The National Review into Model OHS Laws: A Paper
Examining the Duties of Officers and Due Diligence

Neil Foster, Senior Lecturer, Newcastle Law School,
University of Newcastle
Neil.Foster@newcastle.edu.au

May 2009
About the Centre

The National Research Centre for Occupational Health and Safety Regulation (NRCOHSR) is funded by WorkCover New South Wales and WorkSafe Victoria to work to achieve excellence in OHS research and regulation development. The NRCOHSR is a research centre within the Regulatory Institutions Network (RegNet) at The Australian National University (Canberra), and operates in association with the Socio-Legal Research Centre (SLRC) at Griffith University (Brisbane).

The NRCOHSR conducts and facilitates high quality empirical and policy-focused research into OHS regulation, and facilitates the integration of research into OHS regulation with research findings in other areas of regulation. We encourage and support collaborating researchers to conduct empirical and policy-focused research into OHS regulation. The NRCOHSR also monitors, documents and analyses Australian and international developments in OHS regulation and research, as well as related areas of regulation, and produces a web-based series of working papers reporting on research into OHS regulation.

Address for correspondence

National Research Centre for OHS Regulation
Regulatory Institutions Network
Coombs Extension
Cnr Fellows and Garran Road
The Australian National University
Canberra, ACT, 0200
Email: nrcohsr@anu.edu.au

Disclaimer

This is one of a series of papers presented to the Symposium on the National Review into Model OHS Laws organised by NRCOHSR, Regulatory Institutions Network, Australian National University, 5 May 2009. The views expressed in this paper are the author’s alone and do not reflect any formal opinion of the National Research Centre for OHS Regulation, the Regulatory Institutions Network or the Australian National University. They are provided for the purposes of general discussion and are subject to change as new information becomes available.

The paper was drafted with reference to the first and second reports of the National Review into Model Occupational Health and Safety Laws, current Australian OHS legislation (Acts, regulations and codes of practice), and peer reviewed publications. These sources are referenced through the report. Every effort was made to accurately reflect current proposals for the model OHS Act. However, final decisions relating to the model Act are not yet publicly available. Therefore, before relying on the material in this paper, readers should carefully make their own assessment and check with other sources as to its accuracy, currency, completeness and relevance for their purposes.
Introduction

The two Reports of the National Review into Model Occupational Health and Safety Laws (the First Report of October 2008, and the Second Report of January 2009)\(^1\) when read together make a number of recommendations concerning the personal criminal liability of company officers, and the defence of “due diligence”. A previous paper reviewed the current law as to personal liability under Australian law,\(^2\) building on an initial study published in 2005.\(^3\) In this paper I shall assume some familiarity with those papers and concentrate on the recommendations of the two Reports. Some of the material here commenting on the First Report is also contained in “Recent Developments”, but since at the time it was presented the Second Report had not been published, it seems sensible to provide a combined comment on the overall impact of both Reports.

Before turning to the Reports I should record a relatively recent change to the current Australian law which was not mentioned in the previous papers and should have been.\(^4\) In 2008 South Australia’s Occupational Health, Safety and Welfare Act 1986 was amended by the addition of s 59C to the Act,\(^5\) which provides in part as follows:

<table>
<thead>
<tr>
<th>59C—Liability of officers of body corporate</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) If a body corporate or an administrative unit of the Public Service of the State contravenes a provision of this Act, and the contravention is attributable to an officer of the body corporate or an employee of the administrative unit failing to take reasonable care, then the officer or employee is guilty of an offence and liable to the same penalty as for an offence constituted by a contravention by a natural person of the provision contravened by the body corporate or administrative unit.</td>
</tr>
</tbody>
</table>

Effectively this means that every “officer” of a company may now be guilty of an offence of “failing to take reasonable care” to prevent a contravention of the Act by the company. However, the SA Parliament did not when inserting this new provision repeal the previous s 61, which sets up a different liability scheme by providing for the designation of a “responsible officer” who under s 61(3) “must take reasonable steps to ensure compliance by the body corporate with its obligations under this Act”.\(^6\) It seems that obligations apply, then, both to the designated “responsible officer”, and at the same time to every officer of the company. There may be some slight differences between the persons caught by the sections, given that s 61 contains its own definition of “responsible officer”, whereas s 59C relies on the general definition of “officer” in s 4(1),\(^7\) but it seems odd to have the two different schemes in the

---

4 I was alerted to this change, which I should have noticed previously, by re-reading para 8.7 of the First Report.
5 See the Occupational Health, Safety and Welfare (Penalties) Amendment Act 2007 (SA), No 54 of 2007, which commenced operation on 1 January 2008.
6 Some brief comments on the operation of s 61 were offered in my unpublished thesis, The Personal Liability of Company Officers for Company Breach of Workplace Health and Safety Duties (February, 2004), at 172-174. (Copy available on request.)
7 For example, a s 61 “responsible officer” must generally be resident in South Australia, while the broader definition of “officer” in s 4(1) is not so confined.
one Act. It may be that the removal of s 61 was simply not considered when the new provisions of s 59C were inserted.8

The First Report

Chapter 8 of the First Report deals with “Duties of ‘Officers’”. The discussion at 1/[8.3]9 on the benefits of such duties in shaping the “values and culture” of the corporation “to encourage appropriate attitudes and behaviours for health and safety”, is valuable and eminently clear. In my view the differences between some of the options discussed at 1/[8.24]ff are not as stark as the authors of the Report suggest. The “device” of making the liability of an officer dependant on the liability of the company is mainly a way of ensuring that there does not need to be re-litigation of issues. In other words, I would argue that Options 1 and 3 are legally the same. However, as the First Report notes at 1/[8.29], there seems much to be said (even if simply from an educational perspective) for making it a positive duty of an officer to take steps to keep the company in compliance with OHS legislation, rather than the present situation which imposes a liability “after the event”.

Recommendation 40 is that a new Model Act should “place a positive duty on an officer to exercise due diligence to ensure the compliance by the entity of which they are an officer with the duties of care” under the Act. This, then, is a very commendable recommendation, which I fully support.

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

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

But the key question, however, lies in the question of the onus of proof. Will it be up to the prosecution to prove a lack of care by an officer and a lack of “due diligence”? Or will that be a matter on which evidence must be produced by the officer? Chapter 13, sadly, reveals that the National Review took a wrong turning on this issue on the general duties (in this author’s opinion), recommending no reversal of onus for “offences relating to non-compliance with a duty of care”.10

Oddly, however, it is not immediately clear from the First Report whether this recommendation is meant to be applicable to the personal liability recommendation previously made. The Report’s wording, noted above, would impose on an officer a “duty…

---

8 The main debate over the 2007 amendments related to the issues of “industrial manslaughter” raised by s 59, and there seems no Parliamentary comment on the interaction of sections 59C and 61.

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

10 The case in favour of continuing the current “reversal of onus” provisions contained in the NSW and Queensland legislation is noted, for example, in my submission to the National Review. See Public Submission No 30, http://www.nationalohsreview.gov.au/NR/rdonlyres/7770D20A-185A-4A68-B43F-424E3FCA9C2B/0/030NeilFoster.pdf at pp 3-6. See also the very persuasive submission No 42 by Professor McCallum and colleagues, arguing for continuation of the historically recognised reversal of onus in OHS prosecutions.
to exercise due diligence to ensure” compliance. Indeed, as noted above, the authors go out of
their way to note that “[t]he due diligence qualifier… is more stringent than that of
‘reasonable care’”. Does the Report, then, propose that the officer be required to prove the
defence of due diligence?

As much as this author would like to think so, it seems unlikely. If, as ch 13 suggests,
there is to be no general “reversal of onus” provision, then a criminal obligation expressed in
the terms set out in Recommendation 40 would require the prosecution to prove that the
officer failed to exercise due diligence, to the criminal standard (beyond reasonable doubt).
This seems a clearly retrograde step, and should not be taken. The fact is that s 26 of the OHS
Act 2000 (NSW) has proved to be perfectly workable, and in general to produce sensible
results, with the current structure, under which an accused officer is required to bring forward
evidence of either lack of influence, or due diligence.\textsuperscript{11} The Report itself comments in a
different context, at 1/[8.35], on the fact that there are a “limited number of officer
prosecutions undertaken in Australian jurisdictions”. The “Recent Developments” paper and
the 2005 article demonstrate, I think, that to the contrary, there have been a fair number of
to the contrary, there have been a fair number of
to the contrary, there have been a fair number of
officer prosecutions in NSW. But for whatever reason, the statement seems true across other
jurisdictions, and it is submitted that this is not in itself a good thing.

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-

In short, while recommendation 40 is supported, the implication of chapter 13 of the
First Report that the onus of proof in prosecution of officers will lie on the prosecution would
unduly impede the proper operation of the recommendation.

The Second Report

The Second Report turns to related issues as it addresses the definition of “officer” in

Definition of “officer” (pp 51-57)

If obligations are to be imposed on “officers”, a definition of that term is obviously
needed.\textsuperscript{12}

\textsuperscript{11} The logic applying to reversal of onus for directors is the same as that applicable to the general reversal of
onus for employers, and, as McCallum et al note in their submission to the Inquiry, above n 10 at p 8, the
general reverse onus of proof is a feature of the UK legislation and “has worked well for more than thirty years”.

\textsuperscript{12} Although this perception does not seem to have been shared by the drafters of the new Work Safety Act 2008
(ACT), which is due to commence on 1 July 2009. Obligations (of a fairly minimal sort, it has to be said) are
In my view the current NSW legislative reference in *OHS Act* 2000 s 26(1) to “each director of the corporation, and each person concerned in the management of the corporation” is a perfectly adequate definition. The Report authors state at 2/[23.120] that there is a difference of opinion among the commentators as to whether the scope of the phrase is sufficiently clear. But in the latest edition of one work cited to make this point, the author has replaced a comment about the meaning being “not yet settled”, with a reference to two important cases which arguably do provide a fairly clear definition. This is not a critique of the Report, which did not have the latest edition of the work available. But it demonstrates that a course of judicial decision has actually now clarified the operation of the provision.

The Report then goes on in the same paragraph to record that the term has been given a wide meaning and has resulted in middle-level managers being found to fall within that description.

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

Of course it is true that it would be inappropriate for all “middle level” managers to be held personally liable, since such a term may apply to someone who may have minimal ability to influence working conditions or the safety policy of the company. But in that case a properly crafted defence will allow them to plead matters such as the exercise of “due diligence” (or, under the current NSW law, “inability to influence”), which in appropriate cases will exonerate them from personal liability. Arguably, however, the blanket exclusion of a whole class of “middle managers” is far too generous to those who may have substantial *de facto*, if not *de jure*, power and influence over matters impacting on the safety and lives of many workers.

It is useful to note in this context how this definition operated in the Gretley litigation. At first instance the trial judge held that three managers fell within the meaning
of the term “concerned in management”, two of them being designated “Mine Managers” at different times, but the third being the Mine Surveyor. However, it was already being suggested, after the judgment, that the logic of the legislation meant that someone like a surveyor who, while providing information that managers needed did not themselves have a managing role, should not be included within the meaning of the term. On appeal the Full Court of the Industrial Court overturned the conviction of the surveyor on these grounds, commenting that:

In our opinion, Mr Robinson's role was not managerial but rather was more akin to that of an advisor or consultant to mine management in relation to surveying. Mr Robinson was more in a support role than a role that involved managing or directing the business of the two corporations.

These comments show that the Full Bench was well aware of the considerations noted in the Second Report at 2/[23.134]:

The role of an officer in the governance of a corporation is clearly different from the role of providing information upon which the decision makers will act, or implementing the decisions. There is a clear difference between making decisions that provide for the governance of the entity, and making decisions on action to be taken in relation to an item of work or specific activity. The definition of officer should not blur the line between these different roles.

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

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

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

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

18 See the 2005 article, above n 3, at 123.
19 Newcastle Wallsend Coal Company Pty Ltd v McMartin (2006) 159 IR 121 at [517]; for comment see Foster, “Gretley appeal” above n 16 at 123.
"officer" of an entity that is neither an individual nor a corporation means:
(a) a partner in the partnership if the entity is a partnership; or
(b) an office holder of the unincorporated association if the entity is an unincorporated association; or
(c) a person:
   (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity; or
   (ii) who has the capacity to affect significantly the entity's financial standing.

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

In this context it is worth remembering the comments of Spigelman CJ in the NSW Court of Appeal decision in Powercoal Pty Ltd & Foster v Industrial Relations Commission of NSW & Morrison.20 His Honour commented at [102] that the question of what “concerned in the management” means in the OHS Act cannot be resolved simply by consideration of cases dealing with the phrase as used in legislation governing companies; it must take its meaning from the context in which it is used. The relevant issue in considering the meaning of the phrase in the OHS Act is “any aspect of the operations of the company insofar as it raises safety considerations”.

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

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

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

Volunteer Officers

While not having a strong view on the matter, it seems to me that the discussion at paras 2/[23.142] on “volunteer officers” is sensible, and if the graduated penalty model recommended by the Reports is to be adopted, I would support recommendation 87.

Definition of “Due Diligence”

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

The Report correctly notes that the decision in *Inspector Kumar v David Aylmer Ritchie*\(^\text{21}\) is a major discussion of the issue. Unfortunately, for reasons discussed in detail in “Recent Developments”, the decision on the “due diligence” point in *Ritchie* seems flawed.\(^\text{22}\)

I have suggested there that, while the legal analysis of what needs to be shown is impeccable, the application on the facts to Mr Ritchie seemed fairly harsh.

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

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

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

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

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

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

\(^{21}\) [2006] NSWIRComm 323.

\(^{22}\) See “Recent Developments”, above n 2, at 13-16.
While I would take the view that the phrase “due diligence” is reasonably clear already, I see no major problems from attempting to define it in legislation. It is heartening that the proposed definition does not seem to “water down” existing obligations. In particular, I would commend the authors of the Second Report for noting at 2/[23.174] that

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

In other words, mere appointment of an officer to take responsibility for safety issues does not alone exonerate the manager, unless there is reason to think that the officer has themselves been properly trained and equipped to do the job.23

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

In addition to the matters currently noted in the recommended definition, it should also contain reference to the matters discussed in the important decision in Universal Telecasters (Qld) Ltd v Guthrie, where Bowen CJ referred to the need for an officer showing “due diligence” to demonstrate both that they had “laid down a proper system” for dealing with the issues, and “provided adequate supervision” to ensure the system was carried out.24 In addition, the cases currently stress the need for an officer to personally respond to incidents which are drawn to his or her attention, and it would seem to be wise to incorporate this criterion as well.25

Conclusion

To summarise, my view in relation to the recommendations on officer liability and due diligence is:

• I support recommendation 40 in the First Report, but only on condition that the onus of proof be placed on the accused officer, not on the prosecution, as in the current s 26 of the OHS Act 2000 (NSW);
• I do not support recommendation 86 in the Second Report and believe that the term “concerned in management” should be adopted based on the current s 26 to define the scope of personal managerial liability;
• In particular, I would be concerned about any attempt to give “middle managers” as a broad class immunity from personal liability, arguing that the legitimate concerns here can be addressed through the defence or defences provided;

23 Indeed, in the end considerations of this sort explain the conviction in the Ritchie case, where people had been appointed to undertake safety supervision with no real reason to think that they could do the job properly. See the decision, above n 21, at [154].
24 (1978) 32 FLR 360; the words quoted come from the judgment at 363.
• However, as a “fall back” position I would support a definition of the term “officer” similar to that provided in s 9 of the Corporations Act 2001 (Cth), but with a more specific focus on OHS issues rather than financial issues;
• I support recommendation 87 in the Second Report;
• I support recommendation 88 in the Second Report concerning a definition of “due diligence”, subject to the additional matters noted above to pick up elements of the term currently being applied by the courts.