

WHAT SHOULD THE OPTIMAL STRUCTURE AND CONTENT OF A MODEL OHS ACT BE?

SPECIFIC COMMENTS

Legislative Approach:

Q1. Which regulatory approach or approaches should be taken in the model OHS Act, and why?

A1. I support the “Robens” type of model discussed in the Issues Paper (IP). It has worked well over the years since it was introduced to Australia in the early 1980’s, and it is a model which is generally being adopted around the world (and in particular, in Commonwealth countries around the Asia-Pacific region).

Q2. How detailed should the model OHS Act be in comparison with the subordinate regulations and codes of practice?

A2. The level of detail in the current NSW *OHS Act* 2000 is about right, I think- broad principles of safety stated clearly; enough statutory content to make the powers of the enforcement bodies, prosecution procedures and possible penalties clear and beyond doubt (ie not subject to possible challenge as *ultra vires* if all put into Regulations.)

Scope, Application & Definitions:

Q10. Should general duties of care be tied to the conduct of work, to the workplace or to some other criteria?

A10. In general there should be duties imposed based on both criteria, conduct of work and the workplace. In particular the uncertainty created by the present wording of s 8(2) of the *OHS Act* 2000 (NSW), which imposes a duty on an employer to ensure safety of non-employees “while they are at the employer’s place of work” should be removed. It would be better in model legislation to remove that phrase altogether, and to follow the *OHS Act* 2004 (Vic) s 23(1) in imposing the obligation where the risk arises simply “from the conduct of the undertaking of the employer”. This would avoid the need for a strained interpretation of the NSW provision which has occasionally resulted (eg arguably in *WorkCover v Chubb Security Australia Pty Ltd* [2005] NSWIRComm 263, where the security driver in question was in a car-park far removed from the main office.)

Duties of Care – Who owes them and to whom?:

Q30. Should the model OHS Act include positive duties for officers of bodies corporate?

A30. I would support a model such as the Queensland model noted in the Issues Paper, where all company officers were said to have a duty to ensure the corporation complies. But I would not support a model which only imposed this obligation on selected “safety officers”, as it seems to me this would possibly give rise to “scapegoating” of middle management.

Q36. Are there any other issues in relation to the duties of care that should be addressed in the model OHS Act?

A36. I think serious consideration should be given to adding to the list of those who currently bear duties as to safety, those who design and sell “safety management systems”. There seems to have been an increase in firms offering “pre-packaged” systems for risk assessment and the like. But the law should impose on those firms a duty to ensure that those systems are suitable for the purpose for which they are provided, and hence encourage careful thought to go into safety system advice offered to individual businesses, rather than them being simply sold an “off the shelf” product which will not really suit their situation. That the safety of workers can be put at risk by poorly designed safety systems is obvious, and illustrated in the common law area by the success of a negligence action by a worker against the designers of such a system in *Driver v William Willet (Contractors) Ltd* [1969] 1 All ER 665.

Prosecutions:

Q117. Is ‘reasonably practicable’ an appropriate standard for the model OHS Act?

A117. Yes, this is good standard for the defence under the model Act. It is a standard that has been adopted generally in the civil law area, although not under precisely that name. It seems to represent fairly well the “balancing process” required in a common law action for negligence, where in dealing with the issue of breach of duty a court is required to apply what has become known as the “negligence calculus” to answer the question as to whether a duty-holder has responded to a foreseeable risk as a “reasonable” person. (See *Wyang Shire Council v Shirt* (1980) 146 CLR 40 at 47-48- the response of the reasonable person “calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.” The general approach adopted in *Shirt* to this question, and to the definition of what a “foreseeable” risk is, have been reaffirmed as valid recently by the High Court in *NSW v Fahy* (2007) 236 ALR 406.) This standard has been adopted in industrial safety criminal legislation for many years.

The courts often refer to the comments of a UK court in the civil case of *Edwards v National Coal Board* [1949] 1 KB 704:

'Reasonably practicable' ... seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them- the risk being insignificant in relation to the sacrifice- the defendants discharge the onus on them.

In a similar context, construing statutory occupational health and safety legislation in an action for damages, Gaudron J in the High Court decision in *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304; [2001] HCA 6 offered some very helpful comments on the meaning of the phrase at 322-323, [53]:

[T]hree general propositions are to be discerned from the decided cases:

. the phrase "reasonably practicable" means something narrower than "physically possible" or "feasible";²⁷

²⁷ See, for example, *Edwards v National Coal Board* [1949] 1 KB 704 at 712 per Asquith LJ; *Marshall v Gotham Co Ltd* [1954] AC 360 at 377 per Lord Keith of Avonholm; *Auckland City Council v NZ Fire Service* [1996] 1 NZLR 330 at 337-338 per Gallen J.

. what is "reasonably practicable" is to be judged on the basis of what was known at the relevant time;²⁸

. to determine what is "reasonably practicable" it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to avert that risk.²⁹

Recently the Full Court of the Supreme Court of South Australia in *Dinko Tuna Farmers Pty Ltd v Markos* [2007] SASC 166 commented in some detail on the phrase "reasonably practicable" as it appears in the South Australian legislation. The Court at [38] noted that :

What is "reasonably practicable" is a question of fact for the trial Magistrate. Complaints before the Industrial Court and Magistrates Court under section 19(1) typically may be expected to involve consideration of matters such as: the magnitude of the potential harm; the likelihood that harm will arise; the availability of any measures that could be taken to eliminate or minimise the risk; the cost and time involved in those measures being taken and their effectiveness in addressing the risk.

Maintaining this standard as a defence implements a test with which courts are generally familiar (and which has been translated into health and safety guidance given by regulators), and maintains consistency with other jurisdictions such as the UK, where a "Robens" model of legislation is also still in force.

Q118. Should the prosecutor or the duty holder be required to prove whether the standard was met? Why?

The current model adopted in NSW, Queensland and also in the UK should be maintained in the model legislation- that is, that the onus of proving that a precaution was not "reasonably practicable" should remain on the duty holder. In NSW s 8 of the *OHS Act* 2000 imposes a duty to "ensure" safety, but also provides a defence of "reasonable practicability" in s 28.

An important feature of the NSW legislation is that it is for the defendant in a prosecution under the Act to establish the matters required under s 28. This "reversal of the onus of proof" has been attacked in various quarters as a breach of fundamental common law principles, an attack on human rights, and a totally unprecedented interference with the liberty of the subject. I completely disagree with that assessment.

One important point to make is that the reversal of onus was not invented by the NSW Parliament in 2000 (or in 1983!) In that sense the Issues Paper is slightly misleading at p 36 when, in the fourth paragraph after heading 8.5, "The Burden of Proof and Defence", it draws a contrast between the view of those who "maintain that the duty holder, not the prosecutor, is in the best position to establish reasonable practicability", and "others" who "maintain that **the** rules applying to the proof of criminal offences should apply to OHS prosecution" (emphasis added). The set of rules governing the onus of proof in criminal proceedings is very large, and by no means as uniform as this statement suggests. There are a number of areas where there is a reversal of what could be called the "usual" onus of proof, not just in the occupational health and safety area.

²⁸ See, for example, *Edwards v National Coal Board* [1949] 1 KB 704 at 712 per Asquith LJ; *Marshall v Gotham Co Ltd* [1954] AC 360 at 370 per Lord Oaksey, 377 per Lord Keith of Avonholm; *Buchanans Foundry Ltd v Department of Labour* [1996] 3 NZLR 112 at 118 per Hansen J.

²⁹ See, for example, *Coltness Iron Co v Sharp* [1938] AC 90 at 94 per Lord Atkin; *Edwards v National Coal Board* [1949] 1 KB 704 at 710 per Tucker LJ, 712 per Asquith LJ, 715 per Singleton LJ; *McCarthy v Coldair, Ltd* [1951] 2 TLR 1226 at 1228 per Denning LJ, 1230 per Hodson LJ; *Marshall v Gotham Co Ltd* [1954] AC 360 at 370 per Lord Oaksey, 373 per Lord Reid; *Austin Rover Ltd v Inspector of Factories* [1990] 1 AC 619 at 625 per Lord Goff of Chieveley, 635-636 per Lord Jauncey of Tullichettle; *Auckland City Council v NZ Fire Service* [1996] 1 NZLR 330 at 338 per Gallen J.

Provisions reversing the onus of proof have a long history in Australian law. A number of provisions aimed at important public safety values in the area of motor traffic, drug trafficking, the environment, public health and workplace safety have for many years included a reversal of the usual onus of proof. In his book, *Lessons from Gretley*, Andrew Hopkins lists a number of specific examples.³⁰

There is extensive historical precedent for a ‘reversal of onus’ provision in cases dealing with industrial safety. The question of the onus of proof, while logically distinct from the question of the ‘mental state’ necessary to support criminal liability, has been inextricably bound up with it. As Lord Reid noted in *Tesco Ltd v Nattrass*,³¹ it has been taken to be “an invariable rule that where mens rea is a constituent of any offence the burden of proving mens rea is on the prosecution.” Conversely, where mens rea has been regarded as inappropriate, it is not uncommon to find a reversal of the normal onus of proof.

In Australia it has been commonly accepted, at least since the High Court decision in *He Kaw Teh v R*,³² that while criminal offences generally are to be read with a requirement for *mens rea*, some classes of offence created by parliament will be interpreted not to require this. Dawson J cited ‘statutes which create offences for the purpose of regulating social or industrial conditions’ as an example. He went on to say:

if a prohibition is directed at a grave social evil, the absolute nature of the offence may more readily be seen, particularly if proof of intent would be difficult and would present a real impediment to the successful prosecution of offenders.³³

A recent extensive review of the nature of the duty provision in s 8(1) of the *OHS Act 2000* (NSW) is to be found in the judgment of the President of the Industrial Court of NSW, Boland J, in *Cahill v State of NSW (Dept of Community Services) (No 3)*,³⁴ where the history of the provision and its nature as one which imposes “absolute liability” is helpfully described.

In recent years the justification for reversal of onus provisions in health and safety legislation has been considered by the UK Court of Appeal in *Davies v Health and Safety Executive*³⁵ in the context of a claim that such provisions were in breach of the guarantee of presumption of innocence provided by Art 6(2) of the *European Convention on Human Rights*, now binding on the United Kingdom. The question for the court was stated to be whether ‘a fair balance has been struck between the fundamental right of the individual and the general interests of the community, paying due regard to the choice which the legislature has made when striking that balance, particularly where social or economic policy is involved’.³⁶ The court ruled that the provisions (very similar in effect to the provisions of the *OHS Act 2000*) were justified, taking into account the importance of the area of social policy, and in particular the difficulty that would be found in the prosecution having to prove matters within the knowledge of the accused.

³⁰ A Hopkins, *Lessons from Gretley* (North Ryde: CCH, 2007) at pp 67-69.

³¹ [1972] AC 153 at 169–70; [1971] 2 All ER 127.

³² (1985) 157 CLR 523; 60 ALR 449.

³³ *Ibid*, at 595. See for another example the decision of the Full Bench of the NSW IRC in *Llandilo Staircases Pty Ltd v WorkCover Authority of New South Wales (Inspector Parsons)* (2001) 104 IR 204 holding that an offence of failing to hold adequate workers’ compensation insurance was an ‘absolute’ liability offence, requiring no proof of mens rea and not allowing the defence of ‘honest and reasonable mistake’.

³⁴ [2008] NSWIRComm 123 (27 June 2008), at paras [149]-[254].

³⁵ [2002] EWCA Crim 2949.

³⁶ *Ibid*, at [10]; see also [24]-[30] where the policy reasons for allowing a reversal of onus of proof are spelled out in terms which are also relevant for the NSW Act.

A recent decision of the English Court of Appeal affirming the operation of the relevant UK legislation was *R v Chargot Ltd Trading as Contract Services and ors*,³⁷ holding that the effect of s 40 of the *Health and Safety at Work Act 1974* (UK) was that in a prosecution of an employer all the prosecution need do is to lead evidence of a risk to health and safety, and it is then up to the employer to lead evidence as to why the risk could not reasonably practicably have been avoided. Quoting an earlier decision, Latham LJ noted at para [24]:

[I]t is the risk to the health and safety of the employees or the public which is the trigger for potential liability in cases under sections 2 and 3 of the Act. Once risk can be identified, that is sufficient to impose the onus on the employer or undertaker. This was recognised by the Court in *Davies* [*R v Davies* [2003] ICR 586], in paragraph 25:

"The reversal of the burden of proof takes into account the fact that duty holders are persons who have chosen to engage in work or commercial activity (probably for gain) and are in charge of it. They are not therefore unengaged or disinterested members of the public and in choosing to operate in a regulated sphere of activity they must be taken to have accepted the regulatory controls that go with it. This regulatory regime imposes a continuing duty to ensure a state of affairs, a safety standard. Where the enforcing authority can show that this has not been achieved it is not "unjustifiable" or unfair "to ask" the duty holder who "has" either created or is in control of the risk to show that it was not reasonably practicable for him to have done more than he did to prevent or avoid it."

A reversal of onus, to sum up, has been seen to be appropriate in cases where legislation is designed to deal with a major social problem, and where the matters to be proved will lie particularly within the knowledge of the defendant. If an injury or death has taken place in the workplace, then Parliaments have for many years taken the view that it is reasonable that the employer show why it was not possible to have taken reasonable precautions to prevent the incident.

Secondly, the "reversal" of onus in the NSW legislation is not complete. In criminal prosecutions the prosecutor has to prove all the elements of their case "beyond reasonable doubt", the highest standard of proof. (This is not in any way altered under the *OHS Act 2000* (NSW); the prosecution has to make out the elements of the offence, a detriment to safety and a "causal" link with the workplace,³⁸ beyond reasonable doubt.) In offering a defence, however, the defendant only has to make out their case "on the balance of probabilities".³⁹

Thirdly, while the legislation clearly casts the onus of proving that further precautions were not reasonably practicable onto the defendant, in many prosecutions WorkCover goes above and beyond the call of the Act by leading positive evidence to demonstrate that it **was** reasonably practicable to have done more. But the model where an employer is required to bring forward a defence is clearly the right one for this area.

A number of high-level inquiries into OHS in recent years have recommended that the NSW model is the preferable one: the 1995 Federal Industry Commission Report (Vol 1, pp55-56); the 1997 *McCallum Report* in NSW⁴⁰; and the *Report* of the 1998 NSW Parliamentary Inquiry.⁴¹ The recent recommendation to the contrary in the 2006 Review conducted by

³⁷ [2007] EWCA Crim 3032.

³⁸ See, eg, *Drake Personnel Ltd T/as Drake Industrial v Workcover* [1999] NSWIRComm 341.

³⁹ See W Thompson *Understanding NSW Occupational Health and Safety Legislation* (3rd ed; North Ryde: CCH, 2001) at p 91, citing a number of IRC decisions to this effect.

⁴⁰ *Review of the Occupational Health and Safety Act 1983: Final Report of the Panel of Review*, February 1997; see recommendation 14.

⁴¹ NSW Legislative Council Standing Committee on Law & Justice, *Report on the Inquiry into Workplace Safety: Interim Report* (December 1997), recommendation 3 at p.27. The *Final Report* of November 1998 simply re-iterated the Committee's commitment to the recommendations of the *Interim Report*: see para 5.5.7 of the *Final Report*.

WorkCover is not persuasive. (We still do not know the views of the Stein Inquiry which was commissioned by the NSW Government to consider the implementation of the recommendations of that review, as the Report of that Inquiry has not been released.)

One more point should be made about the reversal of onus provision. Arguments are sometimes presented to the effect that these provisions “unfairly discriminate against corporate personnel compared with the way in which other people are treated under the law”.⁴² When analysed (and this view is not usually defended in any detail) what this apparently means is that people charged with murder, rape and theft are given the benefit of a presumption of innocence and the burden of proof being on the prosecution, whereas provisions like s 8 and s 26 of the *OHS Act 2000* “reverse the onus”. What is not mentioned is that employers charged under s 8, and officers charged under s 26, will face no-where near the same level of penalty as murderers, rapists and thieves. Indeed, it is only in very rare cases that personal offenders under the *OHS Act* will even be *possibly* liable for jail- only, under s 12(c) *OHS Act 2000*, for second offenders, and even then only for a maximum of 2 years. In fact, there are **no** recorded cases where an individual has been imprisoned for a second offence under the *OHS Act 2000* or its predecessor.

The *OHS Act 2000* does now contain a provision allowing imprisonment for a first offence, s 32A, dealing with reckless conduct causing death at a workplace, introduced in 2005 but so far not tested in the courts. It is clear that the elements of that offence, in s 32A(2) (causation, duty and recklessness), all have to be made out beyond reasonable doubt before there can be a conviction. There is a general defence of “reasonable excuse” the onus of proof of which lies on the defendant,⁴³ and the general defence under s 28 also applies. But for an offence which has such serious consequences, additional safeguards have been introduced.⁴⁴

For the sadly “usual” offences of failing to ensure safety, however, the current reversal of onus provision is a sensible and well-accepted technique of ensuring that a court considering the question of whether everything was done that reasonably could have been done to protect a worker from harm, deals directly with the relevant issues. It is the employer who knows what might have been put in place, what it would have cost and how difficult it would have been to implement; the employer can present the evidence to persuade the tribunal that they should share his or her view on the matter.

Q119. Should the burden of proving elements of an offence differ between different types of offences (e.g. duties of care and procedural obligations)? If so, why?

Yes, but only along the lines that the NSW Act does already, as noted above, by requiring a strong burden of proof on a prosecutor where an offence will potentially expose a defendant to imprisonment for a first offence (as does s 32A of the NSW *OHS Act*.) But general duties of care should continue to be subject to a principle that a *prima facie* breach will expose the duty-holder to a penalty unless they can make out a defence of reasonable practicability or the like.

⁴² See the Federal Government’s Corporations and Markets Advisory Committee (CAMAC) Report on *Personal Liability for Corporate Fault* in September 2006, at 1.5.1, summary. For a general response to this report see N Foster, “The CAMAC Report on Personal Liability for Corporate Fault - A Critique from the OHS Perspective” (2007) 20(1) *Australian Journal of Labour Law* 112-118.

⁴³ See also s 110 confirming what is obvious from s 32A(3) in any event.

⁴⁴ See also s 5AG of the *Criminal Appeal Act 1912* (NSW) which ensures that, despite the normally exclusionary “privative clause” in s 179 of the *Industrial Relations Act 1996* (NSW), in the case of a sentence of imprisonment under s 32A there is an appeal to the NSW Court of Criminal Appeal once the usual appeal procedures in the Industrial Court of NSW have been exhausted.

Q120. What, if any, defences should the model OHS Act provide?

The defences available under NSW s 28 for general offences against the legislation seem to strike a reasonable balance between duty-holders and the rights of possible victims of a breach of safety. Recently the Full Bench of the Industrial Court of NSW in *St Hilliers Contracting Pty Ltd v WorkCover Authority of NSW* [2007] NSWIRComm 39 commented:

The defences afforded by s28 are vital to balance the absolute criminal liability created by the Act and their significance should not be undervalued. They must be given due consideration, and, should the court come to the view that they do not apply, adequate reasons must be given.

In particular, it is worth restating that it should *not* be a defence to a charge of failure to ensure safety that the defendant can point to someone else who has also failed to carry out some duty under the legislation. Each defendant has their own responsibility, and should be held accountable for their own failure. Apportionment of overall blame may be carried out by a court at the sentencing stage, but should not detract from liability issues.

Q121. Should the burden of proof or defences be different for a corporation and an individual (officer or employee)? If so, why?

Currently under the NSW *OHS Act* 2000 an offence may be committed by an employee under s 20 where the employee fails to “take reasonable care for the health and safety of people who are at the employee’s place of work and who may be affected by the employee’s acts or omissions at work”. Given that “reasonable care” is an element of the offence, then it is clear that to some extent the onus of proof differs in the case of an employee, from that imposed in an action against an employer. But it is submitted that this is a perfectly reasonable policy position. In general an employer is the one in a position to determine the systems of work, the level of risk assessment, the resources allocated to safety. An employee is not. It is reasonable to ask an employee to take care for others around them in the sense set out here; but the difference of position between an employer and an employee is clear and justifies differential treatment.

I would argue that an individual company officer, however, should bear the onus of showing (if the company has committed an offence) that they were either not in a position to influence the company or exercised due diligence (as in current NSW s 26). By virtue of their position the officer will almost always have a stronger degree of influence over possible precautions, risk assessment, etc. Where they do not they will have a chance to make out the defence.

Q104. Should the model OHS Act provide for breaches of duties or obligations to be criminal offences, or be the subject of civil proceedings and penalties, or a mixture of both?

A104. I would recommend that the offences under the Act be purely criminal. The whole notion of a “civil penalty” provision (which is not an action for civil damages by an injured person, but an action taken by a regulator) is still mostly untried in Australia, certainly in the workplace safety area. While it may be acceptable to have such provisions in legislation dealing with commercial matters such as anti-competitive behaviour, or company law issues such as failure to file returns, it seems inappropriate that breaches of duty as to the safety of workers (and hence which have put their bodily safety and their very lives at risk) should be “downgraded” to what is arguable a less serious matter. This sends precisely the wrong message about the importance of these issues.

Q106. Which courts or tribunals should have jurisdiction to hear prosecutions for OHS offences?

Q107. Is it appropriate for prosecutions to be heard by specialist courts or tribunals (or specialist divisions in courts)? Why?

Q108. To where should appeals lie? Should the right to appeal be subject to any conditions and if so, what should they be?

Q109. Should defendants be entitled to trial by jury in prosecutions for any offence and, if so, which?

A106-109. The NSW model, where there is a specialist tribunal which deals with safety prosecutions as well as having a general role in industrial matters, seems reasonable. The benefit of having a specialist tribunal is that safety matters are not “lost” in court management procedures, they are given appropriate priority, and when they are dealt with the judicial officer concerned is familiar with the area and so has a feel for what is “reasonable” behaviour.

However, I disagree with the current NSW model which restricts appeals by a “privative” clause so that they cannot go beyond the Full Bench of the Industrial Court. In my view there should be a “special leave” process for an appeal to progress beyond the Full Bench to the NSW Court of Criminal Appeal (and hence to the High Court through their leave procedures.) I think there is arguably a case that the present system is unconstitutional (given the need to preserve the right of an accused person to have possible access to the ultimate appellate tribunal in Australia.) But even if this is not so (and of course there are arguments either way), as a matter of legal policy and to facilitate the sensible development of, and supervision of, the law, appeals to the CCA ought to be incorporated into the system. They should not be “of right”- they should be confined to circumstances where the CCA are of the view that there is arguably a matter of public importance for the interpretation of the law, or a serious miscarriage of justice. But appeals of this sort should be available. Providing the Industrial Court with the benefit of appellate supervision by the Court of Criminal Appeal will have the benefit of ensuring that the Industrial Court itself does not continue down a “wrong track”; but perhaps more importantly will have the benefit for the Industrial Court of becoming an acknowledged part of the judicial system of the State, and avoid suggestions that are sometimes made of a lack of accountability.

I do not think there should be an introduction of jury trials for OHS offences. They would see an immense increase in expense of trials. While OHS offences are criminal matters, they are not at the same level of conscious criminality of the offences such as murder and rape that are the matter of jury trials at the moment.

Q122. Should ‘officers’ of a corporation be liable to an offence because the corporation has committed an offence?

A122. Yes. There is now a persuasive body of research which demonstrates that personal liability for company officers is a major factor in influencing corporate behaviour.⁴⁵ I refer the Review Panel to my article on the operation of s 26 of the *OHS Act 2000* (NSW), which reviews some of the provisions in the current Australian law and the NSW provision in

⁴⁵ See, eg, N Gunningham, *CEO and Supervisor Drivers: Review of Literature and Current Practice* (NOHSC, 1999) 39-40; N Gunningham and R Johnstone *Regulating Workplace Safety: System and Sanctions* (Oxford: OUP, 1999) 217-218.

detail.⁴⁶ There have been of course a number of important prosecutions under s 26 since that article was finalised, but in my view the provision continues to be an effective one.⁴⁷

Q123. How should officer be defined?

A123. The most effective definition of “officer” seems to be that adopted in NSW, where s 26 applies to anyone who is a “director” or “concerned in the management of the corporation”. The meaning of “concerned in management” was unclear for a while, but has been helpfully (if not perfectly) clarified in recent years- see the judgment of Staunton J in *McMartin v Newcastle Wallsend Coal Company Pty Ltd and ors* [2004] NSWIRComm 202 at [885], qualified by the decision of the Full Court of the Industrial Court in *Newcastle Wallsend Coal Company Pty Ltd v McMartin* [2006] NSWIRComm 339 at para [517].

In brief, Staunton J’s comments can be summarised as holding that a person will be “concerned in management” for the purposes of s 26 if they have

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

In *Powercoal Pty Ltd & Foster v Industrial Relations Commission of NSW & Morrison* [2005] NSWCA 345 Spigelman CJ offered a number of comments about the provision which are also very instructive. His Honour noted that

- The question of what “concerned in the management” means cannot be resolved simply by consideration of cases dealing with the phrase as used in legislation governing companies; it must take its meaning from the context in which it is used. The relevant issue in considering the meaning of the phrase in the *OHS Act 2000* is “any aspect of the operations of the company insofar as it raises safety considerations”- para [102].
- The broad purposes of the Act, to encourage safety and apply to a range of possible defendants, lead to a conclusion that the phrase should not be interpreted narrowly.

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

I would suggest that the current Victorian provision, in contrast, may be unhelpful. In that Act,⁴⁸ and in the proposals put forward in their draft Exposure Bill by WorkCover (NSW) in

⁴⁶ N Foster, “Personal Liability of Company Officers for Corporate Occupational Health and Safety Breaches: section 26 of the *Occupational Health and Safety Act 2000* (NSW)” (2005) 18 *Australian Journal of Labour Law* 107-135. For comment on some other recent criticisms of personal liability provisions, see N Foster “The CAMAC Report on Personal Liability for Corporate Fault - A Critique from the OHS Perspective” (2007) 20(1) *Australian Journal of Labour Law* 112-118.

⁴⁷ For discussion of the one of most “high profile” prosecutions of company officers in recent years under the NSW legislation, see N Foster “Mining, maps and mindfulness: the Gretley appeal to the Full Bench of the Industrial Court of NSW” (2008) 24/2 *Journal of Occupational Health and Safety, Australia and New Zealand* 113-129.

⁴⁸ See s 144 of the *OHS Act 2004* (Vic) and the definition of “officer” in s 5 of that Act.

2006, the option is taken of adopting the definition of “officer” in s 9 of the *Corporations Act* 2001 (Cth). There is one important possible difference between the law as it seems to have been developing in NSW on the current s 26, and the s 9 definition. The s 9 definition refers to a person “(b)(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the **business** of the corporation; or (ii) who has the capacity to affect significantly the corporation’s **financial standing**” (emphasis added). It seems fairly clear that this definition has itself been based on the decision of Ormiston J in the Supreme Court of Victoria in *Commissioner for Corporate Affairs v Bracht* [1989] VR 821, in a case dealing with a prohibition on someone who was insolvent being “concerned in the management” of a company (see his Honour’s definition of this term at p 830 of the judgment.) However, while references to the impact of the person on the company’s “business” or “financial standing” seem perfectly appropriate in the context of general companies legislation, it may be queried whether they are entirely apt for a statute dealing with workplace health and safety. By contrast, as interpreted by Spigelman CJ as noted above, in NSW the questions will relate to the person’s role in relation to the safety of those to whom the company owes duties. The blanket incorporation of the general definition of “officer” from the Commonwealth companies’ legislation does not allow the careful nuancing of this issue needed for workplace health and safety purposes. Ironically, it may lead to a court concluding that an accountant, who has no involvement in safety issues, should automatically be regarded as an “officer” for the purposes of the *OHS Act*.

Q124. Should liability of an officer, if any, be subject to the prosecution proving that an act or omission by the officer contributed to the offence of the corporation? Alternatively, should the officer be automatically guilty of an offence, subject only to proving a defence? Why?

I favour the second alternative, that an officer should be deemed to be guilty of an offence, subject to being able to make out appropriate defences. The policy reasons justifying reversal of onus in the general duty provisions, also justify a reversal in the area of the liability of officers. By virtue of their position, they have the power to make decisions about company procedures and precautions which will have a possibly devastating effect on the “lives and limbs” of workers. Where there has been a company failure to provide such systems, then it seems reasonable (given the complexities of corporate decision-making and possibly poor documentation of decisions) for the officer to produce the evidence which establishes their innocence, rather than placing on the prosecution the burden of persuading the court of the “non-existence” of the defences.

Q125. Should the model OHS Act provide for a test for determining liability of an officer? If so, what should the test be or contain?

A125. My view is that officer liability should depend, first on the liability of the company, and then on them being unable to make out the relevant defences.

Q126. Should the model OHS Act provide for specific defences to be available to an officer? If so, what?

A126. Yes. The current NSW defences in s 26 (either that the officer (a) was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or (b) being in such a position, used all due diligence to prevent the contravention by the corporation) seem to be workable and reasonable.

Q127. What should the approach to officers of unincorporated associations or volunteer officers be?

A127. I have not seen a persuasive case that “volunteer” officers of corporations should be exempt from the usual rules recommended above, if the corporation is employing people or otherwise entering into the “workplace”. A person who volunteers in such a position should be prepared to take on the responsibility required by the position, in the interests of those who might be harmed in the workplace by the actions or inactions of the corporation.

On the other hand I have not seen any evidence to suggest that it is necessary to impose safety obligations on officers of unincorporated bodies. Usually a “club” or body that is not incorporated will not be entering into contracts of employment. Where it does then it seems possible that all members of the current committee might be jointly liable as employers, so they will be liable under the employer duties.

Q136. Should there be specific offences relating to workplace death or serious injury? If so, what?

A136. Yes, I support the model of s 32A in the current NSW legislation. Imposing a possible term of imprisonment for “recklessness” causing death seems appropriate. In still more serious cases it may still be possible to charge an individual (or indeed a company) with manslaughter, and this should remain a possibility (though it does not need to be addressed in the OHS legislation.)⁴⁹

Q137. Should breaches of OHS duties resulting in death or serious injury be dealt with in OHS legislation or in the Crimes Act?

A137. In my view the model in NSW where the specific workplace death provision is included in the primary OHS legislation is sensible and appropriate. It is seen to form a part of the overall OHS law. I would support continued retention of the situation where an appeal against such a conviction can be taken to the ultimate court of criminal appeal in the State (as noted above, I support the possibility of “ordinary” OHS offences being so appealable in special circumstances; however, it would be reasonable to provide that a sentence of imprisonment be able to be appealed without onerous “special leave” provisions.)

⁴⁹ For discussion of some of these issues see N Foster “Manslaughter by Managers: The Personal Liability of Company Officers for Death Flowing from Company Workplace Safety Breach” (2006) 9 *Flinders Journal of Law Reform* 79-111.