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## **Working Paper 63**

### **Recent Developments in Personal Liability of Company Officers for Workplace Safety Breaches – Australian and UK Decisions**

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## **About the Centre**

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## Introduction

In 2005 I published an article summarising decisions to that point based specifically on the New South Wales (NSW) statutory provisions imposing personal liability on company officers for workplace safety breaches.<sup>1</sup> Four years down the track the courts have been interpreting and developing the law, and it seems appropriate to see where we have come to now. That article also touched briefly on the law of other Australian States and the United Kingdom (UK), and in this update I will (again, briefly) indicate what has been happening in those jurisdictions. In particular, there are now some interesting UK decisions which show that the law in both NSW and the UK is developing in parallel and in ways which seem to be very effective. The possible implications of legislative proposals for future reform will also be touched on.

## Overview of the legislation

For many years, occupational health and safety (OHS) legislation has contained provisions extending offences under the legislation from employers and other duty-holders to, where the duty-holder is a company, the individuals who manage the company. The reasons for doing so are fairly obvious- there is a lot of research showing that the prospect of individual criminal liability is a key factor in encouraging officers to pay attention to the issue in making decisions for the company.<sup>2</sup>

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

### **26 Offences by corporations-liability of directors and managers**

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

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

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

(2) A person may be proceeded against and convicted under a provision pursuant to subsection

(1) whether or not the corporation has been proceeded against or been convicted under that provision.

<sup>1</sup> 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 *Aust Jnl of Labour Law* 107-135 ("2005 article").

<sup>2</sup> See N Gunningham, *CEO and Supervisor Drivers: Review of Literature and Current Practice*, NOHSC, 1999, pp 39-40; N Gunningham and R Johnstone, *Regulating Workplace Safety: System and Sanctions*, OUP, Oxford, 1999, pp 217-18. For recent discussion of personal *civil* liability see N Foster, "Personal civil liability of company officers for company workplace torts" (2008) 16 *Torts Law Journal* 20-68. This paper, however, is concerned solely with *criminal* liability.

Previously an almost identical provision was contained in s 50 of the now-repealed *OHS Act 1983* (worth noticing because some post-2005 decisions still refer to the former provisions, where the relevant prosecution initially commenced prior to the commencement of the new Act on 1 September 2001). Some features of s 26 which are worth highlighting include:

- Before there can be personal liability the company concerned must itself have been guilty of a contravention of the legislation;<sup>3</sup>
- The provision applies to both formal “directors” who are members of the Board, and also those “concerned in management”- the previous article discussed the definition of this concept and we will see below that further clarification has been provided since 2005;
- The essence of s 26 is that the officer is “deemed” to be guilty of a breach of the provision that the company breached, simply by virtue of their position, unless they can make out one of the two statutory defences, “unable to influence” or “due diligence”.
- The onus of making out these defences clearly rests on the accused officer.

Section 26 has not been amended since the previous article was published. The previous article also provided an overview of other Australian provisions of this sort.<sup>4</sup> Since what was noted in 2005 there have been the following legislative changes in provisions outside NSW:

- The Western Australian provision noted previously, s 55 of the *Occupational Safety and Health Act 1984* (WA) now has specific provisions adapting personal officer liability to a series of newer provisions introduced into the legislation (such as, for example, s 19A) imposing higher penalties where an OHS offence is committed in circumstances of “gross negligence” or leads to death or serious injury. Under s 55(1a), for example, there can be personal officer liability for a “gross negligence” offence only where the prosecution can show that the officer either was negligent, or “consented or connived” at the offence, and *also* that the officer “knew that the contravention would be likely to cause the death of, or serious harm to, a person”.<sup>5</sup>
- The Northern Territory *Work Health Act* has been repealed and replaced as from 1 July 2008 by the *Workplace Health and Safety Act 2007* (NT). Section 86 of that Act provides for personal liability for “officers” of a company, and the definitions provision in s 4 refers the meaning of that term to the *Corporations Act 2001* (Cth). An officer has accessorial liability based on the company having committed an offence if: “(a) the

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<sup>3</sup> A recent example of a case where a s 50 charge was dismissed, because on careful examination of the evidence the company concerned had not breached the Act, is the decision in *Morrison v Milner, Baldwin* [2008] NSWIRComm 77 (Haylen J). With respect to his Honour, it may be suggested that the approach noted at para [238] of the judgment- “there needs to be established, to the criminal standard, acts and/or omissions of the company that led to a risk”- may suffer from an approach which focuses too much on the specifics of the particular incident (see the discussion below on the *Gretley* case). But it seems fairly clear that, given the other matters canvassed in the judgment, the company had done all that was “reasonably practicable” in its careful safety procedures, and the acquittal seems justified on that basis.

<sup>4</sup> Above, 2005 article, n 1 at 110-113.

<sup>5</sup> In fact these provisions commenced in 2004, inserted by the *Occupational Safety and Health Legislation Amendment and Repeal Act 2004* (WA); but since they were not noted in my previous article I thought it was worthwhile mentioning them.

principal offence is attributable to the act or omission of the officer; or (b) the officer could have prevented the commission of the principal offence by exercising reasonable care.” While similar to existing provisions, s 86 is not identical to any of them, and so provides yet another model for personal liability.

- The ACT has now introduced new legislation, the *Work Safety Act 2008* (ACT), which is due to commence on 1 July 2009. Whereas previously the relevant ACT legislation made no provision for personal officer liability,<sup>6</sup> the new Act at least does so to some extent. But we have yet another model, not closely resembling anything else in other Australian jurisdictions, in s 219. The section contains a number of oddities of drafting:
  - Personal liability is imposed on “officers” of corporations- but the term seems not to be defined in the Act, or in the *Legislation Act 2001* (ACT). As a result it seems it will be necessary for courts to refer to the common law on the definition of the term, which will no doubt include formally appointed “directors”; but the extent to which executive officers not on the Board, “shadow directors”, senior or junior supervisors, or others, are included will remain quite unclear.
  - Before there can be liability, under subsection (2) there must not only be contravention of a relevant provision (limited by the listing of specific provisions in subsection (1)), but the officer must also be shown to have been “reckless” as to the possible contravention (a much higher standard than mere “negligence”), *and* the officer must be shown to have been in a position to influence the conduct of the corporation, *and* it must be proved that the officer failed to take reasonable steps to prevent the contravention. (These requirements, it may be noted, go far beyond what is necessary in any other Australian jurisdiction, where even the most previously generous provisions only required proof of “negligence” or “consent and connivance”. Matters which in NSW are left to the accused to prove by way of defence, must be made out by the prosecution beyond reasonable doubt on this model.)
  - But then, in subsection (4) where there is an attempt to clarify what “reasonable steps” involve, the term used is not “officer” but “executive officer”. Does this mean that only executive officers can avail themselves of the matters set out in that subsection? Is this an indication that “officer” is wider than “executive officer”? Or is it, as one has to suspect, simply a drafting error from a time when the earlier provision used the term “executive officer” rather than merely “officer”?
  - Whoever can take advantage of subsection (4), it requires the court in determining “reasonable steps” to consider what actions had been previously taken “towards ensuring” such things as “regular professional assessments” of compliance, implementation of recommendations from these assessments, and making employees and others aware of the need for compliance. It also requires the

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<sup>6</sup> See above, 2005 article, n 1, at 110 n21 and associated text.

court to have regard to what the officer did when they became aware of the contravention or possible contravention. The legislative “hint” that “regular professional assessment” of compliance may weigh with the court in determining possible personal liability is very interesting; perhaps we may expect a great expansion of “safety compliance” firms in the ACT as directors take the hint and engage outside firms to carry out these “regular” checks!

## Significant NSW decisions

The detailed interpretation of s 26 *OHS Act 2000* (NSW) has continued to be explored in a number of important decisions over the last few years.

### 1. *The Gretley Appeal*

The first decision that should be mentioned is the Full Bench appeal in *Newcastle Wallsend Coal Company Pty Ltd & Ors v McMartin* (the “*Gretley appeal*”).<sup>7</sup> The earlier stages of this litigation were noted the 2005 article,<sup>8</sup> but the subsequent appeal provided more clarification of the extent and meaning of s 26. Since the appeal decision was discussed in some detail in an article published in 2008,<sup>9</sup> only brief comments will be provided here.

The *Gretley* case is important in the OHS policy area for a number of reasons which go beyond the legal reasoning necessary for the decision. It seems to have been one of the first cases where the general provisions of the *OHS Act 2000* (or indeed the mine-specific legislation which was in force for many years) were used in a formal court prosecution against a mining company. Since that time there have been many such prosecutions, so much so that some commentators are now suggesting that prosecution has become too heavily used in the mining sector in NSW.<sup>10</sup> I do not necessarily share that view- it seems to me that the extent of prosecutions is now (in contrast to the previous situation) reflecting the extent of mining operations in the State, and the extreme danger always posed by work with high energy machinery in an enclosed space far underground.

Importantly for our present topic, however, the *Gretley* case was also one of the first cases where a prosecution was undertaken of managers who were (literally) not “at the coal-face”, but instead were making decisions at some remove from those which directly led to the specific accident. The 2005 article noted that for some time prosecutions under the former s 50 of the 1983 Act had mostly been limited to officers who were “directly involved in the incident”, but that more recently there was

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<sup>7</sup> (2006) 159 IR 121, [2006] NSWIRComm 339.

<sup>8</sup> Above, n 1, at 122-123 where it was suggested that the initial conviction of the mine surveyor, Mr Robinson, was flawed. The Full Bench appeal overturned Mr Robinson’s conviction.

<sup>9</sup> N Foster, “Mining, maps and mindfulness: the *Gretley* appeal to the Full Bench of the Industrial Court of NSW” (2008) 24 *Journal of Occupational Health and Safety, Australia and New Zealand* 113-129.

<sup>10</sup> See, for example, N Gunningham “Prosecution for OHS offences: deterrent or disincentive?” (2007) 29 *Sydney Law Review* 359-390; and *Mine Safety: Law Regulation Policy* (Sydney: Federation, 2007) esp ch 7.

a sign that prosecution of higher officers was starting to take place.<sup>11</sup> The ramifications of the prosecution of two senior mine managers and a series of under-managers at Gretley are still being felt today. It is arguable, for example, that the *Gretley* case may have sparked a determination on the part of managers around Australia to mount a consistent campaign with the aim of reducing the effectiveness of the NSW provisions, and to seek to ensure that similar provisions were not put in place in other jurisdictions.<sup>12</sup>

Whether or not this is so, it is worth noting here the purely **legal** consequences of the *Gretley Appeal* for personal liability under s 26.

**(a) “Concerned in management”**

The scope of the phrase “concerned in management” had to be considered, as none of the officers charged were formally members of the board of the relevant companies. As noted in the 2005 article, Staunton J had given detailed consideration to this issue, and in short concluded that someone who was not on the board would be caught by s 26 where they had:

1. decision-making power and authority,
2. going beyond the mere carrying out of directions as an employee,
3. such as to affect the whole or a substantial part of the corporation,
4. which powers relate to the matters which constituted the offence under the Act.<sup>13</sup>

In general this interpretation of the phrase was adopted by the Full Bench, which referred in the *Gretley Appeal* to both the judgement of Staunton J and the decision of the NSW Court Appeal in *Powercoal Pty Ltd v IRC of NSW*.<sup>14</sup> Staunton J’s comments were affirmed at [479]:

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

The *Powercoal* decision is noted further below.

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<sup>11</sup> Above, n 1, at 114-116.

<sup>12</sup> See, for example, the vociferous press campaigns aimed at characterising the NSW legislation as “draconian” and “anti-business”- for further details see A Hopkins *Lessons from Gretley: mindful leadership and the law* (Sydney: CCH Australia Ltd, 2007), ch 5; the Federal Government’s Corporations and Markets Advisory Committee (CAMAC) Report on *Personal Liability for Corporate Fault* in September 2006, riddled with “implicit” references to s 26, and a response to it in N Foster “The CAMAC Report on Personal Liability for Corporate Fault - A Critique from the OHS Perspective” (2007) 20 *Australian Journal of Labour Law* 112-118; the surprising report of WorkCover in May 2006 watering down the s 26 provisions; the extremely attenuated form of the ACT provisions, discussed above; and the recommendations of the *First Report* (Oct 2008) of the National Review into Model OHS Laws, noted below. It would be perhaps going too far to say that all these developments stemmed from reaction to the *Gretley* proceedings, but there are a number of links that can be traced back.

<sup>13</sup> *McMartin v Newcastle Wallsend Coal Company Pty Ltd* [2004] NSWIRComm 202; see above n 1 at 122-123.

<sup>14</sup> (2005) 145 IR 327, [2005] NSWCA 345.

## **(b) Interaction of defences in ss 26 and 28**

An issue that was still noted in 2005 as being not finally resolved was the question whether an officer, charged under s 26 or its former equivalent, could rely not only on the “internal” s 26 defences of “unable to influence” and “due diligence”, but also on the general s 28 defence of “reasonable practicability”.<sup>15</sup> It was suggested then that the fairly clear answer was “No”, and this view has since been further confirmed. In the *Gretley Appeal* at [498]-[499] the Full Bench confirmed the comments of a previous Full Bench in *Morrison v Powercoal Pty Ltd*<sup>16</sup> denying the availability of s 28-type defences to a s 26-type prosecution, and noted that this comment was supported by the tenor of the judgments in both the Court of Appeal in *Powercoal*,<sup>17</sup> and the High Court in dismissing a special leave application in *Daly Smith Corporation (Aust) Pty Ltd & Anor v WorkCover Authority (NSW)*.<sup>18</sup>

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

## **(c) Prosecutorial discretion and s 26**

Finally on the *Gretley Appeal*, it is worth noting that the controversial nature of the proceedings in the public press were reflected in a very unusually sharp exchange of views within the Industrial Court itself, some of which related to the decision to prosecute the officers. In his judgment in the case Marks J at [746] made a pointed criticism of the decision of the prosecutors to proceed with the s 50 prosecution against the company officers, where the company at a very early stage of the actual trial had offered to plead guilty if the personal charges were dropped. It is submitted that this criticism was unfounded; that for reasons already noted, it was well worthwhile pursuing the prosecution of officers who were not involved directly on the spot, not only for the sake of justice being done in these proceedings, but also by way of a message being sent to other company officers.<sup>19</sup> It is worth noting that in later proceedings related to costs the other members of the Full Bench were in turn quite bluntly critical of the previous remarks of Marks J, calling them “unfair” and “immoderate”, and reinforcing the established view that the decision on who to prosecute is very much one that the courts must leave to the prosecution authorities.<sup>20</sup>

## **2. Other NSW decisions**

There have been a number of decisions since those noted in the 2005 article where liability has been imposed on the basis of s 26 (or former s 50).<sup>21</sup> However, the

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<sup>15</sup> See the 2005 article, above n 1 at 130.

<sup>16</sup> (2004) 137 IR 253, [2004] NSWIRComm 297 at [163]-[167].

<sup>17</sup> Above, n 14.

<sup>18</sup> [2006] HCA Trans 475. See the discussion of the *Smith* proceedings below.

<sup>19</sup> See above, n 9 at 125 where this is discussed further.

<sup>20</sup> See *Newcastle Wallsend Coal Company Pty Ltd and Ors v McMartin (No 2)* (2007) 164 IR 326, [2007] NSWIRComm 125 at [91], noted above n 9 at 126-127.

<sup>21</sup> A search using the valuable “Noteup” facility on the [www.austlii.edu.au](http://www.austlii.edu.au) database reveals that there are currently some 56 decisions of the Industrial Court referring to s 26, and 11 decisions of the Chief

purpose of this paper is not to provide a comprehensive discussion of all of these decisions, as many are cases where the personal defendant pleaded guilty and where well-established sentencing principles were simply applied to the particular facts. The following cases, however, represent those where some new legal elements involved in the interpretation and application of the provision were involved, or where the case has become one of interest for other reasons. For reasons of space, consideration of the facts of each case is necessarily highly abbreviated.

**(a) *Powercoal (Foster)***<sup>22</sup>

The *Powercoal* litigation has a complex history, but the element to be noted here is the prosecution of Mr Peter Foster.<sup>23</sup>

Mr Foster was the manager of Awaba colliery on 17 July 1998 when a portion of the roof in the underground area collapsed, killing a Mr Barry Edwards who was operating mining machinery at the time. After an initial acquittal of the company (which automatically meant an acquittal of Mr Foster, of course),<sup>24</sup> the Full Bench of the IRC in Court Session overturned both acquittals and entered guilty verdicts<sup>25</sup> and sentences.<sup>26</sup> The company and Mr Foster then attempted to seek review of the decision in the NSW Court of Appeal. In *Powercoal Pty Ltd & Foster v Industrial Relations Commission of NSW & Morrison*<sup>27</sup> the attempted review was refused.

Of interest for present purposes is the discussion in the Court of Appeal of the argument put forward by Mr Foster that as mine manager at Awaba he was not of sufficient seniority to be caught by the provisions of s 50 of the *OHS Act 1983* (equivalent of the present s 26). His argument was that the phrase “concerned in the management” in relation to a corporation meant that he would have to be involved in the overall management of the company as a whole, rather than simply as a local manager.<sup>28</sup>

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

- The question of what “concerned in the management” means cannot be resolved simply by consideration of cases dealing with the phrase as used in legislation governing companies; it must take its meaning from the context in which it is used. The relevant issue in considering the meaning of the phrase in the *OHS Act 2000* is “any aspect of the

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Industrial Magistrate. Some 36 of the Industrial Court decisions, and 6 of the CIM, were handed down since the beginning of 2006. (This may not be a complete list, but gives some idea of the extensive use of the provision.)

<sup>22</sup> For further commentary on the decision of the Court of Appeal, see J Catanzariti & M Byrnes, “Major Tribunal Decisions in 2005” (2006) 48 *Journal of Industrial Relations* 357-368, at 362-364.

<sup>23</sup> Just to be clear, no relation to the present author, as far as I know!

<sup>24</sup> *Morrison v Powercoal Pty Ltd and anor* [2003] NSWIRComm 342 (Peterson J).

<sup>25</sup> *Morrison v Powercoal Pty Ltd and anor* (2004) 137 IR 253; [2004] NSWIRComm 297.

<sup>26</sup> *Morrison v Powercoal Pty Ltd and anor (No 3)* [2005] NSWIRComm 61 (7 March 2005); in fact on sentencing Mr Foster received the benefit of s 10 of the *Crimes (Sentencing Procedure) Act 1999*, which allowed the court to enter no conviction in “extenuating circumstances”- see [143]. But the application for review to the Court of Appeal still went ahead.

<sup>27</sup> (2005) 145 IR 327, [2005] NSWCA 345.

<sup>28</sup> See the argument presented at [90] in the proceedings, above n 27.

operations of the company insofar as it raises safety considerations”- para [102].

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

116 The objects of the Act, and the general nature of the duties imposed by the Act, suggest that Parliament did not intend to give the language of s 50(1) a narrow, let alone a technical, meaning. The purposive approach to interpretation required at common law, and now by s33 of the *Interpretation Act* 1987, suggests that the words “management of the corporation” should not be read down so as to apply only to central management.

The judgment here provides a good foundation for a proper understanding of the reach of s 26 of the current Act. The only comment I would make is that it is a pity that, like the Full Bench, the Court of Appeal do not seem to have been taken to the detailed and extensive analysis of the issue by Staunton J in *McMartin v Newcastle Wallsend Coal Company Pty Ltd* [2004] NSWIRComm 202, where as noted above her Honour came to very similar conclusions.<sup>29</sup>

The *Powercoal* decision is less clear on the question whether the general (s53, now s 28) defences can be relied on by an officer charged under s 50 (now s 26). While the failure of the Full Bench of the IRC to apply the s 53 defences was a ground on which Mr Foster had sought review of the decision, in the end the tenor of the judgement of Spigelman CJ in the Court of Appeal is that this ground could not succeed, simply because the Full Bench had in any event gone on to consider the s 53 defences and found against Mr Foster on that point.<sup>30</sup> But, as also noted previously, the consistent view of the Industrial Court as expressed in the *Gretley Appeal*, is against applying the general defences to the s 26 offence, and there seems no reason to suppose that the Court of Appeal would not support that view were it directly presented for decision.

### **(b) Hitchcock**

In *Inspector Campbell v James Gordon Hitchcock*<sup>31</sup> the defendant was the main director of a small trucking company which was prosecuted for allowing its drivers to drive dangerous lengths of time and to suffer fatigue, which had led to the death of one of the drivers. Perhaps the main point of legal interest is that, the company having been deregistered, Mr Hitchcock’s prosecution under s 50 continued, a situation clearly provided for in s 26(2). He received a significant penalty of \$42,000.<sup>32</sup>

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<sup>29</sup> See above, n 1, at 122-124.

<sup>30</sup> See Spigelman CJ, above n 27, at [121]-[124].

<sup>31</sup> [2004] NSWIRComm 87.

<sup>32</sup> [2005] NSWIRComm 34, at [52].

### (c) *Daoud*

*Inspector Jorgensen v Daoud*<sup>33</sup> involved an interesting question of construction of s 26. The defendant, director of a construction company, had been charged on the basis of injuries caused to employees and subcontractors when formwork failed. The form of the charge alleged that he had “contravened s 26”. On the first day of the trial counsel for the defence objected to the jurisdiction of the Commission in Court Session to hear the charges, on the basis that s 26 as such could not be “contravened” and hence the charge was not valid.

While at first glance a classic piece of legal “nit-picking”, the defence offered in support a sentence from the decision of the Full Bench in *Powercoal*,<sup>34</sup> where at [163] it had been said (in the context of ruling that the s 53 defences were not available to a s 50 charge), that “a person facing prosecution by virtue of s 50 is not the subject of proceedings for an offence against the Act”. Hence, the defence argued, since the jurisdiction of the IRC only arose under s 107 of the *OHS Act 2000* in relation to “proceedings for an offence against this Act”, the IRC had no jurisdiction to hear s 50 (or, by analogy, current s 26) proceedings.

The implication of this argument being accepted, of course, would be that no previous s 50 or s 26 prosecution had been valid! Not surprisingly, the argument was not accepted. The Full Bench at [34] held that the defence were taking the comment made in *Powercoal* out of context, where it was a discussion of another point altogether.

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

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

They concluded with the following summary:

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

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

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<sup>33</sup> (2005) 143 IR 170, [2005] NSWIRComm 135 (FB).

<sup>34</sup> Above, n 25.

charge be described as “a prosecution under s 26 for which the defendant is taken to have breached s 8”.

**(d) Kirk**

The proceedings involving Mr Kirk have been long and drawn-out. They flow from an incident where Mr Palmer, the manager of a farm owned by Kirk Group Holdings Pty Ltd, died when an “all-terrain vehicle” he was driving overturned while he was carrying a load of steel pipes. The company, and the main director Mr Kirk, were convicted of offences under the Act in 2004,<sup>35</sup> and sentenced in 2005.<sup>36</sup> They then sought to avoid the appeal process within the IRC by seeking judicial review of the conviction before the NSW Court of Appeal. That Court, in *Kirk Group Holdings Pty Ltd and anor v WorkCover Authority of NSW*,<sup>37</sup> refused to allow the “bypassing” of the IRC appeal system.

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

Mr Kirk and the company then applied for leave to appeal their conviction to the Full Bench of the Industrial Court. Leave was granted,<sup>38</sup> but on the hearing of the final appeal the appeal was dismissed.<sup>39</sup>

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

Actually the formulation of this proposition reveals the difficulties with it. If indeed Mr Palmer was “the company”, then there seems no doubt that he had created a risk to a company employee, ie himself. But in fact the Full Bench rejected the proposition that Mr Palmer could be identified with the company. They acknowledged the long line of authorities which holds that for some purposes a company may be

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<sup>35</sup> (2004) 135 IR 166; [2004] NSWIRComm 207.

<sup>36</sup> (2005) 137 IR 462; [2005] NSWIRComm 1.

<sup>37</sup> (2006) 154 IR 310; [2006] NSWCA 172.

<sup>38</sup> See *Kirk Group Holdings Pty Ltd and anor v WorkCover Authority of NSW* (2006) 158 IR 284, [2006] NSWIRComm 355- although leave to appeal was granted on only one, quite limited, point; see paras [51]-[55].

<sup>39</sup> [2007] NSWIRComm 86.

deemed to have attributed to it, the behaviour or state of mind of one of its officers, whether regarded as someone who is the “controlling mind” of the company,<sup>40</sup> or someone else selected for a particular purpose.<sup>41</sup>

But the key problem with the asserted defence was the idea that a company which was an employer could delegate to some officer within the company responsibility for safety issues. They referred with approval to the comment of Steyn LJ (as he then was) in the UK decision of *R v British Steel Plc*,<sup>42</sup> where his Lordship had commented:

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

The UK legislation was, of course, the precursor of and model for the NSW legislation, and the Court went on to also cite the words of the Court of Appeal in the prosecution in *R v Gateway Foodmarkets Ltd*<sup>43</sup> that

[T]he company is liable in the event that there is a failure to ensure the safety, etc, of any employee, unless all reasonable precautions have been taken- as we would add, by the company or on its behalf... [I]t follows that the qualification places upon the company the onus of proving that all reasonable precautions were taken both by it and by its servants and agents on its behalf.<sup>44</sup> The concept of the “directing mind” of the company has no application here... (at 46)

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

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

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<sup>40</sup> As in *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.

<sup>41</sup> As in the more recent approach exemplified by the decision of the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

<sup>42</sup> [1995] ICR 586.

<sup>43</sup> [1997] 2 Cr App R 40.

<sup>44</sup> Despite the wording of the UK legislation, which places into the main duty in s 2 of the *Health and Safety at Work etc Act* 1974 (UK) the qualification “so far as reasonably practicable”, the effect of s 40 of that Act is that the onus of proving that no “reasonably practicable” precautions could have been taken rests on the defendant, precisely the same legal situation as under the *OHS Act* 2000 (NSW).

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

The New Zealand Court of Appeal took a similar approach in *Linework Ltd v Dept of Labour*.<sup>45</sup> The company there was held to be liable under the *Health and Safety in Employment Act 1992* (NZ) for the actions of a line supervisor in not taking all practicable precautions for safety. The main judgement (Richardson P, Thomas, Blanchard and McGrath JJ) analyses the company’s liability generally in accordance with the *Meridian* decision, and holds that for the purposes of a statute concerned with safety in the workplace, “the acts and omissions of the person in effective charge of a work site, in this case the foreman who had a supervisory capacity, should be attributed to” the company.<sup>46</sup> But the judgement also recognises that an alternative analysis is possible, simply focussing on the failure of the company “to do what the law required it to do”, for whatever reason.<sup>47</sup> And Tipping J, who delivered a separate judgement agreeing with the result, argued that this approach was “more direct” than the *Meridian* approach, and hence “will therefore usually be the more helpful”.

If a prosecution of an employer for a breach of s6 is to succeed, the crucial thing to be established is that there was a practicable step which could have been taken and which, if taken, was likely to have prevented the harm suffered by the employee. In the present case several such steps were identified. If at least one such step is demonstrated it must follow that the employer has failed to take a step which, ex-hypothesi, was a practicable step which ought to have been taken. It does not matter on this analysis who omitted to take the step, provided some practicable step could have been taken by someone other than the injured employee... The simple fact is that all practicable steps to ensure Mr Thomson's safety were not taken. Both on the language of the Act and in accordance with its policy, Linework as his employer was thereby in breach of its statutory duty to him. As will be apparent, this analysis does not depend on Mr Mazur's status within the employer company, nor upon concepts of agency or vicarious liability. It relies simply upon the proposition that once there has been a failure to take a practicable step to ensure the employee's safety, the employer is responsible for that failure.<sup>48</sup>

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

With the development of the identification doctrine, this simple point has become obscured: where a corporation is under a legal duty to act it may be criminally liable for a failure to act with no resort to the identification doctrine. In many cases where corporate criminal liability is sought to be imposed, it is simpler to subject the corporation to a legal duty and consider whether it has failed to discharge that duty.<sup>49</sup>

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<sup>45</sup> [2001] NZCA 104.

<sup>46</sup> Above, n 45, at para [24].

<sup>47</sup> Above, n 45, at para [25], citing in particular the comment by Smith on the *British Steel* case at [1995] Crim LR 655.

<sup>48</sup> Above, n 45, at paras [44], [45].

<sup>49</sup> J Clough & C Mulhern *The Prosecution of Corporations* (Oxford: OUP, 2002), at 121.

This approach was also adopted by the Victorian Court of Appeal in *R v Commercial Industrial Construction Group Pty Ltd*<sup>50</sup> (“CICG”) in relation to the Victorian OHS legislation, and later in *ABC Developmental Learning Centres Pty Ltd v Joanne Wallace*,<sup>51</sup> dealing with similarly worded legislation governing child care centres.

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

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

“... will only be exposed to the risk if the system (if any) designed to ensure his safety has broken down and it does not matter for the purposes of [s.21] at what level in the hierarchy of employees that breakdown has taken place.”<sup>52</sup>

In a commentary on *British Steel*, published in the *Criminal Law Review*,<sup>53</sup> Professor Sir John Smith<sup>54</sup> said:

“Where a statutory duty to do something is imposed on a particular person (here, an ‘employer’) and he does not do it, he commits the *actus reus* of an offence. It may be that he has failed to fulfil his duty because his employee or agent has failed to carry out his duties properly but this is not a case of vicarious liability. If the employer is held liable, it is because he, personally, has failed to do what the law requires him to do and he is personally, not vicariously, liable. *There is no need to find someone – in the case of a company, the ‘brains’ and not merely the ‘hands’ – for whose acts the person with the duty can be held liable. The duty on the company in this case was ‘to ensure’ – ie. to make certain – that persons are not exposed to risk. They did not make certain. It does not matter how; they were in breach of their statutory duty and, in the absence of any requirement of mens rea, that is the end of the matter.*” (Emphasis added)<sup>55</sup>

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

### **(e) Sayhoun**

In *Inspector Reynolds v Ocean Parade Pty Ltd and ors*<sup>56</sup> two company officers were prosecuted over an incident in which a young boy fell to his death after entering an unfinished building through a hole in the fence, and then falling into a hole which had been left in the 14<sup>th</sup> floor. Ron and John Sayhoun were directors of the company doing the work, with Ron being the site supervisor. The conviction itself was unremarkable once the factual issues were resolved, it being determined that the fence

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<sup>50</sup> (2006) 14 VR 321, [2006] VSCA 181.

<sup>51</sup> [2007] VSCA 138.

<sup>52</sup> [1995] 1 WLR at 1363D.

<sup>53</sup> [1995] Crim L R 655.

<sup>54</sup> The author of *The Law of Theft*, joint author of Smith and Hogan’s *Criminal Law*, and a member of the editorial board of the *Criminal Law Review*.

<sup>55</sup> This commentary was quoted by the English Court of Appeal in *Attorney-General’s Reference (No.2 of 1999)* [2000] QB 796 at 812.

<sup>56</sup> [2006] NSWIRComm 400 (Schmidt J).

had been known to have a gap in it and it clearly being foreseeable that children might enter.<sup>57</sup>

In sentencing,<sup>58</sup> the two directors were given fines that differed slightly- both were in charge of the company and should have ensured that safe systems were in place, but Ron Sayhoun conceded that he knew that there was a hole in the perimeter fence which was not repaired before the boys gained access, and he received a slightly higher fine (\$8250, as opposed to John Sayhoun, \$6600). The case illustrates the proposition that while directors will be equally deemed to share the “guilt” of the company, the level of penalty actually imposed may vary according to their precise role in the circumstances leading to the lack of safety.

#### **(f) *Ritchie and related proceedings***

Rivalling the *Gretley Appeal* in its impact, the *Ritchie* case illustrates the far-reaching nature of the safety obligations imposed on senior managers. In *Inspector Kumar v David Aylmer Ritchie*<sup>59</sup> an explosion occurred when a tank was being chemically cleaned in a workshop in Sydney. Mr Ritchie was the Chief Executive Officer of the company involved, Owens Container Services Australia Pty Ltd, a part of the multinational Owens Group which operated in a number of locations in Australia, New Zealand and around the Pacific. Mr Ritchie was a resident of New Zealand at the time of the incident concerned on 15 January 2003. He was prosecuted under s 26, in circumstances where the company pleaded guilty to a s 8 offence. He accepted at the beginning of the trial that the company had committed the relevant offence. The case is valuable, then, because it required detailed consideration of the two defences in s 26, “unable to influence” and “due diligence”.

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

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

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<sup>57</sup> It is worth noting, however, that in considering defences that might apply to the directors, Schmidt J at [130]-[133] discussed the possible application of s 28 (the general defence provision) to one of the directors. It seems fairly clear that this was an error; for reasons noted previously the jurisprudence of the Industrial Court now holds clearly that s 28 defences are not applicable to charges made by virtue of s 26. However, it was an error which could only have benefited, not been a detriment to, the accused, and in the event the defence was not made out.

<sup>58</sup> [2007] NSWIRComm 231.

<sup>59</sup> [2006] NSWIRComm 323.

director was absent from board meetings due to illness for a long period, and uninformed of the relevant decision.<sup>60</sup>

With respect to his Honour, it seems arguable that even the acceptance of these limited exceptions to the “influence” of a formally appointed director could be said to be too generous. These two examples would both be prime candidates for an “due diligence” defence; in each case the legal power to influence is still there, the defendant would be able to claim that while having legal authority, in practice he or she had “done the best that they could”. It is submitted that a simpler and more obvious interpretation of the defence is that para (a) is not intended to be operative in relation to formally appointed directors, unless they can show that the instrument of their appointment somehow limits their legal power to influence decision-making.<sup>61</sup>

Whether or not this is correct, in the circumstances of the *Ritchie* case Mr Ritchie could not demonstrate any obstacle to his influencing the company’s decisions. In fact, he gave extensive evidence of his overall control over company policy, in addressing the question of “due diligence”. The irony is that a director who attempts to demonstrate the defence under para 26(1)(b) will usually find it hard to argue in the alternative that under para (a) he or she had insufficient influence over the company.<sup>62</sup> Haylen J concluded his rejection of Mr Ritchie’s para (a) defence by noting at [176]:

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

The second defence of “due diligence” was then considered. Haylen J defined due diligence in this way, at para [177]:

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

In this case Haylen J found that, while Mr Ritchie could not have been expected to be across the fine details of every process used by the company, more could have been done to ensure that systems were in place for safety, and those systems were put into practice.

With respect, it is submitted that his Honour’s consideration of the para (b) defence here is fairly cursory. However, the prosecutor had presented a very powerful case, and at [178] his Honour indicated that he accepted “the general thrust of the

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<sup>60</sup> Above, n 59 at [170].

<sup>61</sup> An extremely rare situation, now, however, exemplified in the *Ngai* case discussed below.

<sup>62</sup> See the comment by Haylen J, above n 59 at [179]: “In a sense the more evidence that the defendant calls to make out the s 26(1)(b) defence, the likelihood is that such evidence will diminish the case attempting to be established under s 26(1)(a).”

prosecutor's submissions". On this basis it seems worthwhile to set out here two paragraphs from the prosecutor's detailed submissions on the question of "due diligence", recorded earlier in the judgment:

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

(a) there was in place a systematic approach designed to achieve compliance with a regulatory scheme established by the Act and to prevent its contravention;  
(b) that the system so established was both proper and appropriate so as to achieve the regulatory requirements of the Act and, in particular, was not merely some paper scheme that paid lip service to the Act or merely exaggerated the reality of the system that was in place; and

(c) that the system was properly enforced and policed to achieve the regulatory outcome of preventing contraventions of the Act.

It was submitted that, for the defendant to make out the defence, each of these elements had to be established.

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

Emphasis in the end was placed on the fact that while there were paper systems in place, the actual auditing of compliance was not properly supervised, and there was also no evidence that those who had been appointed to supervise safety in the company had appropriate qualifications and experience. Mr Ritchie on a number of occasions said that he "assumed" that the people he had appointed were doing their jobs. The court obviously found that more was required. He received a personal penalty of \$22,500.<sup>63</sup>

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

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<sup>63</sup> See [2006] NSWIRComm 384 for sentencing proceedings. It is perhaps worth noting that proceedings flowing from the same incident against another company officer, the Division General Manager, *Inspector Kumar v Rose* [2006] NSWIRComm 325, resulted in a fine of \$18,500 after a guilty plea at an early stage of the proceedings.

On the other hand, it has certainly sparked interest in professional circles,<sup>64</sup> and perhaps it will serve as a genuine reminder to senior executives of their responsibilities. But the courts do need to be careful not to apply the legislation to such an impossibly high standard that a reaction will set in, where those who are duty-holders simply “give up” trying to comply.

### **(g) *Burn and Steel***

Two prosecutions in relation to the one incident demonstrate the point noted above in *Sayhoun*, that, while directors and officers will be liable in the circumstances mentioned, their differing involvement in the events which have caused a risk may lead to their receiving different sentences. In *WorkCover v Burn*<sup>65</sup> the director of a company called Top Container Transport was found guilty pursuant to s 26 in relation to an incident that led to the death of a fork lift driver. He was fined \$17,500. In *WorkCover v Steel*<sup>66</sup> the General Manager of the same company was also convicted in relation to the same incident, but was able to show in mitigation that he had a role that was mainly in the financial area, that he had only commenced work with the company 4 months prior to the accident, and that he had responded to any safety matters which were drawn specifically to his attention. He was only fined \$5,000 in relation to the same incident.

### **(h) *Smith***

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

In coming to the personal charge against Mr Smith, Staunton J at [124] issued what amounted to a very stern judicial rebuke to the prosecutor in the case, who had

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<sup>64</sup> See, commenting on the decision, J Catanzariti, “Danger at work: directors face strict OHS liability” (Dec 2006) *Law Society Journal* 52-54; S Nicol, “Directors beware: personal liability for occupational, health and safety breaches” (March 2007) *Keeping Good Companies* 98-100; S Nettleton “OHS due diligence- A guide for Directors and CEOs” (March 2007) *Company Law & Governance Update* 5-8, available at <http://www.blakedawson.com/> in the “Publications” area.

<sup>65</sup> [2005] NSWIRComm 206.

<sup>66</sup> [2005] NSWIRComm 215.

<sup>67</sup> [2004] NSWIRComm 349 (Staunton J).

apparently assured Mr Smith at an initial interview that he (as opposed to the company) would not be prosecuted. Notwithstanding, the prosecution against Mr Smith had been instituted and needed to be dealt with. Her Honour found that Mr Smith as a director was *prima facie* guilty of the same offence as the company. She ruled that the defences under s 53 of the Act were not applicable to the s 50 charge.<sup>68</sup> She also ruled that Mr Smith was not able to establish the defence of “due diligence”- while there was a paper policy on safety, he did not “ensure that the policy became the basis for an entrenched systemic process” within the company, and “took no proactive steps to ‘adequately supervise compliance’ with the company’s policy”- paras [131]-[132].

On sentencing Mr Smith received a penalty of \$5000.<sup>69</sup> It is worth noting that his particular attitude in the trial and at the sentencing hearing seems to have weighed against him with the judge. He seems to have denied all the way through that the company should have done any more than it had actually done. In the sentencing proceedings Staunton J commented at [57], [59]:

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

An appeal to the Full Bench in *Daly Smith Corporation (Aust) Pty Ltd and anor v WorkCover*<sup>70</sup> was unsuccessful. For present purposes it is worth noting the grounds of appeal relating to s 50. It was argued again that s 53 defences were applicable to offence charged by means of s 50. The Full Bench referred to its own previous judgments in *Morrison v Powercoal*<sup>71</sup> and *Inspector Jorgenson v Daoud*<sup>72</sup> in rejecting this argument. It implicitly accepted at [66] that Staunton J’s reference, in considering “due diligence”, to the Canadian decision of *R v Bata Industries Ltd (No 2)*<sup>73</sup> was correct.

Unlike most other convictions under the *OHS Act* 2000, Mr Smith’s litigation did not stop at the Full Bench. He applied to the High Court of Australia for special leave to appeal the Full Bench’s decision. Special leave was denied- see *Daly Smith Corporation (Aust) Pty Ltd v WorkCover*.<sup>74</sup>

The transcript of argument reveals that there were two legal issues at stake. Clearly the most important from the constitutional perspective was the claim that, even though s 179 of the *Industrial Relations Act* 1996 (NSW) prevented a further

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<sup>68</sup> At [126], following her Honour’s own previous decision in *McMartin v Newcastle Wallsend Coal Co* [2004] NSWIRComm 202.

<sup>69</sup> [2005] NSWIRComm 101.

<sup>70</sup> [2006] NSWIRComm 111.

<sup>71</sup> Above, n 25.

<sup>72</sup> Above, n

<sup>73</sup> (1992) 7 CELR (NS) 245, noted in the 2005 article above n 1 at 130.

<sup>74</sup> [2006] HCATrans 475.

appeal beyond the Full Bench of the Industrial Relations Commission, the Federal *Constitution* required there to be a process of appeal reaching all the way to the High Court. This argument required the court to read the provisions of s 73 of the *Constitution*, in providing for appeals from State Supreme Courts to the High Court, as if the words “Supreme Court” included other superior tribunals established by the States. The other legal issue was whether the Full Bench had been correct to rule that s 53 defences were not available in proceedings under s 50.

As the High Court noted, the Constitutional issue was so important that it would have required a much more detailed hearing. But the application was refused on the basis that, even if Mr Smith’s counsel were successful on the constitutional issue, the merits of his appeal were not sufficient to take up the time of the Court. In the language adopted in these matters, special leave was refused because “there are insufficient prospects of success”. This ruling does not amount to a binding precedent for the future; but since the inter-relationship between s 53 and s 50 was the main topic of submissions by counsel for WorkCover, it seems fairly likely that these arguments were the ones which seemed to have the greater weight in the eyes of the two Justices of the High Court who were hearing the application.<sup>75</sup>

#### **(i) *Herbert and Walker (Akerman-Apache)***

Comments about the inability of directors to delegate away their responsibility to ensure that safety is considered by their company are to be found in *WorkCover v Akerman-Apache (Joint Venture) Pty Ltd and ors*<sup>76</sup> at [43]. In that case a large piece of machinery was being towed without proper brakes, killing one of the employees who was driving. The operation was a joint venture between Australian and American companies, and the evidence of the two Australian directors was that they had left the safety procedures to be looked after by the American director, who was to be the “hands on” manager. As Staunton J found at [37], “they were content to leave all operational matters, including safety, to Mr Akerman.” In doing this, her Honour commented at [44], they made a “serious misjudgement ... as to the legal obligations that arise for directors of a company”. Both were fined \$10,250.

#### **(j) *Herbert (Salamander Shores)***

We have seen in the previous case, and of course the *Ritchie* case, that where directors have legal responsibility to manage the company, they will not be able to avoid liability under s 26 by claiming that they in fact played no part in the safety monitoring that should go on. This is further dramatically illustrated by *Inspector Aldred v Herbert*.<sup>77</sup> In that case a 13-year-old boy who was trespassing on the premises of a hotel was killed when electrocuted by standing on a pipe near the pool. (While he was a trespasser, it was clear of course that any of the guests of the hotel, or their children, might have done the same thing.) The directors of the company claimed that they were not in a position to influence the safety procedures as they had appointed a manager to look after day-to-day issues. Backman J, however, ruled that this was not sufficient “due diligence”- that the directors had not specifically addressed safety issues at board meetings, and did not require the manager to report

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<sup>75</sup> Callinan and Heydon JJ.

<sup>76</sup> [2006] NSWIRComm 370.

<sup>77</sup> [2007] NSWIRComm 170.

on safety issues, or monitor safety as an issue- see [25]. Submissions that the directors were not in a position to influence the company were rejected. In subsequent sentencing proceedings, *Inspector Graeme Keith Aldred v Salamander Shores Hotel Pty Ltd and Others*<sup>78</sup> the company was fined \$150,000 and the individual directors \$12,000 each.

**(k) Ngai**

As well as “due diligence”, it has been noted that the other defence that is available under s 26 is that the officer “was not in a position to influence the conduct of the corporation in relation to its contravention of the provision”. It has been suggested above that it is very rare that someone who has actually been appointed as a formal member of the board will be able to rely on this defence, as by its very nature appointment as a “director” automatically means that someone has legal authority to influence the conduct of the company. The only exception to this principle involving an actual director would seem to arise in the very unusual situation illustrated by the decision in *Inspector James v Sunny Ngai and ors*.<sup>79</sup> In that case a very odd company structure existed, where under the Articles of Association all the directors other than Mr Henry Ngai, the Governing Director, were said to be “under his control and shall be bound to conform to his directions in regard to the Company's business”. As a result the accused here (other members of the board) were able to make out the defence that they were not in a position to influence the corporation’s conduct- see para [127].

**(l) Nouh**

In *WorkCover Authority v Anywhere Tower Cranes Pty Ltd and ors*<sup>80</sup> the individuals charged after the collapse of a crane in the Sydney CBD included the sole director of a crane supply company, Ms Ghada Nouh, who testified that she was effectively a secretary in the office, who had no involvement on the ground with the cranes, and had agreed to be appointed as director. The court expressed sympathy for her position but noted that those who take on the management of companies in NSW do accept responsibility for seeing to the safety of company employees and others affected by the company’s work. Marks J commented:

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

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

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<sup>78</sup> [2008] NSWIRComm 102.

<sup>79</sup> [2007] NSWIRComm 203.

<sup>80</sup> [2007] NSWIRComm 44.

### **(m) Cahill**

In *Morrison v Barry John Cahill*<sup>81</sup> Mr Cahill, who was the Director of Operations of a smallish mine in Broken Hill, pleaded guilty to a breach of s 8 of the *OHS Act 2000* by virtue of s 26, flowing from the death of a miner. But the court applied s 10 of the *Crimes (Sentencing Procedures) Act 1999* to his case, entering no conviction. Matters that led to this decision included the fact that Mr Cahill had not been working on the actual site at the time; and that he had undertaken a number of measures while in charge of operations to improve safety, including shutting down mining operations for 4 weeks to address some issues. In addition he had implemented a system to deal with the specific problem that led to the death of the worker, although the system had not been operating properly on the day- see para [32].

### **Decisions from other Australian States**

In general there seem to be very few reported prosecutions under other State legislation dealing with personal officer liability. One that has been identified is *Baker v Hyledate Pty Ltd & Elmes*,<sup>82</sup> where the director of a hotel company, Mr Elmes, was fined following the second of two incidents that occurred within a month where an employee in the kitchen suffered severe burns from scalding water. Under SA law Mr Elmes was the “responsible officer”, and a factor influencing the decision that he had not taken “reasonable steps” to see that the company adopted safe systems was that nothing had been done after the obvious risks revealed by the first incident. The Court noted at [3]:

The incident with Ellis identified a particular hazard and there was a failure on the part of Elmes to ensure that appropriate responses had been taken, which may have prevented the occurrence of the second incident.

### **Developments in the UK**

Australian OHS law, of course, has many links with that in the UK, and it is instructive to see the way that legislation has been interpreted there.

As noted in the 2005 article, the structure of the UK law on personal liability is not the same as that in NSW, although it bears some similarity to that in some other States. Section 37 of the *Health and Safety at Work etc Act 1974* (UK) (the *HSW Act*) imposes personal liability on a company officer where the company’s offence has “been committed with the consent or connivance of”, or “to have been attributable to any neglect on the part of”, the officer.

There have not been many decisions illuminating the interpretation of s 37, as noted in the previous article.<sup>83</sup> But there is now some recent important guidance in a Court of Appeal decision and in the House of Lords.

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<sup>81</sup> [2007] NSWIRComm 114.

<sup>82</sup> [2007] SAIRC 76 (16 November 2007).

<sup>83</sup> There is however a “Guidance Note” issued by the Health and Safety Executive in relation to s 37- see <http://www.hse.gov.uk/enforce/enforcementguide/investigation/identifying/directors.htm> .

**(a) R v P**

The ruling of the Court of Appeal in *R v P*<sup>84</sup> came by way of an appeal on a preliminary point of law from the decision of the trial judge. The facts involved an accident which led to the death of a six year old boy at the docks in London, when he was thrown from a forklift on which he was riding as a passenger as it collided with another forklift which was unsafely loaded. The company “P Ltd” (presumably, though this is not clear from the judgment, either owners of the forklifts or manager of the docks) were charged with breaches of the *HSW Act* and a “Mr G”, the managing director of the company, was charged under s 37.

The specific issue that arose involved a very narrow question of what the prosecution needed to establish to show “neglect” under s 37. The trial judge had ruled that in order to show “neglect” it had to be shown, not only that Mr G “had a duty to inform himself of the facts” concerning the safety risk, but also that he “did know of the material facts”.<sup>85</sup> In so ruling the judge was apparently following an (unreported) preliminary ruling of MacKay J in a prosecution following a railway accident at Hatfield.<sup>86</sup> MacKay J in his ruling equated “neglect” with “turning a blind eye” to circumstances which the officer really knew about, and called it explicitly a “subjective test and not equivalent to inadvertence, laziness or even gross negligence”.<sup>87</sup>

The Criminal Division of the Court of Appeal rejected this view of s 37. Latham LJ, for the Court, noted at [12] that this placed the burden of proof on the prosecution too high. “Neglect” did not require showing a subjective awareness (otherwise there would have been no need to add the other elements of “consent” and “connivance”). His Lordship noted at [13] that the question will always be:

whether ..., where there is no actual knowledge of the state of facts, [that] nonetheless the officer in question of the company should have, by reason of the surrounding circumstances, been put on enquiry so as to require him to have taken steps to determine whether or not the appropriate safety procedures were in place.

In adopting this more “objective” standard the Court at [8]-[9] affirmed very strongly some previous comments made in the Scottish decision of the High Court of Justiciary in *Wotherspoon v HM Advocate*.<sup>88</sup> Some brief discussion of this decision may be helpful.

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

- 1) the word presupposes some duty which the person concerned has failed to carry out;

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<sup>84</sup> [2007] EWCA Crim 1937, [2008] ICR 96.

<sup>85</sup> Above n 84 at [7], quoting from the trial judge.

<sup>86</sup> *R v Balfour Beatty Infrastructure Services Ltd, Network Rail and ors* (Central Criminal Court, 7 Oct 2005). The citation is provided in B Barrett, “Liability for Safety Offences: Is the Law Still Fatally Flawed?” (2008) 37 *Industrial Law Jnl* 100-118, at 102 n 7.

<sup>87</sup> See above n 84 at [11] for this quote from MacKay J.

<sup>88</sup> 1978 JC 74; 19 May 1978 (Emslie LJG, Cameron & Johnston LJ).

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

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

The more junior the officer charged and the more limited his role in the company’s affairs the greater will be the need to emphasise to the jury the importance of the scope of the proper functions of the accused in any consideration of alleged neglect on his part for the purposes of s 37.<sup>89</sup>

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

An earlier case illustrating this problem is *Huckerby v Elliott*.<sup>90</sup> This was a decision of the UK Queen’s Bench Division on appeal from a magistrate’s conviction of a company director for allowing premises to be used for gambling without a licence. The evidence showed that the particular director took no real interest in the running of the company and left the obtaining of licences to other directors. She was convicted under a provision analogous to the ones being considered here, on the basis that the failure to obtain the licence was attributable to her “neglect”.

On appeal the conviction was overturned, Lord Parker CJ for the court ruling that not every director had a duty to closely supervise the operation of the company. His Lordship specifically followed the decision of Romer J in *Re City Equitable Fire Insurance Co Ltd*.<sup>91</sup> This case is familiar in the area of company law as stating the former standard of care required of directors, but if not actually yet overruled it should probably now be regarded as having been “overtaken” by a much higher standard of care.<sup>92</sup> Accordingly, it seems likely that *Huckerby* would be decided

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<sup>89</sup> Above, n 88.

<sup>90</sup> [1970] 1 All ER 189.

<sup>91</sup> [1925] Ch 407.

<sup>92</sup> For a more recent overview of a director’s duty of care, see the summary offered by Santow J in *ASIC v Adler* [2002] NSWSC 171, at para [372], referring to *Daniels t/as Deloitte Haskins & Sells v AWA Ltd* (1995) 37 NSWLR 438 and other recent decisions establishing that “directors are required to

differently today. In any event, attention to safety of employees is likely to be regarded as a more serious matter than attention to merely regulatory matters such as a licence.

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

### **(b) *R v Charget Ltd***

The second major decision giving guidance on s 37 came with the recent decision of the House of Lords on appeal in *R v Charget Limited (t/a Contract Services)*<sup>93</sup>. In that case an employee of Charget, who had been assisting in works being carried out on a farm, was killed when a dump truck he was driving overturned and buried him. Mr Ruttle, who was apparently managing director of a group of companies including Charget, and on the board of a contracting company which was also charged in relation to the incident, Ruttle Contracting Ltd, was charged under s 37 *HSW Act*. The trial judge having entered convictions and fines against both companies and Mr Ruttle, and an appeal to the Court of Appeal having failed,<sup>94</sup> an appeal proceeded to the House of Lords. In a unanimous judgment the Appellate Committee of the House dismissed the appeal and affirmed the convictions of all the defendants.

A large part of the discussion in the judgment concerned the nature of the charges under ss 2 and 3 of the *HSW Act*, and the interaction of the duty to do what was “reasonably practicable” with the reversal of onus of proof provided by s 40 of the Act. The House affirmed that the UK legislation operates in precisely the way that the NSW *OHS Act* 2000 does- that once there is a risk to safety proved on the facts, then the onus falls on the company concerned to show that it was not reasonably practicable to do more. It is not necessary for the prosecutor to prove the precise particulars of the alleged risk.<sup>95</sup> Their Lordships also confirmed the view that had been taken by the Court of Appeal in *R v Davies*,<sup>96</sup> that this reversal of onus was not in breach of the obligations of the UK under article 6(1) of the European Convention on Human Rights, as it was a “proportionate” response to the social, legal and economic purposes of the law relating to workplace safety.<sup>97</sup>

For present purposes, however, there were also some important comments made about the operation of s 37. Lord Hope noted at [32] that to establish a s 37 breach the liability of the company must first be considered, and then “additional facts and circumstances” established. The officer can only be convicted if it is shown that

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take reasonable steps to place themselves in a position to guide and monitor the management of the company” (*Daniels* at 664).

<sup>93</sup> [2008] UKHL 73 (10 Dec 2008).

<sup>94</sup> *R v Charget Ltd* [2007] EWCA Crim 3032; [2008] ICR 517.

<sup>95</sup> See Lord Hope, above n 93 at [21].

<sup>96</sup> [2003] ICR 586.

<sup>97</sup> See Lord Hope, above n 93, at [28]-[30].

offence involved his or her consent, connivance or neglect. His Lordship at [33] approved the decision in *R v P*<sup>98</sup> noted above, and impliedly the approach taken in the *Wotherspoon* case, that what is relevant is what the officer “ought to have known” not just his or her actual knowledge.

The distinction between “consent” and “neglect” was brought out by noting that in *Attorney-General’s Reference (No 1 of 1995)*<sup>99</sup> Lord Taylor in the Court of Appeal had ruled that:

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

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

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

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

These comments bring out sharply, of course, the difference between the UK and the NSW models as far as personal officer liability is concerned. In the circumstances of *Ritchie*, for example,<sup>100</sup> it seems highly unlikely that a s 37 offence could have been proved, the officer there being geographically and in terms of the company structure far removed from the work place. But this does not mean that the UK model is to be preferred. It is submitted that there are important reasons why even (perhaps one might say, especially) officers whose decision-making processes shield them from observing what happens on the ground, should be required to make sure that there are proper procedures and processes in place to ensure safety.

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

There is another issue arising under the *HSW Act* which may need to be further resolved in the future. Interestingly, it is similar to an issue which has troubled NSW

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<sup>98</sup> Above, n 84.

<sup>99</sup> [1996] 1 WLR 970.

<sup>100</sup> See above, near n 59.

courts. The question is that of the reversal of onus of proof in relation to the defence of “reasonable practicability”. If a director is charged under s 37, does the Act operate to require them to make out a defence that it was “reasonably practicable” to have done more? Or does the onus in relation to this matter rest with the prosecution?

The question was raised by MacKay J in the Hatfield prosecution mentioned previously,<sup>101</sup> and is noted in an article by Wright:<sup>102</sup>

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

With respect to MacKay J, this comment seems as much in need of correction as his Honour’s previously noted remark which had to be corrected in *R v P*.<sup>103</sup> Ultimately it seems clear that the legislative structure does not require separate re-consideration of the issue of “reasonable practicability” in a s 37 prosecution; the issue is considered at the stage when the tribunal of fact is considering the preliminary question whether or not the company has committed an offence.

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

1. Section 37 is not subject to the “reversal of onus” provision in s 40, which is confined on its terms to sections 2-6. This is spelled out quite clearly in *R v Davies*<sup>104</sup> at [27].
2. The Court of Appeal in *Charget*<sup>105</sup> had occasion to correct the trial judge on this point in the following comments:

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

It is clear from these comments that the only issues that the jury ought to have considered were (1) was the company guilty of an offence? and (2) had the defendant caused this by his consent, connivance or neglect? In making up its mind on the first question the jury would consider the question of “reasonable practicability”, but in

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<sup>101</sup> Above, n 86.

<sup>102</sup> F B Wright, “Criminal Liability of Directors and Senior Managers for Deaths at Work” [2007] *Criminal Law Rev* 949-968, at 961.

<sup>103</sup> See above, n 87.

<sup>104</sup> Above, n 96.

<sup>105</sup> Above n 94.

doing so they were considering the application of either s 2 or s 3, which are subject to the s 40 reversal of onus. Once they had reached a decision on the guilt of the company, the question of “reasonable practicability” became irrelevant to s 37, and so did s 40.

3. While the House of Lords in *Chargot*<sup>106</sup> made no direct comment on this issue, the careful analysis of the elements of the s 37 offence offered by their Lordships reveals no need for an additional step involving “reasonably practicable” being considered again at the stage of the officer’s liability. Lord Hope’s analysis at [35]-[36] moves through the steps of determining the company’s failure to ensure safety, the need for the company at that stage to prove that they had done what was reasonable practicable, and then if it failed at that point the simple need for the prosecution to prove consent, connivance or neglect.

In short, the only sensible way of interpreting the provisions seems to be that in consideration of a s 37 offence, there is no further “reconsideration” of the “reasonably practicable” defence, which should already have been taken into account in dealing with the preliminary question of the company’s guilt. This, it will be noted, is the same position that the NSW courts have reached on the analogous question of whether, in an offence charged under s 26, the general s 28 defences should again be used.<sup>107</sup>

### **Possible Future Legislative Reform**

Of course the future of s 26 of the *OHS Act 2000* (NSW), like the future of all OHS legislation in Australia at the moment, is uncertain given the recommendations of the *First Report* of the National Review into Model Occupational Health and Safety Laws (Oct 2008).<sup>108</sup> In a lengthy paper it is only possible to briefly survey the recommendations relating to personal liability of company officers, contained in chapter 8 of the Report.

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. Of itself this is a commendable recommendation. As the Report notes at para [8.29], there seems much to be said 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”. On the other hand, not too much should be made of the form in which the obligation is imposed- the legal effect of s 26 of the NSW Act is really identical to this, simply expressed in a different way.

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<sup>106</sup> Above n 93.

<sup>107</sup> See the discussion above near n 15.

<sup>108</sup> For a copy of the First Report see <http://www.nationalohsreview.gov.au/ohs/Reports/> . The Second Report was due to be finalised by 30 January 2009.

Other recommendations contained in chapter 8 (concerning the technical definition of “officer” and the type of entity covered) are unexceptionable, and in any event mostly require further definition in the Second Report.

But the key question, of course, lies in the requirements for proof. Will it be up to the prosecution to prove 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 has taken a wrong turning on this issue in this author’s opinion on the general duties, recommending no reversal of onus for “offences relating to non-compliance with a duty of care”.

Oddly, however, it is not immediately clear from the 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... to exercise due diligence to ensure” compliance. Indeed, at para [8.42] 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 due diligence?

As much as this author would like to think so, it seems unlikely. If, as ch 13 suggests, there is 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 NSW legislation has proved to be perfectly workable, and in general to produce sensible results, with the current structure where an accused officer is required to bring forward evidence of either lack of influence, or due diligence. The Report itself comments in a different context, at para [8.35], on the fact that there are a “limited number of officer prosecutions undertaken in Australian jurisdictions”. This paper and the 2005 article demonstrate, I think, that 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.

## Conclusion

The law on the operation of s 26 of the *OHS Act* 2000 (NSW) has been clarified by further judicial comment over the last four years. It seems fairly clear now, as we have seen, that among other things-

- The term “concerned in management” is not restricted to those in the “central” management of a large firm, but extends to a wider group of managers who have decision-making power and authority, going beyond the mere carrying out of directions as an employee, such as to affect the whole or a substantial part of the corporation, which powers relate to the matters which constituted the offence under the Act.<sup>109</sup>

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<sup>109</sup> *McMartin v Newcastle Wallsend Coal Company Pty Ltd* [2004] NSWIRComm 202; see also the *Powercoal* decision in the Court of Appeal, text above near n 27.

- The general defences under s 28 of the Act are not applicable to the specific charge under s 26, which contains its own defences of “unable to influence” or “due diligence”.<sup>110</sup>
- The “unable to influence” defence will be narrowly construed, possibly so that where a formally appointed board member is involved it can only apply where the articles of association of the company impose some unusual limitation on the member’s powers.<sup>111</sup>
- The “due diligence” defence requires consideration of a range of “proactive” activities whereby safety systems are not only established on paper, but also implemented on the ground, their operation regularly monitored, and specific issues responded to when they are drawn to attention.<sup>112</sup>
- It is perfectly possible for a senior manager who only visits a workplace occasionally to be held not to have exercised “due diligence” and to receive a personal fine.<sup>113</sup>
- Where more than one manager is convicted under s 26, differential fines may be imposed depending on the culpability of the individual.<sup>114</sup> In some (though by no means all) cases, no conviction might be entered where a manager, while technically guilty, had little involvement in decisions which led to the incident, and had made a genuine effort to introduce and monitor safety systems.<sup>115</sup>

We have also noted that the law of personal liability in the UK has received renewed attention at the highest level, and its clarification by the House of Lords there may lead to the provisions being more widely used.

Finally, it has been argued that the changes to personal liability provisions proposed by the National Inquiry in its *First Report* have some commendable aspects, but that the failure to provide for a reversal of onus will leave the model provision hard to use and unlikely to have a continuing serious impact on corporate decision-making which may save lives and preserve the health of workers.

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<sup>110</sup> The *Gretley Appeal*, discussion above near n 15, and see also the outcome of the *Daly Smith* litigation above n 74. It has also been seen that the UK courts are apparently adopting a similar approach under the *HSW Act*.

<sup>111</sup> See the discussion in *Ritchie*, text near n 60, and *Ngai*, text near n 79.

<sup>112</sup> See for example *Herbert (Salamander Shores)* at n 77.

<sup>113</sup> See *Ritchie*, above n 59; and *Smith*, n 67.

<sup>114</sup> See *Sayhoun*, near n 56; and *Burn and Steel*, near n 65

<sup>115</sup> See *Cahill*, n 81.