instruction, training and supervision; and failed to provide or ensure the use of safe footwear.

Key cases (continued)

Section 26 deems each director of the corporation, and each person concerned in the management of the corporation, to have contravened a provision of the Act which has been contravened by the corporation, unless the director or manager can show that they were not in a position to influence the conduct of the corporation in relation to the contravention; or that if they were in such a position, they exercised all due diligence to prevent the contravention.

The CEO of the Owens Group contested the section 26 charge. The CEO lived and worked in New Zealand and argued that he had no day-to-day involvement with the operation of the Owens Group companies, which were managed by the general manager of each division. He underwent OHS training every few years but was not personally involved in the OHS of particular businesses because he considered that he had inadequate specialist knowledge and expertise. He argued that he was far too remote to be able to effectively influence the conduct of the corporation in relation to its contravention, as he spent less than one day a month on Owens' container division, and of that time only about one-third was allocated to its Australian operations.

At paragraphs [168[-[170] Haylen J held that:

> 168 … the term "persons concerned in the management" of a corporation has generally been treated as encompassing those who have decision making and policy powers such as exercised by directors. The essence of these provisions is the control exercised by the individual. Not surprisingly, all these cases treat a director as at the apex of control and authority and, in my view, s 26 adopts the same approach.
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> 169 A particular defect in the approach urged by the defendant, therefore**,** is that it attempts to impose a preliminary test of hands-on involvement and participation in safety matters to delineate the class of director or person involved in the management of the corporation that is caught by the section. The section does not operate in that way. In clear words, the section operates so that each director of the corporation and each person concerned in the management of the corporation is taken to have contravened the same provision that was contravened by the corporation and then reverses the onus of proof so that the director or the individual may avoid liability if he or she is able to show either that they were not in a position to influence the conduct of the corporation in relation to its contravention or, that being in such a position, they used all due diligence to prevent the contravention by the corporation. In the case of directors, all such directors are caught and the only defence is to be found in subsection 1(a) and (b).
>
> 170 As already noted, the construction urged by the defendant suggests that this approach could not have been intended by the legislature because, by the very nature of their roles, all directors are capable of influencing the actions of the corporation. In dealing with this argument it is well to remember that the Act imposes a strict or absolute liability on employers in relation to safety at the workplace. It is quite consistent with that approach that where a corporation is the employer that strict liability applies to those who are the operative minds of the corporation, namely the directors. There is nothing incongruous or unlikely about such an approach. The legislature has, however, provided a limited defence by allowing liability to be avoided if the director demonstrates that he or she was not in a position to influence the conduct of the corporation in relation to the contravention or, being in such a position, used all diligence to prevent the contravention by the corporation. Those defences focus upon the contravention and, in a sense, recognise that in the "real world" (so heavily relied upon by the defendant) there may be situations where, for a variety of reasons, a director was not able to influence the conduct of the corporation. Hypothetical examples are of necessity artificial but it is not beyond the realms of possibility that a director may have been in a minority on the Board in urging a more costly but effective system of safety that the other directors were not prepared to adopt or, as suggested by the prosecutor, at the relevant time a director was on leave of absence or suffering some other disability when a particular policy decision was taken and may not have been informed of that decision.

Haylen J consequently found that the CEO was in a position to influence the conduct of the corporation. He further found that the CEO had not exercised “all due diligence” because exercising due diligence would have involved a proper audit and risk assessment of the facility; proper training in OHS of all employees; a proper audit process or supervision and checking to ensure the system was working rather than relying on assumptions; and a system that would have resulted at the very least in the CEO knowing that people in OHS positions were trained, that monthly safety audits were undertaken and that risk assessments of new facilities had been carried out.

For another case involving a successful prosecution of three directors of a joint venture between an American and Australian company, see ***WorkCover Authority of New South Wales (Inspector Belley) v Akerman-Apache (Joint Venture) Pty Limited, Jonathon Dwyer Herbert and John Lindsay Walker*** [2006] **NSWIRComm 370**

Key cases (continued)

Gray Bruni Constructions v Victorian WorkCover Authority (Occupational and Business Regulation) [2006] VCAT 1969

Section 128 of the *Occupational Health and Safety Act* 2004 (Vic) gives a person to whom a prohibition notice has been issued a right to seek an internal review of the determination to issue the notice. The Victorian WorkCover Authority is then empowered to affirm or vary the reviewable decision or else set it aside and substitute another decision considered appropriate. Section 129 of the Act provides a further right to seek review from the Victorian Civil and Administrative Tribunal (VCAT).

In this case, VCAT held (at paragraph 31) that

> In exercising this merits review jurisdiction the Tribunal reaches its own decision on the merits of the matter before it rather than reviewing the propriety or legality of the decision made by the initial decision-maker. A question for the Tribunal is not whether the decision under review was *'open'* to the initial decision-maker as a matter of fact or law but rather what the correct decision upon the material before the Tribunal is.

The Tribunal is required to reach the "correct or preferable" decision on the material before it (see paragraph 32).

VCAT found that the review officer conducting the internal review did not reach his own decision as to whether the correct or preferable decision was to issue or not issue the relevant prohibition notices, but rather he asked whether it was "open" to each of the inspectors to issue the relevant notice.

Section 112 of the *Occupational Health and Safety Act* 2004 (Vic) provides that prohibition notices can be issued to a person "who has or appears to have control over the activity". In this case the "activity" concerned was the laying of pipes with an internal diameter of 1.5m and an excavation that is approximately 3m deep without suitable ground support. An issue in this case was whether the Mildura Rural City Council had "control" over that activity. The Authority submitted that the word "control" should be given a wide meaning so as to give the fullest effect to the beneficial intention of the statute, and that there was no need to show that the relevant person had day-to-day or minute by minute supervision of an activity. It argued that the mere fact that Council had outsourced this civil engineering project to contractors (Gray Bruni) did not relieve it of its obligation to see to the safety of those who carried out the work. The fact that others, including the contractor, may also have been regarded as in "control" for the purposes of the statute was irrelevant. The Authority argued that the Council had control in two senses. First, it had a contractual right to direct that a sub-contractor engaged by the contractor not perform trenching work in an unsafe manner by virtue of the terms of its contract with the contractor. Second, it had control in that it saw it as within its area of authority to give a direction to the sub-contractor which was complied with by that sub-contractor. The Council argued that the word "control" in section 112 meant actual control and not the right to exercise it deriving by some abstract entitlement in contract or by virtue of ownership. The question was: who was in actual control at the time that the activity was being carried out? VCAT agreed with the Council's argument, and held (at paragraph [69]) that the Council

> was not *'in control'* of the trenching activities on 13 February. If it were appropriate to view this matter in another way I do not believe that there was evidence then or now which could properly have satisfied [the inspector issuing the prohibition notice] that Council was *'in control'* of these activities.

Another issue in this case pertained to a prohibition notice issued against the contractor. It was argued that a prohibition notice issued to the contractor was invalid because there was no basis upon which it was reasonable to believe that an activity was occurring as at 15 February 2006 (two days after the notice issued to the Council) or that there was one which might occur at the site but if it occurred would involve an immediate risk to the health and safety of any person. It was argued that one or other of those beliefs was necessary for the valid issue of the notice to the contractor. VCAT upheld this argument, stating (at paragraph [81]):

> Work had stopped entirely. The offending sub-contractor had been ordered off the site. The offending sub-contractor had received its own prohibition notice. There was no reason to think that the offending sub-contractor would do any further work on the site, in fact it did no more work on site. [The inspector] correctly observed that there were hundreds of metres of drain to lay. Clearly someone was going to be tasked at some point with the responsibility of completing that work. Everything which had happened following the regrettable experience … on 13 February indicated full and complete co-operation by both [the contractor] and the Council. On 14 February there was a meeting at the Council chambers attended not only by a group of inspectors from the Authority but also senior executives from [the contractor] who had taken the trouble to travel from Melbourne. In the evidence before me no single reservation or reluctance on the part of Council and [the contractor] to co-operate with the Authority is demon-

Key cases (continued)

strated. There was nothing which either the Council or [the contractor] was asked to do which it failed to do. I specifically reject any contention that [the contractor] failed to produce documentation which it was asked to produce.

At paragraph [82] VCAT accepted that:

something more than the mere possibility of occurrence must be made out. Unless this were true it is difficult to see how a conscientious inspector could ever refrain in any circumstance in issuing a prohibition notice where any hazardous work was being undertaken.

Inspector Gill v Liana Park Pty Ltd [2006] NSWIRComm 348

In this case a labour hire company was prosecuted after an employee had been seriously injured at a host employer's workplace. (The host employer was also prosecuted). A director of the labour hire company visited the offices at the host employer's freight terminal regularly to discuss safety and employment issues, but she was only allowed access to her employees' work area about once every six months because she didn't have the appropriate security clearance. The host employer was responsible for day-to-day supervision and control of the labour hire employees. The court said these circumstances gave rise to special responsibilities on the part of the labour hire company to ensure the safety of its employees in the workplace, and, at paragraph [13] it noted that:

[I]t is no answer on the part of the [labour hire company] to contend that it could not properly assess and supervise its workers at the freight terminal because of security issues and restricted access or that the host employer had sole responsibility for worker safety ... In the [labour hire company's] situation it was therefore incumbent upon it, in the absence of being able to provide direct day to day supervision to ensure, by appropriate contact with the host employer, that its employees were adequately supervised for example by ensuring that they wore correct clothing while on the job.

The Gretley Appeal to the Full Bench of the Industrial Court of New South Wales

The Full Bench of the Industrial Court of NSW has now handed down its decision on the appeal in *Newcastle Wallsend Coal Company Pty Ltd & Ors v McMartin* [2006] NSWIRComm 339 (5 December 2006). The decision overturns previous heavy fines imposed on two of the company officers, but it affirms the guilt of the two companies concerned in the management of the Gretley colliery when four miners died in an inrush of water on 14 November 1996, and re-affirms the personal conviction of the Mine Manager at the time. Neil Foster, Lecturer in the Faculty of Business and Law at The University of Newcastle and member of the OHS Regulation Research Consortium examines the decision.

Background

Newcastle Wallsend Coal Co (NWCC), which was itself owned by Oakbridge Pty Ltd (OPL), operated the Gretley coal mine. It had received permission to work in an area where it was known that there was an abandoned mine nearby, the "Young Wallsend" mine. This mine had not been worked since the 1920s. The Department of Mineral Resources (DMR) had provided NWCC with maps which seemed to indicate that the area where they were proposing to mine was some distance away from the abandoned mine. It was known that the abandoned mine had been filled with water.

On 14 November 1996, while extending the new mine, the abandoned mine was broken into, and the subsequent inrush of water killed four miners, Ted Batterham, John Hunter, Mark Kaiser and Damon Murray. It emerged after the tragedy that the mine maps which had been supplied by the DMR were inaccurate.

Prosecutions

After a special commission of inquiry and a coronial inquest, prosecutions were commenced against the two companies NWCC and OPL, for breaches of sections 15(1) and 16(1) of the NSW *Occupational Health and Safety Act* 1983 (corresponding to sections 8(1) and 8(2) of the current *OHS Act* 2000). One of the workers who

The Gretley Appeal (continued)

died was an employee of NWCC; the other three were employees of a "labour hire" firm, United Mining Support Services Pty Ltd (UMSS). Of course it was clear that the deceased workers were not the only ones "at risk", and so the prosecutions were also supported by risks created to other employees and to non-employees working at the mine.

In addition to the companies, charges were laid against 8 individuals who were alleged to be "concerned in the management" of the companies, under s 50 of the 1983 Act (corresponding to s 26 of the *OHS Act* 2000).

Staunton J at first instance found the charges made out against both companies and against three of the managers: Mr Porteous, who was the Mine Manager on the day of the incident, Mr Romcke, who had been the Mine Manager when the decision was made to proceed based on the faulty maps, and Mr Robinson, who was the Mine Surveyor on the day of the incident.[1] In subsequent sentencing proceedings, the companies were fined a total of $1.46 million, Mr Porteous $42,000, Mr Romcke $30,000 and Mr Robinson $30,000.[2]

The Appeal

The appeal from the decision of Staunton J was delayed by other proceedings commenced by the now-convicted defendants.[3] The Full Bench has now delivered its decision on the appeal proper. In the end all members of the Full Bench (Walton J, VP, and Boland J delivering a joint judgement; Marks J writing separately) agreed with each other and with the decision of Staunton J as to the liability of the companies. Mr Robinson's conviction was overturned by all members of the Full Bench, and Mr Romcke's sentence effectively overturned. Marks J, however, disagreed with the other members of the court on the sentences that should have been imposed on the remaining accused, and made some very scathing comments about the prosecution process.

(a) Liability of the companies

The Full Bench agreed (in the majority joint judgement of Walton and Boland JJ, and the separate judgement of Marks J) that both NWCC and OPL were justifiably found guilty of breaching sections 15 and 16 of the 1983 Act, and that neither of the defences in s 53 were made out. The route by which the two judgements reached that result, however, differed slightly.

Marks J, in a very helpful passage, noted that the case could have been put in a very straightforward way. The obligations under ss 15 and 16 were said many times by past decisions to have been "absolute" obligations, not requiring proof of a "guilty mind". To take the s 15 obligation as the prime example, it was an obligation to "ensure the health, safety and welfare at work of all the employer's employees". Once there was harm to an employee, connected in some causal way with the workplace, then there was a *prima facie* breach of the provision.[4] In this case it was crystal clear that once the adjoining abandoned workings were breached, there had been a failure to ensure safety. As Marks J put it:

> it would only have been necessary for each of the corporate defendants to have been charged under ss 15 and 16 of the Act with breaches constituting the holing in of the adjoining abandoned workings. As the holing in was caused by the mining operations, there could be no doubt that the corporate defendants had, in a causal sense, brought about each breach. Accordingly, the only matters for consideration would have been those raised by s 53. The onus of satisfying the Court about the matters covered by s 53 would rest with the defendants. All that would have been necessary for the prosecution to establish was that mining operations were being conducted by both corporate defendants, that the holing in occurred and that some persons were killed and others injured. It is a prosecution case that should have taken no more than a few court hearing days to establish.[5]

The conviction would then depend on whether or not it could be shown by the companies that under s 53 it was "reasonably practicable" for them to have avoided the risk. This in turn depended very heavily on expert evidence as to whether it was reasonable for the companies to have relied completely on the maps provided by the DMR, or whether they should have conducted further research to ensure that the maps were accurate. Marks J at [701] agreed with the majority judgement that the company did not do what was "reasonably practicable" in the circumstances. The majority at [154]-[212] reviewed in some detail the expert evidence of a Mr Adam and a Professor Thomas, called by the prosecution, who both effectively held that a competent surveyor reading the DMR maps would have noticed a number of anomalies, and, especially given the potentially disastrous consequences of those maps being in error, would have undertaken further research to determine whether or not the maps were accurate.

The Gretley Appeal (continued)

As Marks J points out (perhaps with some exaggeration) a case of that sort, while involving difficult questions of the assessment of expert evidence, would not have taken very long. Yet this case took 70 hearing days on the question of liability alone. The length and complexity of the actual charges laid against the various defendants seems to have been the main cause. Twelve different charges were laid against each of the companies and individuals, divided up into charges covering three different time periods- "type 1" charges relating to the actual night of the inrush, "type 2" charges relating to a period from September to November while the mining was proceeding, and "type 3" charges relating to a period stretching back to March 1994 when the decision was first made to commence mining using the defective maps.

The majority judgement accepted this formulation of the charges, and proceeded to examine each of the alleged "particulars" which had been provided. It is impossible to do justice to that lengthy consideration in this note, but the result was that by and large most of the particulars on which Staunton J had based her decision to convict the companies were found to be established. While there may be some doubt about this approach, which seems to be unnecessarily generous to the defendants in examining each specific "failing" on the standard of "beyond reasonable doubt", it seems clear that the defendants could not complain that they did not have a fair hearing.

In the course of the judgement another important issue was raised. The majority dealt with it under the heading of "risk" from para [387] onwards. The view that was adopted seemed to be that, despite the fact that from the beginning of the mining process mining was being undertaken in the vicinity of abandoned workings with no accurate maps as to where the boundary of those workings lay, a relevant "risk" only arose from the point where the mining took the workers within 50 metres of the old workings.

With respect, this seems contrary to the overall thrust of the legislation and to decided cases. If something is "dangerous", as the majority concede, then surely to expose workers to it is, *at the time the activity is undertaken,* to "fail to ensure" their safety. To operate on a defective map is to expose workers to this danger every moment that mining proceeds. The fact that, in hindsight, it is apparent that the old workings were some distance away, does not remove the danger to which workers were being exposed as far as the employer was aware. If the employer cannot establish a s 53 defence, because it was careless not to further research the maps, then it seems obvious that the safety of workers, moment by moment, was not being ensured. This question of the judicial interpretation of "risk" seems to warrant further investigation not possible in this brief note.

Having accepted that certain failures of the company had causally led to the risk to safety to employees, the majority reviewed the application of the s 53 defences, and agreed with Staunton J that it was reasonably practicable for the companies to have conducted more research into the location of the old workings (see eg the summary at [451]-[457]). The evidence of Mr Adam and Professor Thomas, as noted previously, was crucial on this point: that the existing maps on their face raised a number of obvious problems which should have been further investigated.

Despite his Honour's preference for the more straightforward approach noted previously, Marks J also conducted an analysis of the charges in terms of the specific particulars and generally agreed with their analysis, including the majority's view that no "risk" arose until 29 October 1996, when the mining crossed the 50-metre barrier- [654].

But Marks J's view of the point of "risk" arising had a major impact on his Honour's view of which charges could be made out. Effectively no charges were made out where the conduct concerned took place before the 50-metre point- [669]. Charges could be established in relation to conduct that occurred between 29 October and 14 November, the date of the inrush. But the overlapping of the "type 2" and "type 1" charges meant that there was duplicity in the charges, and Staunton J ought at the trial to have required the prosecution to elect to make either one or the other type of charge, but not both- [697]. Still, in the end there was a clear failure to ensure safety on 14 November, and hence the charge against both companies was made out- [699]. Nor, as noted before, were the s 53 defences established- [701].

(b) Liability of the officers

A major part of the controversy surrounding the original decision was the conviction of the three company officers under s 50 of the 1983 Act (the equivalent of current s 26 of the *OHS Act* 2000). That provision broadly states that where a company has contravened the Act, then directors and others "concerned in the management" will be deemed to be guilty of the same offence, unless they can make out one of two

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specific defences. The defences are that either they were "not in a position to influence" the corporations' conduct in relation to the contravention (s 50(1)(b)), or that they exercised "due diligence" to prevent the contravention (s 50 (1)(c)).

A major issue arising in this case was the scope of the phrase "concerned in the management". None of the officers charged were formally on the board of the companies concerned, so it became necessary to define more precisely what it was to be concerned in management for the purposes of s 50. Staunton J gave what was effectively the first detailed discussion of the concept in her liability judgement, reviewing a number of decisions on the concept from other areas but carefully applying them to the workplace safety context.[6]

The criteria set out by her Honour may be summarised as follows: that a person will be "concerned in the management" of a company for the purposes of s 50 of the 1983 Act if they have: (i) decision-making power and authority, which; (ii) goes beyond the mere carrying out of directions as an employee; and (iii) is such as to affect the whole or a substantial part of the corporation; and (iv) which powers relate to the matters which constituted the offence under the Act.

The Full Bench in the Gretley appeal noted at [479] that a pair of intervening decisions handed down after Staunton J's judgement at first instance,[7] particularly that of the Court of Appeal, had now settled the construction of the phrase "concerned in the management", and said that the discussion of Staunton J at first instance in the Gretley proceedings represented the settled meaning.

It was clear from the facts that Mr Porteous, as the overall Mine Manager at the time, fell within this description. The Full Bench on appeal agreed- see [485]-[486] of the majority judgement, Marks J at [708]. There was more doubt over the position of Mr Romcke, who had been Mine Manager at a previous stage (when the mining operations commenced) but was not at the time of the inrush. But the majority held that, since the company had been convicted of offences against ss 15 and 16 based in part on a failure to properly check the maps, and since Mr Romcke was a manager at the time of failure to check, then he was liable to be convicted under s 50.

The majority did find, however, that while Mr Romcke was concerned in the management of NWCC, there was insufficient evidence to prove beyond reasonable doubt that he had such responsibility within the parent company, OPL. Hence they overturned Staunton J's finding insofar as the offences committed by Mr Romcke under s 50 were based on the conduct of OPL- see [551]. This is of course exactly the correct approach- on any view of s 50, the requirement that the person be actually "concerned in the management" of the specific corporation is a fundamental element of the offence that must be proven beyond reasonable doubt.

Marks J devoted some time to a careful discussion of Mr Romcke's liability, given his view that no offence had been committed by either of the companies before the 50-metre mark was reached on 29 October 1996. The question for him, then, was, as he put it at [715], whether s 50 deemed there to be a contravention of the Act where the personal defendant was only concerned in management *prior* to the commission of any offence, but engaged in activity at that stage which led to the *later* commission of an offence. After a careful discussion of the competing issues of law and policy, his Honour concluded at [727] that the purposes of the Act would best be served by imposing liability on a defendant under s 50 even where the defendant's role in management had ceased before the actual breach. On this basis Mr Romcke's conviction could have been upheld (as we will see below, at the sentencing stage it was not).

On the other hand, the majority found that it was not possible to agree with Staunton J that Mr Robinson, the Mine Surveyor, was relevantly "concerned in the management" of either company. Concern had previously been expressed about the finding that Mr Robinson was a manager.[8] The majority held that his role "was not managerial, but rather was more akin to that of an advisor or consultant to mine management in relation to surveying"- [517]. Mr Robinson was not charged with any statutory managerial responsibility under the relevant legislation; he supervised only 2 or 3 staff and was himself under the Mine Manager; he prepared plans for management, but did not himself participate in management meetings. Mr Robinson's conviction was overturned.[9]

So far the preceding discussion has focused on the question of management. Mention should be made of the application of the **statutory defences** to the personal defendants who were found to be concerned in management.

One very helpful feature of the decision is that it clarifies (at least for the purposes of the Industrial Court) the somewhat vexed question of whether the general statutory defences under s 53 are available to a defendant

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charged under s 50, or whether such a defendant is confined to the two specific defences listed in s 50.[10] All members of the Full Bench agree that s 53 defences are not available in a s 50 charge.[11]

Each of those who were held to be concerned in the management of the corporation had a possible defence based on either lack of influence or due diligence. One of the unfortunate aspects of the conduct of the litigation seems to be that neither presented clear evidence on these points. Clearly both were in a position of influence. But the majority notes at [500] that in relation to Mr Porteous there was "no evidence that [he] used all due diligence to prevent the contravention", and at [557] that Mr Romcke "called no evidence" on the point. The comments of the majority make it fairly clear that their view would be that both officers could (and should) have done more to arrange further checking of the maps. But it is unfortunate that the specific issues of "due diligence" were not explored in more detail.

(c) Sentences for the companies

On appeal, despite some criticisms of the reasoning of Staunton J on some points, the majority at [594] upheld the sentences her Honour had handed down for the two companies. Marks J, however, taking a different view of the convictions due to his view about the implications of the "risk" not arising until the 50-metre point was reached, would have only entered two convictions for each company (one under s 15 and one under s 16) rather than all those accepted by the majority- see [702]. He would have imposed an overall penalty for each offence of $300,000 on each company (ie $600,000 for the two companies), in contrast to the $1.46 million imposed by Staunton J and accepted by the majority.

(d) Sentences for the individual officers

The majority accepted that the fine of $42,000 imposed on Mr Porteous, Mine Manager at the time of the inrush was not "manifestly excessive" and should stand- [602]. However, they dramatically changed the sentence imposed on Mr Romcke, the former Mine Manager. It was going to be necessary to reduce the sentence in any event given that the majority had overturned Staunton J's finding that Mr Romcke was concerned in the management of OPL, meaning that some of the alleged offences were now no longer proven.

The majority was also faced with a recent precedent for not recording a formal conviction against a Mine Manager in the decision of the Full Bench in *Morrison v Powercoal Pty Ltd (No 3) (2005)* 147 IR 117. There a Mr Foster, while found guilty under s 50, had s 10 of the *Crimes (Sentencing Procedure) Act* 1999 applied, and no conviction was recorded.[12]

In the circumstances, despite the clear view expressed in previous decisions that s 10 should only be applied very rarely in OHS prosecutions, the majority held at [628] that Mr Romcke's circumstances warranted the application of s 10 and the dismissal of the charges. Matters mentioned included the fact that he had ceased to be Mine Manager in October 1994 (more than two years prior to the inrush), had an otherwise unblemished record, and interestingly had a "justifiable sense of injustice" because another possible defendant, who clearly bore a major responsibility for the events, had not been charged.

The reference here was to the failure of the prosecutor to charge the Department of Mineral Resources, who had of course supplied the defective maps which had been the main cause of the disaster. Indeed, the majority went further than simply factoring this in to its decision to record no conviction against Mr Romcke. They said at [627]:

> [W[hilst it is not for this Court to question the prosecutorial discretion in determining who it is that will face criminal charges we should express our disquiet, on the information available to us, about a situation where the DMR, the major repository of information about old mine workings, provided plans to the appellants that were fundamentally wrong yet it has not been called upon to explain itself and, if sanction were warranted, has escaped it entirely.

This factor alone may have been a significant matter which influenced the court to enter no conviction against Mr Romcke.

Marks J, while agreeing at [733] with the application of s 10 to Mr Romcke, took a slightly different approach to the sentencing of Mr Porteous. Given his view that the companies had only been guilty of two contraventions each, the sentence for Mr Porteous given by Staunton J needed to be reduced. The result was that he would only have imposed a total penalty of $20,000 on Mr Porteous. Given that he was in the minority, however, the higher penalty upheld by the majority will still stand.

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(e) Other issues

There are a number of other issues that the court dealt with which have not been discussed here (such as the correction of erroneous paperwork commencing the litigation, and matters relating to costs.) But brief reference should be made at least to the scathing remarks of Marks J in his overall consideration of the course of the prosecution, at paras [734] ff. His Honour attacked the prolixity of the charges that were laid and the attitude of the prosecutor, which he effectively characterised as vindictive. In very strong language he said at [734]:

> In my opinion the proceedings constitute an undue waste of the resources of this Court, an undue impost on the finances of the State of New South Wales, an undue expense burden on all of the defendants and, arguably, reflect adversely on the administration of significant beneficial legislation.

And later, after extensive citation of comments made by Staunton J during the trial recording the refusal of the parties to refine or reduce the matters needing consideration, he concluded at [755]-[756]:

> If one takes into account the unnecessarily complex, extensive and repetitive nature of the charges and the manner in which they were framed, together with the refusal to allow the corporate defendants to plead guilty upon discontinuance against the individual defendants, the attempt to pursue higher penalties under s 51A and the denial of mitigating factors in favour of the defendants during the sentencing process, one must query the bona fides of the prosecutor in terms of these proceedings … I would, advisedly, characterise what has happened in these proceedings as constituting more than prosecution, and amounting to persecution of the defendants.

There is much to be applauded in his Honour's plea for prosecutions of this sort to clarify relevant issues at an early stage, and for public officials to be, and to be seen to be, impartial and fair in approaching issues of criminal prosecution. However, with respect, one of his Honour's criticisms seems unjustified. He made a particular point of noting at [746] that at a very early stage of the ultimate hearing an offer was made by the companies concerned to plead guilty, if charges against the personal defendants were dropped. With respect to his Honour, the prosecutor's decision to continue the case against the personal defendants seems entirely justified.

It is well-established that imposing personal responsibility for safety matters on company officers is one of the very effective ways of focussing the attention of those officers on safety issues.[13] The history of prosecutions under s 50 of the 1983 Act up to recent years has, however, mainly been one of prosecution of smaller companies where company officers were mostly directly involved in the particular safety breach concerned. The decision to prosecute the officers involved in the Gretley tragedy was a significant turning-point in sending the message that the law seriously expects senior managers to be devoting time and energy (that is, "due diligence") to issues of workplace safety. Certainly the reaction to the initial prosecutions and convictions has shown that the law has now been very effectively brought to the attention of senior managers. Contrary to the view of Marks J, it is submitted that it was a wise move to continue with the prosecution of individual officers.

There are elements of the Gretley prosecution which can be justifiably criticised.[14] But it is worth stepping back now that the appeal has been heard and reflecting on what the case stands for. The conviction of the companies sends a message that where the lives of many workers are at high risk from a known danger, then the company needs to be very, very careful in planning and executing its work. The expert evidence that was accepted by the court was to the effect that the plans obtained by the company should have raised concerns for any competent mine surveyor, and led to careful extra research. The senior manager who was in charge of the operations of the mine when that failure led to the tragic death of four workers has also been held accountable. Other managers, who were just following company policy, were not convicted. In the end the outcome overall seems to be a fair one, and hopefully one that has served and will continue to serve to focus the attention of senior managers on the life-threatening issues that are raised by large industries.

Endnotes

1. *McMartin v Newcastle Wallsend Coal Company Pty Ltd* [2004] NSWIRComm 202.

2. *McMartin v Newcastle Wallsend Coal Company Pty Ltd* [2005] NSWIRComm 31.

3. *Porteous et al v McMartin* [2005] NSWIRComm 122; *Newcastle Wallsend Coal Company Pty Ltd v Industrial Relations Commission of NSW* [2006] NSWCA 129.

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4. See the cases and discussion in the majority judgement, *Newcastle Wallsend Coal Company Pty Ltd & Ors v McMartin* [2006] NSWIRComm 339, at [213]-[215]. The same approach is followed under the *OHS Act* 2000, ss 8 and 9.

5. *Newcastle Wallsend Coal Company Pty Ltd & Ors v McMartin* [2006] NSWIRComm 339, at para [737].

6. See [2004] NSWIRComm 202 at [885] for the overall summary of criteria, noted in N Foster, "Personal Liability of Company Officers for Corporate Occupational Health and Safety Breaches: Section 26 of the Occupational Health and Safety Act 2000 (NSW)" (2005) 18 *Austn Jnl of Labour Law* 107-135, at 123.

7. *Morrison v Powercoal Pty Ltd and Anor* (2004) 137 IR 253; *Powercoal Pty Ltd and Anor v Industrial Relations Commission of NSW* (2005) 156 A Crim R 269, 145 IR 327.

8. See Foster, above n 6, at 123.

9. Marks J, at [704], somewhat oddly said that it was "not necessary" for him to deal with Mr Robinson's conviction. Presumably this indicated that he was in agreement with the reasoning of the majority on this point.

10. See discussion of this question in Foster, above n 6, at 130 in relation to the identical question whether under the *OHS Act* 2000 the general defences under s 28 are relevant to a charge under s 26.

11. See the majority at at paras [498]-[499]; Marks J at para [705]. See also *Morrison v Powercoal Pty Ltd* (2004) 137 IR 253, *Powercoal Pty Ltd and Anor v Industrial Relations Commission of NSW* (2005) 156 A Crim R 269, 145 IR 327 for discussion of the issue.

12. That provision allows a court to enter no conviction having regard under s 10(3) to: (a) the person's character, antecedents, age, health and mental condition, (b) the trivial nature of the offence, (c) the extenuating circumstances in which the offence was committed, and any other matters considered relevant.

13. See Foster, above n 6, at 116 n 40, citing eg N Gunningham and R Johnstone *Regulating Workplace Safety: Systems and Sanctions*, Oxford University Press, Oxford, 1999 at 217-23.

14. In particular the failure to prosecute both the Department of Mineral Resources, and the labour-hire firm, UMSS, who employed three of the workers. These are matters that are justifiably highlighted in the Institute of Public Affairs paper *The Politics of a Tragedy* (IPA Work Reform Unit, October 2006) (although in other areas not a document whose views I would support.)