



## Articles

# Personal Liability of Company Officers for Corporate Occupational Health and Safety Breaches: Section 26 of the Occupational Health and Safety Act 2000 (NSW)

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*Section 26 of the Occupational Health and Safety Act 2000 (NSW) (like similar provisions in other Australian jurisdictions) imposes personal liability for corporate breaches of the Act on officers of the relevant company. This article explores this provision in detail through analysis of cases decided in the NSW Industrial Relations Commission, and other material. It deals with the general background to the provision, the practice of prosecutors, and a number of legal issues arising under the section. These include the meaning of 'due diligence' as a defence, the difficult issues raised by the privilege against self-incrimination when both officers and the company are prosecuted, and sentencing issues such as the appropriate allocation of penalty between the company and the officer. The article concludes by suggesting a number of areas where some 'fine-tuning' of s 26 is desirable to enable it to be effective in encouraging senior managers to pay proper attention to workplace safety.*

## Introduction

The high toll of death and injury in the workplace continues to be a matter of concern in Australia. This article analyses aspects of one legal response to the problem — the imposition of 'deemed' personal criminal responsibility on company officers where the company has been responsible for a workplace injury or fatality. While similar provisions are in force around Australia,<sup>1</sup> this study focuses in particular on the current provision in New South Wales, s 26 of the Occupational Health and Safety Act 2000 (OHS Act 2000),<sup>2</sup> although analogous provisions from other jurisdictions are mentioned briefly. The NSW provision seems to have been used more extensively than similar provisions in other States, and decisions applying it (and its equivalent under the previous legislation) demonstrate some important features of the law. They also demonstrate that some fine-tuning of the section is needed, and that more strategic use of it should be made in attacking workplace injuries and death

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1 See below text accompanying nn 15–22.

2 Formerly Occupational Health and Safety Act 1983 (NSW) (OHS Act 1983) s 50. As the current legislation only came into operation on 1 September 2001, many of the cases discussed in this article were decided under the former provision. Apart from one or two minor points specifically mentioned below, the provisions are equivalent and cases under the former s 50 continue to be referred to in prosecutions under the new s 26.

which result from a failure of corporate management systems. No previous study seems to have been published in any detail on the way the courts have approached this provision, and it is hoped that this study will be useful not only for those in New South Wales but for those encountering analogous provisions around Australia.

Recently the NSW Parliament has introduced new provisions imposing substantially increased penalties where ‘reckless conduct’ by a person owing a duty under the OHS Act 2000 causes death at a place of work.<sup>3</sup> These provisions will apply to directors and managers,<sup>4</sup> but they do not create ‘deemed’ liability like the provisions of s 26 discussed here, only operating where there has been actual reckless conduct by those persons causing death.<sup>5</sup> While the provisions in their application to company officers are an important addition to the legislation in this area, in light of their different operation they are not considered in detail in this article.

Most Australian legislation creating criminal liability for breach of duty in the OHS area contains provisions which can be used to impose personal criminal liability on company officers for breaches committed by their company. From a criminal law perspective, they create a specific type of ‘accessorial liability’, imposing a liability for the ‘head’ offence committed by the company where the conditions set out are satisfied. The policy reasons for this are succinctly summarised by Clough and Mulhern:

If the fate of the individual is linked to the fate of the corporation, then the individual has a vested interest in ensuring corporate compliance.<sup>6</sup>

This article will examine some of the practical legal issues involved in making such provisions work.

## **Section 26 OHS Act 2000 (NSW) and Related Provisions — An Overview**

### The NSW legislation

The OHS Act 2000 is the successor to the OHS Act 1983, itself part of a ‘wave’ of new legislation dealing with workplace safety in Australia which was introduced, mostly in the 1980s, following the recommendations of the 1972 UK Robens Report. In the United Kingdom itself that Report was implemented by the Health and Safety at Work etc Act 1974 (UK) (HSW Act 1974), and many of its provisions are mirrored in the Australian legislation.<sup>7</sup>

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3 New Pt 2A (ss 32A, 32B) of the OHS Act 2000, inserted by the Occupational Health and Safety Amendment (Workplace Deaths) Act 2005, effective 15 June 2005.

4 See s 32A(5), which provides that directors and other persons concerned in management are to be taken to owe a duty under Pt 2 of the OHS Act 2000 for the purposes of s 32A(2), where the corporation of which they are officers owes that duty.

5 See s 32A(6), which specifically provides that s 26 of the Act does not apply to the offence created by s 32A. This would of course over-ride the otherwise unqualified terms of s 26.

6 J Clough and C Mulhern, *The Prosecution of Corporations*, Oxford University Press, Oxford, 2002, p 130.

7 For a general overview of the Australian legislation, see R Johnstone, *Occupational Health and Safety Law and Policy: Text and Materials*, 2nd ed, Lawbook Co, Pymont, 2004; for a review in briefer compass see Johnstone’s article ‘Paradigm Crossed? The Statutory

The core obligations imposed by the OHS Act 2000 are to be found in Pt 2 Div 1, headed ‘General Duties’. The introductory words of s 8 illustrate the approach taken:

### **8 Duties of employers**

#### (1) Employees

An employer must ensure the health, safety and welfare at work of all the employees of the employer.<sup>8</sup>

Succeeding provisions impose similar obligations on employers to ‘ensure’ safety in relation to non-employees at a place of work (s 8(2)),<sup>9</sup> on self-employed persons (s 9),<sup>10</sup> on controllers of premises (s 10)<sup>11</sup> and on manufacturers (s 11).<sup>12</sup> A slightly lower standard of ‘reasonable care’ is required of employees in relation to fellow workplace participants (s 20).<sup>13</sup> But the words ‘shall ensure’ have been repeatedly held to impose absolute liability, so that a risk to safety created in the workplace will normally mean a *prima facie* breach of the Act.<sup>14</sup> This effective ‘reversal of the onus of proof’ is accompanied by a defence provision in s 28,<sup>15</sup> allowing for defences of ‘reasonable practicability’ or ‘impossibility’. The general provisions of the Act are complemented by the duties imposed by the Occupational Health and Safety Regulation 2001 (NSW). In particular the Regulation contains detailed provisions concerning ‘Risk Management’ and consultation with employees.

By virtue of the extended definition of ‘person’ in the Interpretation Act 1987 (NSW) s 21, the obligations under the Act extend generally to corporations as well as to individuals. The key provision for present purposes is that which imposes personal liability on company officers, s 26, contained in Div 4 of Pt 2:

### **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:

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Occupational Health and Safety Obligations of the Business Undertaking’ (1999) 12 *AJLL* 73, and A Brooks, ‘Risk Management and Consultation Systems: Developments and Disappointments in the New Occupational Health and Safety Legislation in New South Wales’ (2002) 24 *Syd L Rev* 89 at 89–92. There are two annotated versions of the Act available: W Thompson, *Understanding NSW Occupational Health and Safety Legislation*, 3rd ed, CCH, Sydney, 2001 (a book previously edited by Justice Marks of the NSW IRC); and M Tooma, *Tooma’s Annotated Occupational Health and Safety Act 2000 New South Wales*, 2nd ed, Lawbook Co, Pyrmont, 2004.

8 The equivalent provision in the OHS Act 1983 was s 15(1).

9 Former s 16(1).

10 Former s 16(2).

11 Former s 17.

12 Former s 18.

13 Former s 19.

14 See, eg, *State Rail Authority of NSW v Dawson* (1990) 37 IR 110; *Kirkby v A&MI Hanson Pty Ltd* (1994) 55 IR 40; *Drake Personnel Ltd v WorkCover Authority of NSW* (1999) 90 IR 432; *WorkCover Authority of NSW v Kirk Group Holdings Pty Ltd* (2004) 135 IR 166, esp at [123]–[125].

15 Former s 53.

- (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.
  - (3) Nothing in subsection (1) prejudices or affects any liability imposed by a provision of this Act or the regulations on any corporation by which an offence against the provision is actually committed.
  - (4) In the case of a corporation that is a local council, a member of the council (in his or her capacity as such a member) is not to be regarded as a director or person concerned in the management of the council for the purposes of this section.

The heading to this current provision makes clear that it deals with the liability of officers as a consequence of an offence committed by a corporation.<sup>16</sup> The provision deems the officer to be liable when the corporation has committed an offence, unless a 'defence' under s 26(1)(a) or (b) is made out. The onus of proof of these matters will clearly rest on the accused.<sup>17</sup>

### Other Australian legislation

A similar approach to the liability of directors for safety offences is taken by most other Australian legislation. A detailed analysis of these provisions is beyond the scope of this article. Clough and Mulhern provide a general review of analogous provisions,<sup>18</sup> and Howard reviews the State-by-State differences in similar provisions in the area of environmental protection legislation.<sup>19</sup> Howard's remarks about the difficulties caused by the variation in corporate liability provisions for environmental offences are also applicable to the State-by-State variation in the area of workplace health and safety offences. Without comparing the provisions in fine detail, it may be noted that not only do the various States differ from each other, the corporate liability provisions within each State differ between the environmental and the workplace safety statutes.<sup>20</sup> However, neither the Occupational Health and Safety (Commonwealth Employees) Act 1991 (Cth) (Commonwealth OHS legislation) nor the Occupational Safety and Health Act 1989 (ACT) make officers personally liable.<sup>21</sup>

16 Unlike the misleading heading to the former s 50, which read simply 'Offences by corporations', when the provision did not deal with corporate liability at all.

17 See Tooma, above n 7, p 128: 'Once the offence against the corporation is proven, directors and persons concerned in the management of a corporation are guilty of the same offence unless they can make out one of the defences, on the balance of probabilities.' The provisions that reverse the onus of proof are discussed below.

18 Clough and Mulhern, above n 6, pp 130-5.

19 T Howard, 'Liability of Directors for Environmental Crime: the Anything-but-Level Playing Field in Australia' (2000) 17 *Env & Planning Law Jnl* 250.

20 See, for example, in NSW the retention in environmental legislation of the defence of 'ignorance' which has been removed from the OHS Act since 1995.

21 Somewhat oddly for the ACT, given that s 147 of the Environment Protection Act 1997 (ACT) imposes a separate corporate officer liability in that area: see the discussion in Howard, above n 19, at 257-9.

In those jurisdictions where personal liability is imposed there are three broad models followed by the legislation. They may be described as the 'deemed liability' model (the NSW model, reflected in the Tasmanian and Queensland provisions); the 'responsible officer model' (South Australia); and the 'consent and connivance' model (represented by the 1985 Victorian Act, Western Australia and the Northern Territory).

Section 53 of the Workplace Health and Safety Act 1995 (Tas), and s 167 of the Workplace Health and Safety Act 1995 (Qld) adopt essentially the same approach as s 26 of the NSW Act by conditioning officer liability directly on corporate liability, but allowing some defences. The Tasmanian provision is unusual in that it does not impose liability on managers other than those formally appointed to the board as directors, and in allowing a defence based on 'ignorance' to be pleaded by a director.<sup>22</sup>

South Australia's Occupational Health Safety and Welfare Act 1986, s 61, imposes liability only on an officer designated as a 'responsible officer'. It is this officer who has the responsibility to ensure that the corporation complies with the legislation.

In Victoria, the approach formerly taken under s 52 of the Occupational Health and Safety Act 1985 was to make it an offence for an officer to consent or 'connive' at an offence against the Act, or to allow an offence to occur by 'wilful neglect'. This 'consent or connivance' approach is still followed in Western Australia, by s 55 of the Occupational Safety and Health Act 1984 (WA) and in the Northern Territory by s 180 of the Work Health Act 1986 (NT). It is also the approach adopted under s 37 of the HSW Act 1974.<sup>23</sup>

However, Victoria has recently enacted a completely new piece of legislation, the Occupational Health and Safety Act 2004 (Vic), commencing on 1 July 2005.<sup>24</sup> The new provision imposing personal liability on corporate officers, s 144, is worded differently from s 52 of the 1985 Act. The new Victorian provision might be characterised as yet another approach to personal liability, which could be called the 'negligent officer' approach. Liability of officers under the new s 144 is no longer conditioned on 'consent or connivance' or 'wilful neglect', but is based on the officer's 'failing to take

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22 In NSW the defence was removed in 1995 and must be seen as an important step in allowing prosecution of directors to proceed. Howard, reviewing the analogous NSW environmental provisions that retain the defence of 'no knowledge', comments: 'The no knowledge defence has arguably stemmed the flow of charges laid against directors and, where charges have been laid, stymied the development of case law on due diligence': above n 19, at 260. Similarly Andrew Hopkins, writing before the amendment, commented: 'The way the law is currently written makes it very difficult for a prosecution to succeed against a director or senior manager of a large corporation . . . Australian OHS legislation needs to be rewritten so that directors cannot plead ignorance; due diligence should be their only defence': A Hopkins, *Making Safety Work*, Allen & Unwin, St Leonards, 1995, p 107.

23 While beyond the scope of this article, it should be noted that the Victorian Supreme Court has recently considered the meaning of 'consent and connivance' in s 52 of the Occupational Health and Safety Act 1985 (Vic) — see *AB Oxford Cold Storage Co Pty Ltd v Arnott* (2003) 8 VR 288; 130 IR 179.

24 The legislation was enacted following a review of the area conducted in 2003–2004 by Mr Chris Maxwell QC. See The State of Victoria, *Occupational Health and Safety Review*, March 2004 available at <[http://www.dtf.vic.gov.au/DTF/RWP323.nsf/0/a554a45320f4b8bbca256e0013d7e4/\\$FILE/MaxwellReport\\_06Apr04.pdf](http://www.dtf.vic.gov.au/DTF/RWP323.nsf/0/a554a45320f4b8bbca256e0013d7e4/$FILE/MaxwellReport_06Apr04.pdf)> (accessed 11 July 2005). Chapter 17 of the Report provides the background to the new s 144.

reasonable care'. Subsection 144(3) sets out matters which the court must take into account in deciding this issue, including the officer's personal knowledge and ability to participate in decisions, and the possible responsibility of other persons. The provisions cover persons who are classified as 'officers' of the corporation under s 9 of the Corporations Act 2001 (Cth),<sup>25</sup> which would include a range of persons not formally appointed to the board (such as persons not formally appointed as directors but who act as such or in accordance with whose directions the formal directors are accustomed to act). This definition also includes a 'manager' who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation, or who has the capacity to affect significantly the corporation's financial standing.

The different State and Territory provisions may be summed up in the following table.

**Table 1: Summary of State and Territory Provisions imposing personal liability for OHS offences**

Juris-diction	Provision	Directors alone, or Other Managers?	Separate Offence, or Accessorial Liability for Company's Offence?	Defence of 'due diligence' or something similar?	Defence of 'unable to influence' or another defence?	Onus of proof for defence
NSW	OHS Act 2000 s 26	Directors and Managers	Accessorial Liability	Due Diligence	Not in a position to influence	Onus on accused to establish defences
Tasmania	Workplace Health and Safety Act 1995 s 53	Directors only	Accessorial Liability	Due Diligence	Lack of knowledge not reasonably able to be acquired	Onus on accused to establish defences
Queens-land	Workplace Health and Safety Act 1995 s 167	Executive officers- includes lower-level	Separate offence	Reasonable diligence	Not in a position to influence	Onus on accused to establish defences
South Australia	Occupational Health Safety and Welfare Act 1986 s 61	Designated 'responsible officer' — in default every 'officer'	Separate offence — take reasonable steps to ensure compliance	'Reasonable' steps	Lesser penalty if failure not causally related to company's offence	Onus on accused to establish 'reasonable' steps; apparently onus on prosecution to argue for causal link

25 See the definition of 'officer' in the Occupational Health and Safety Act 2004 (Vic) s 5(1).

Juris-diction	Provision	Directors alone, or Other Managers?	Separate Offence, or Accessorial Liability for Company's Offence?	Defence of 'due diligence' or something similar?	Defence of 'unable to influence' or another defence?	Onus of proof for defence
Victoria (before 1 July 2005)	Occupational Health and Safety Act 1985 s 52	Directors and managers	Accessorial liability	No	Company offence must have been committed with 'consent', 'connivance' or due to 'wilful neglect'	Onus presumably on prosecution to prove consent, connivance or neglect
Victoria (after 1 July 2005)	Occupational Health and Safety Act 2004 s 144	Directors and managers	Separate offence, apparently	Reasonable care	Matters to be 'taken into account' in s 144(3) — officer's knowledge, ability to participate in decisions, responsibility of others	Onus presumably on prosecution to prove lack of reasonable care
Western Australia	Occupational Safety and Health Act 1984 s 55	Directors and 'other officers', and even members 'in connection with' functions of management	Accessorial liability	No	As for Vic 1985- 'consent', 'connivance' or due to 'wilful neglect'	As for Vic 1985 — onus presumably on prosecution to prove consent, connivance or neglect
Northern Territory	Work Health Act 1986 s 180	Directors and managers	Accessorial liability	No	As for Victoria 1985	As for Victoria 1985

### Issues arising under s 26 of the OHS Act 2000

A number of questions are raised by the above provisions. How often are they used? In what circumstances are prosecutions brought? To what levels of management does responsibility extend?<sup>26</sup> These matters will be addressed here in relation to the NSW legislation.

#### The law in operation — prosecution and practice

The NSW WorkCover Authority has published a very broad statement of its prosecution policy.<sup>27</sup> In relation to directors and managers it simply states:

<sup>26</sup> For a review of the experience in the UK under s 37 of the HSW Act 1974, see D Bergman, 'Corporate Conniving and Directors' Duties' (1999) 149 (6906) *New Law Jnl* 1436.

<sup>27</sup> *Compliance Policy and Prosecution Guidelines* (WorkCover Authority of NSW, March

5.19 WorkCover's policy is to actively pursue both corporations and those concerned in the management of those corporations for breaches of the OHS and workers compensation legislation.

There seem to be no more specific, publicly available, statements as to which directors and managers will be chosen for prosecution. Hence, a review was conducted for the purposes of this study of prosecutions, mainly under former s 50 of the OHS Act 1983, which were reported on the AUSTLII database of the NSW Industrial Relations Commission (NSW IRC). A total of 35 cases were found to be relevant.<sup>28</sup>

Some fairly clear trends seem to emerge in the cases considered. These include the following:

- i. Most prosecutions are brought against those who are clearly formal 'directors' of the company, rather than against others involved in management;
- ii. Those officers who were prosecuted were often directly involved in making specific decisions which led to the injury or fatality;
- iii. Most of the companies whose officers were prosecuted were fairly small.

Nevertheless, it should be noted that these trends may be changing, and there are some significant exceptions noted below.

### **'Directors' as opposed to 'managers'**

The majority of the cases (27 out of 35 — 77%) involved formally-appointed company directors, as opposed to others 'concerned in the management'.

### **Directors prosecuted were mostly directly involved in the incident**

In cases involving formally appointed directors, almost every case involved a director who was heavily involved in decisions or actions 'on the ground' which led directly to the incident concerned.<sup>29</sup> It is of course understandable (and right) that these prosecutions should be undertaken. But the cases reveal few instances where a member of a board of directors who was themselves

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2004), available at <[http://www.workcover.nsw.gov.au/Publications/LawAndPolicy/Policies/prosecution\\_guideline.htm](http://www.workcover.nsw.gov.au/Publications/LawAndPolicy/Policies/prosecution_guideline.htm)> (accessed 11 July 2005).

28 In addition some decisions of the Chief Industrial Magistrate were included, when that database became available. Once it came online, the 'official' database of IRC decisions in Lawlink (<[www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au)>) was invaluable as a cross-check. Advice received from the Industrial Relations Commission (personal communication with the author, 25 January 2005) is that at least at the moment all decisions handed down by the Commission in Court Session are published electronically on the Lawlink database. This makes the database an exhaustive record of Commission determinations on s 26 and former s 50. The author's initial review covered cases decided up to 31 December 2003 (data in the author's unpublished LLM thesis, *The Personal Liability of Company Officers for Company Breach of Workplace Health and Safety Duties*, available on request). This article, however, also draws upon some decisions on ss 50 and 26 handed down during 2004.

29 A decision as to the level of involvement of the director concerned was made from a careful reading of the judgment. Close involvement of the director usually involved the director concerned being physically present when the incident occurred.



removed from the ‘coalface’ was held liable under s 50 for failure of safety systems or equipment, or any other matter which may have led to a serious risk to safety.<sup>30</sup>

To some extent the distinction between different types of directors revealed here overlaps with the distinction drawn in the corporate governance context between ‘executive’ and ‘non-executive’ directors. For some years it had been assumed that part-time members of the board of directors were entitled to rely almost exclusively on the expertise of the full-time members and company officers. In *Daniels v Anderson* (the AWA case),<sup>31</sup> the NSW Court of Appeal overturned this approach and held that non-executive members of a company board have a duty to be familiar with the operations of the company, and to devote an appropriate amount of time and energy personally to their supervisory duties. Of course as a matter of practice it remains the case that many non-executive directors may have a lesser duty of care than executive directors.<sup>32</sup> But the OHS Act draws no such distinction, even if prosecutorial policy may seem to be doing so *de facto*.

It is interesting to note that a very similar analysis has been provided of analogous provisions in the legislation around Australia imposing criminal penalties for breach of environmental laws.<sup>33</sup> Howard provides further support for this view, and suggests that part of the reason in the environmental context is the availability of the defence of ‘no knowledge’ which makes it very hard to prosecute someone who is not personally involved.<sup>34</sup> Given that ignorance has not been a defence under the OHS Act since 1995 this makes it all the more surprising that so few OHS prosecutions of ‘higher-up’ managers have been brought.

However, this is an area where policy may be changing. Exceptions to the former general principle that only ‘hands-on’ directors are normally prosecuted can be found in three decisions handed down in 2002–2003: *Frankel*,<sup>35</sup> *Sywak*,<sup>36</sup> and *Bloodsworth*.<sup>37</sup> These prosecutions are an indication that WorkCover seems to be increasingly prepared to prosecute directors, and

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30 Two important decisions handed down in 2004, however, reveal that at least in the specific area of coal mining, there is an increased willingness to prosecute mine managers, who have overall responsibility for a specific mine. See below n 63 for discussion of the *Newcastle Wallsend* case: *McMartin v Newcastle Wallsend Coal Company Pty Ltd* [2004] NSWIRComm 202; and below n 71 for discussion of *Morrison v Powercoal Pty Ltd* (2004) 137 IR 253.

31 (1995) 37 NSWLR 438; 16 ACSR 607.

32 See, eg, the CCH, *Australian Corporations and Securities Law Reporter*, ¶42-340, at 63,502: ‘in general, a non-executive director is not expected to be involved in the day-to-day running of the business’.

33 S Streets, ‘Prosecuting Directors and Managers in Australia: A Brave New Response to an Old Problem?’ (1998) 22 *MULR* 693.

34 Above n 19, at 263.

35 *Inspector Martin Carmody v Ronald William Frankel* [2002] NSWIRComm 333. The defendant, despite a lack of direct involvement on site when the offence concerned occurred, pleaded guilty and the court accepted his plea. A fine of \$4500 was imposed.

36 *Inspector John Patton v Orest Peter Sywak* [2003] NSWIRComm 238. The defendant was director of a company but regarded his role as a purely financial one, delegating concern for project management and safety issues to a senior employee. When two employees were injured as a result of deliberate ‘short-cuts’ being taken in relation to safety, Mr Sywak was convicted and fined \$14,400 under s 50 of the 1983 Act.

37 *Inspector Green v Keith Bloodsworth* [2003] NSWIRComm 271. Boland J disagreed with

the Industrial Relations Commission to convict directors, in situations where they may not necessarily have had a direct involvement in the particular incident.

### Most companies involved were small

Almost all the companies concerned (as far as can be judged from the reports examined) were either effectively 'one-person' companies or at least small family companies with limited assets.<sup>38</sup> This continued to be the case to the end of 2003. The directors concerned were almost all likely to have high personal knowledge of workplace procedures and, as noted above, many were heavily involved in the particular incident concerned. There are no examples in these cases of a large company where a member of the board was held liable for failure to exercise 'due diligence' in addressing the issue of safety.

It is clear that high-level 'policy' decisions, no less than, and indeed often far more than, day-to-day 'operational' decisions, have a significant impact on safety in the workplace.<sup>39</sup> It is important that decision-makers at this higher level are keenly aware of the impact of their decisions on the lives and health of the workers implementing them. Holding them personally criminally accountable is an important part of bringing this responsibility home.<sup>40</sup>

An exception in relation to company size may be the *McCabe* case,<sup>41</sup> where the company had some 20 employees. The two defendants were father and son. The father had started the business and was working on the site on the day of the incident.<sup>42</sup>

In brief, there seems to be no doubt that s 50 of the 1983 Act has been used in New South Wales to bring company directors and managers to account. But the overwhelming use of the section until recently has been to penalise directors and managers who are effectively 'on the ground', and usually those who have made immediate decisions which have led to an injury or fatality.

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the suggestion made by counsel for the defendant that s 50 had no separate role to play in a smallish company, and imposed a penalty on both the director and the company. The director was fined \$9750.

- 38 To some extent this is a subjective judgment based on the material presented in the reports; but 'small' for these purposes means with apparently fewer than 20 employees.
- 39 Hopkins puts it this way in his study of the causes of the Longford Gas Explosion: 'If culture, understood as mindset, is to be the key to preventing major accidents, it is management culture rather than the culture of the workforce in general which is most relevant': A Hopkins, *Lessons from Longford: The Esso Gas Plant Explosion*, CCH, Sydney, 2000, p 76.
- 40 See N Gunningham, *CEO and Supervisor Drivers: Review of Literature and Current Practice*, Report prepared for the National Occupational Health and Safety Commission, October 1999: '[R]egulation was identified by a large majority of studies as the single most important driver of corporations, and the threat of personal criminal liability (in particular of prosecutions brought against them as individuals) as the most powerful motivator of their CEOs to improve OHS'; see also N Gunningham and R Johnstone, *Regulating Workplace Safety: System and Sanctions*, Oxford University Press, Oxford, 1999, pp 217–23.
- 41 *WorkCover Authority of NSW (Inspector Evans) v GC McCabe & Co (Parkes) Pty Ltd* [1999] NSWIRComm 564.
- 42 *McMartin v Newcastle Wallsend Coal Company Pty Ltd* [2004] NSWIRComm 202, as noted below n 63, was a case involving a largish company where senior managers were prosecuted and convicted, and also seems to indicate a change in prosecutorial approach, at least in the mining sector. Perhaps not coincidentally, the decision is now the subject of a major appeal which challenges a number of features of the OHS Act 2000 — see below n 70.

It is encouraging that there are now some cases where a board member who has not been closely involved with workplace decisions has been prosecuted. The prosecuting authorities should continue to pursue cases where, in larger companies, workplace injury or death has resulted from overall management failure to attend to safety issues. Such prosecutions would be likely to have a salutary effect on the decisions of company boards about allocation of resources to safety.

### Legal issues in applying s 26

The above discussion reveals something about prosecutorial practice in relation to directors and managers. There is also a number of legal issues which arise in these prosecutions which need to be addressed. They flow from the overall effect of the 'deeming' provisions, through a number of complex issues that might arise in the course of a trial where the privilege against self-incrimination is raised, the meaning of the defence of 'due diligence', the interaction of the s 26 defences with the overall s 28 defences, and finally to a number of issues that have come up in the sentencing process.

The structure and language of s 26 needs to be analysed with some care. In broad outline, the provision sets out the *conditions* for personal liability (the existence of a corporation, which has contravened the legislation), the *persons* who are liable, the *nature* of the liability, and *defences* which may be presented by those persons.<sup>43</sup>

#### Conditions for liability — proving the contravention by the company

Section 26 opens with the words, 'If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations . . .'. Thus the liability of the officers concerned is clearly conditioned on the company being an offender. Note that it is not the *conviction* of the company, but the company's *contravention* that must be established. This means that an officer can be convicted pursuant to s 26 even if the company cannot (as indeed s 26(2) puts beyond doubt).<sup>44</sup>

In many situations the prosecution of the company and of the officer will

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43 The following discussion is based on the current form of s 26. In June 2004, a Report to the NSW WorkCover Authority, *Advice in relation to workplace death, occupational health and safety legislation & other matters*, prepared by Prof R McCallum, P Hall QC, A Hatcher and A Searle, suggested in part that s 26 was defective and required a radical re-draft: see pp 48ff. The *Advice* is available at <[http://www.workcover.nsw.gov.au/NR/rdonlyres/CA20497D-E6E8-4CDA-8649-D58A691E51B9/0/final\\_report\\_4481.pdf](http://www.workcover.nsw.gov.au/NR/rdonlyres/CA20497D-E6E8-4CDA-8649-D58A691E51B9/0/final_report_4481.pdf)> (accessed 11 July 2005). While legislation has now commenced implementing to some extent other recommendations of the *Advice* (see the Occupational Health and Safety Amendment (Workplace Deaths) Act 2005, referred to previously), the s 26 recommendations have not been adopted by the NSW Government at the moment, and so are not considered in detail here. Space does not permit a fuller discussion of the recommendations, but it should be noted that they seem to be made without a detailed understanding of how the current provision operates, and are not very persuasive.

44 In *R v Dickson & Wright* (1992) 94 Cr App R 7, the UK Court of Appeal upheld a conviction of directors under an analogous provision in the Trade Descriptions Act 1968 (UK) even though at the time of the trial the company itself had been wound up. For recent NSW cases where an officer alone has been prosecuted, apparently due to the winding-up of a company,

proceed in the same trial, and so the court will have made its decision as to whether the company has contravened the legislation just prior to considering the liability of the officer under s 26. The complications that may arise in this situation due to questions of admissibility of evidence are considered below. It might be thought that it would be a simpler issue to resolve if the company had already been convicted in prior proceedings. That this is not so is illustrated by the decision in *WorkCover Authority of New South Wales (Inspector Lane) v Australian Winch & Haulage Co Pty Ltd*.<sup>45</sup> In that case the Commission had to deal with a question concerning the way that former s 50 functioned where there had been a previous actual conviction recorded against the company. Was it sufficient to establish this condition (as in fact was held by the Chief Industrial Magistrate in *Inspector Mackintosh v Phillips*)<sup>46</sup> simply to produce formal evidence of the company's conviction? Or, since s 50 required that the company 'contravene' the Act or regulations, was it necessary in a s 50 prosecution to once again litigate the issue of the company's guilt?<sup>47</sup>

The Full Bench in *Australian Winch & Haulage* concluded that it was *not* sufficient simply to produce a record of conviction of the company. In doing so the court pointed out that the requirement for an offence under the former s 50 (as under current s 26) was not a 'conviction' of the company, but the fact that the company had 'contravened' the legislation. Section 178 of the Evidence Act 1995 (NSW) allows the fact of *conviction* to be proved by a certificate from a court; but it needs to be read with s 91(1) of that Act, which provides that:

Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.

Their Honours concluded:

[I]n our view the essential element of an offence under s 50 is the contravention of the Act by the corporation, not the conviction of the corporation: s 50(1). An offence under s 50 does not require that a corporation has been proceeded against or convicted: s 50(2). As such, the conviction of the corporate defendant is not a fact

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see, for example, *Inspector Campbell v Hitchcock* [2004] NSWIRComm 87; and *Inspector Woodington v Austin* [2004] NSWIRComm 75.

45 (2000) 102 IR 40 (*Australian Winch & Haulage*); earlier proceedings at [2000] NSWIRComm 2 (10 February 2000).

46 Unreported, Case No 91/491, 5 May 1992.

47 It could be argued that the decision of Maidment J in *Workcover Authority of NSW v Grigor (No 2)* [1997] NSWIRComm 62 should have some bearing on the question. In that decision Maidment J refused to hear a s 50 prosecution of a director where the company had been acquitted of the 'head' offence. The decision was made on the basis that to allow the s 50 action to proceed would be an abuse of process, as it would involve relitigating issues that had already been decided by the previous hearing. It might be argued, then, that the converse principle ought to apply in a prosecution where the preliminary issue is whether or not the corporation 'contravened' the Act. If there is a decision of a court of competent jurisdiction that the corporation did indeed contravene the Act, it would seem to be an abuse of process to require that issue to be relitigated. While this seems a valid policy argument, it was not presented to the Full Bench, which decided the issue as set out in the text on the basis of the statutory requirements of the Evidence Act 1995 (NSW).

in issue in proceedings under s 50 and therefore the certificate of conviction could not be tendered under s 178 of the Evidence Act; s 91(1) operates to preclude it.<sup>48</sup>

On the view taken by the Full Bench, then, a s 26 conviction will either need to be recorded in the same proceedings as a conviction of the company, or, if subsequent proceedings are initiated, evidence of the contravention of the Act by the company will have to be led a second time.

### Conditions for liability: the privilege against self-incrimination

In the course of establishing that a contravention has been committed by the company, the question of the application of the privilege against self-incrimination is a vital one.<sup>49</sup> The issue arises because evidence that tends to show that a company has been guilty of an offence against the OHS Act 2000, will logically then lead to a possible conviction of a company officer under s 26. Given this fact, can the company officer be required to give such evidence in a prosecution of the company?

The general common law privilege against self-incrimination has now effectively been taken up in s 128 of the Evidence Act 1995 of the Commonwealth and New South Wales.<sup>50</sup> In *Australian Winch & Haulage*,<sup>51</sup> the Full Bench of the Industrial Relations Commission in Court Session commented that:

In the context of the Act, a director or manager of a company would be entitled to claim the privilege against self-incrimination when asked questions about an offence which may have been committed by the company on the ground that it may tend to prove the director or manager had personally committed an offence under s 50.<sup>52</sup>

Assuming s 128 would prevent the asking of questions of a witness in court proceedings, it does not govern the question of the admissibility of statements made in pre-trial investigations. Extensive powers to require the answering of questions are given to WorkCover inspectors under the OHS Act 2000, Pt 5 Div 2, including under s 59(e), power to ‘require any person in or about . . . premises to answer questions or otherwise furnish information’.

Can a company officer refuse to answer such questions on the basis that the result might be his or her conviction under s 26? Section 65 of the Act (equivalent to s 31M of the 1983 Act) contains a detailed code on the general admissibility of evidence collected by inspectors, which starts with the proposition that a person may not refuse to answer on the ground of self-incrimination. But s 65(2) qualifies that proposition by requiring that such answers will not be admissible if either a claim of privilege has been made before the answer is provided, or the person has not been warned that such a claim may be made. Hence generally answers to questions pursuant to s 65

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48 *Australian Winch & Haulage*, above n 45, at [59]. The Full Bench’s view is supported by A Palmer, *Principles of Evidence*, Cavendish, Sydney, 1998, p 195, and judicially by the Queensland Court of Appeal in *R v Kirkby* [2000] 2 Qd R 57; 105 A Crim R 323.

49 One of the few reported cases involving the predecessor of s 50, s 147(3) of the Factories Shops and Industries Act 1962 (NSW), also involved the same issue of the privilege against self-incrimination: see *Dunne v J Connolly Ltd* [1963] AR(NSW) 873.

50 There are minor differences between the provisions in the two jurisdictions which are not relevant for present purposes.

51 Above n 45.

52 *Ibid*, at [29].

may not of themselves be used as evidence in a subsequent prosecution.

In *Australian Winch & Haulage*,<sup>53</sup> the company was being prosecuted under s 15 of the OHS Act 1983, and at the same time Adam Hemsworth had been charged under former s 50 in relation to the same incident, as a director of the company. One of the issues in the trial concerned whether Mr Hemsworth was interviewed without being properly cautioned as required by the former s 31M(2). The result of that<sup>54</sup> would be that any statement he made would be inadmissible in criminal proceedings *against him*. The prosecution, however, made an application that proceedings against Mr Hemsworth be heard separately, following the conclusion of proceedings against the company. The effect of this would be that in the proceedings against the company Mr Hemsworth's statement would be admissible against the company. The High Court in *Environment Protection Authority v Caltex Refining Co Pty Ltd*,<sup>55</sup> held that a corporation could not claim the privilege against self-incrimination, a situation confirmed by s 187 of the Evidence Act 1995.

The situation was complicated by the fact that some comments had been made in the earlier case of *Seccombe*<sup>56</sup> that, where there was a joint trial of company and officer, statements which were inadmissible against the officer could *not* be admitted against the company. However, subsequent to the *Seccombe* proceedings, s 31M(3) had been introduced into the Act. It read:

(3) Subsection (2) does not prevent the admission in evidence in proceedings against a body corporate of any statement, information, document or evidence obtained pursuant to a requirement under this Division from a person as a competent officer of the body corporate.

The defendants argued that to allow the evidence of the officer to be admissible against the company would amount to circumventing the important statutory protection against self-incrimination.<sup>57</sup>

The Full Bench concluded that evidence which was inadmissible against an officer *could* be admissible against the company, and that there could be a joint trial of both company and officer. In such a trial, of course, the finder of fact (who would mostly be a judge, and not a jury) would need to distinguish

53 Ibid.

54 See the decision of the Full Bench in *WorkCover Authority of New South Wales v Seccombe* (1998) 43 NSWLR 390; 101 A Crim R 303 (*Seccombe*).

55 (1993) 178 CLR 477; 118 ALR 392.

56 Above n 54.

57 A similar issue emerged but did not have to be resolved finally in *Morrison v Powercoal Pty Ltd* [2003] NSWIRComm 342, where a Mine Manager, Mr Foster, was being prosecuted under s 50 in the same proceedings where the mining company were being prosecuted under s 15. A hearsay statement by a mine employee was ruled to be admissible against the company under s 87(1)(b) of the Evidence Act 1995 (dealing with statements made by a company employee), but was inadmissible against Mr Foster. The question that was left unresolved was whether, if that admission had led to conviction of the company under s 15, a different result should follow for the s 50 conviction of Mr Foster. In the end the company was acquitted so the question did not need to be resolved: see the comment of Peterson J at [16]. The hearsay issue was not addressed when on appeal the Full Bench of the IRC, in *Morrison v Powercoal Pty Ltd* (2004) 137 IR 253, overturned the acquittal of the company and also found Mr Foster liable under s 50 — see at [156]–[178]. But in *Morrison v Powercoal Pty Ltd (No 3)* [2005] NSWIRComm 61 the Full Bench in sentencing declined to enter a conviction against Mr Foster, so the issue in the end did not need to be reconsidered.

carefully between the two defendants and the evidence which was admissible against the separate defendants. In coming to this view the Full Bench took into account comments to the contrary made in *Seccombe*, but decided that the introduction into the legislation of s 31M(3) made it clear that the legislature intended to allow the evidence of an officer to be admissible against the company even if not admissible against the officer:

The provisions of s 31M(3) make clear on their face that, as a matter of general application, a statement otherwise inadmissible against an individual person will not be inadmissible against a corporate defendant in a joint trial. *To find otherwise would be to render s 31M(3) nugatory.*<sup>58</sup>

In light of this finding, however, it seems unfortunate that a provision corresponding to s 31M(3) of the OHS Act 1983 has not found its way into the OHS Act 2000.<sup>59</sup> Section 65 of that Act now deals with the issue of ‘Protection from Incrimination’ and parallels fairly closely former s 31M, with the notable exception of subs (3). On the basis of the reasoning in the Full Bench decision in *Australian Winch & Haulage*, in the absence of a provision like s 31M(3) there must be some doubt as to whether in a joint trial evidence obtained pursuant to pre-trial investigations which is inadmissible against a company officer can be admitted against the company.

Given the wide reach of s 26 (covering not only directors but others ‘concerned in management’), this has the potential to hamper prosecutions against companies. This will be especially so where it is alleged that a failure to ensure health and safety in the workplace stems not from ‘shop-floor’ incidents but from some sort of systemic management failure. Evidence of an unguarded machine, for example, can clearly be taken from employees. But evidence that management failed to consider safety issues over a period of time, for example, may sometimes require testimony and documents from those who would be potential accused persons.

The problem should not be overstated; the scheme of the Act means that where there is an obvious risk to health and safety then *prima facie* an offence has been committed — it is then up to company officers to produce management documents by way of defence, and once they do this then such evidence obviously becomes admissible. Still, there may be occasions where

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<sup>58</sup> Above n 45, at [42] (emphasis added).

<sup>59</sup> An explanation may perhaps be found in the timing of relevant court decisions and the introduction of the OHS Act 2000. The proceedings in *Seccombe* dealt with an interview which had taken place in 1995, and the decision of a trial judge (made on 2 September 1996) not to admit certain evidence. A new version of s 31M, including the crucial s 31M(3), commenced on 12 January 1997, having been inserted by the WorkCover Legislation Amendment Act 1996 (NSW) Sch 2.5[5]. Marks J considered s 31M(3) in *WorkCover Authority of NSW (Insp Mackenzie) v Filrose Pty Ltd* [1999] NSWIRComm 390 in 1999, and in that decision his Honour concluded that s 31M(3) was probably not necessary, in that it simply reflected the common law. It may well be, then, that those drafting the OHS Act 2000 took the view that the provision could be safely omitted. Unfortunately the Full Bench decision in *Australian Winch & Haulage*, handed down on 15 December 2000, took a different view, expressly disagreeing with Marks J in *Filrose* and holding that s 31M(3) made a real difference in their decision. (See above n 45, esp [36]: ‘In his Honour’s [ie, Marks J in *Filrose*] view, the insertion of subsection (3) into s 31M may have had little or no impact upon the relevant principles. We do not agree; it represents statutory intervention in a particular context . . .’).

the fact of a 'risk' is itself only within the knowledge of management. One example might be 'Legionnaire's disease' in a water tower. In that case it will be highly desirable that a management representative can be required to provide documents to an investigator and the company then not be able to claim the privilege.

Cases of systemic management failure are precisely the sort of cases where more prosecution activity is required. It would seem to be highly desirable that the OHS Act 2000 be amended at an early stage to restore to s 65 a provision equivalent to the former s 31M(3), which seems to have been omitted by error. This will at least enable evidence obtained in investigations from officers to be used in 'management failure' prosecutions of companies.

### Persons on whom liability is imposed

It is clear that liability under s 26 extends to 'each director of the corporation'. While there is no specific definition of 'director' in the OHS Act 2000, the phrase would clearly cover those formally appointed to the board of the corporation as such. It is a slightly more difficult question whether it would extend to persons who are classified as 'directors' in an extended sense under the definition of that word in s 9 of the Corporations Act 2001 (Cth).<sup>60</sup> Resolution of this question is not necessary, however, as it seems likely that all such persons would also come within the ambit of the extended reach of s 26, which covers 'each person concerned in the management of the corporation'.<sup>61</sup>

Until recently the precise scope of this phrase was a matter of some difficulty, as there had been no binding judicial guidance in New South Wales on the issue.<sup>62</sup> But two recent decisions of the NSW IRC now provide such guidance. Staunton J considered the question in *McMartin v Newcastle Wallsend Coal Company Pty Ltd*.<sup>63</sup> The prosecution in this case flowed from an incident at the Gretley Colliery in which four miners were killed when they unwittingly broke through into a previously abandoned tunnel which had been filled with water and were drowned. The corporations concerned were convicted of offences against ss 15 and 16 of the 1983 Act, flowing from a failure to check adequately the maps of the workings.

The question then arose of the liability of managers under s 50. The judgment contains an extensive discussion of the liability of the individual managers, and in particular, as none of the individual defendants were formal 'directors' of the companies concerned, the question of the meaning of 'concerned in the management'. The judgment discusses a number of cases

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60 See the comment on this issue in text accompanying n 25 above, in relation to the new Victorian legislation, which specifically 'picks up' the Commonwealth definition.

61 It is clear that these represent alternative categories of persons who are liable, so that it is not, for example, necessary to find that someone is *both* a 'director' and *also* 'concerned in the management'; either one category or the other is adequate to establish liability.

62 Even in the UK, the only decision of a superior court dealing with the meaning of this phrase in the context of the equivalent, s 37 of the NSW Act 1974, seems to have been the fairly obscure Scottish decision of *Armour (John) v Skeen (Procurator Fiscal, Glasgow)* [1977] IRLR 310 (Lord Justice-Clerk Wheatley, Lords Kissen and Robertson); also see (1977) *Scots Law Times* 71.

63 [2004] NSWIRComm 202.



from the area of company law,<sup>64</sup> and contains a summary of the law<sup>65</sup> which suggests that a person will be ‘concerned in management’ for the purposes of s 26 of the 2000 Act if they have:

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

In the context of the Gretley litigation, the result of this analysis was that two individual defendants, Messrs Porteous and Romcke, who held the position of Mine Manager at Gretley during relevant times were found to be clearly ‘concerned in the management’ of the mine. A number of other lower-level managers were found not to fall within the definition of ‘concerned in management’.<sup>66</sup> One other person *was*, however, found to be ‘concerned in management’. This was the Mine Surveyor, Mr Robinson. His role was obviously important because the effective cause of the deaths was a failure in the map available to the companies, and he was in charge of the survey and drafting staff for the mine. In addition, he was given a statutory responsibility<sup>67</sup> to certify the accuracy of the plans used in the mine, and to draw to the attention of the manager of the mine any doubt he had about the accuracy of the plans. Due to the key role that this information played in management decision-making<sup>68</sup> Mr Robinson was found to be ‘concerned in management’ for the purposes of s 50.

With great respect, this aspect of her Honour’s decision seems a little difficult to understand. The impeccable analysis of the law concerning the meaning of the phrase ‘concerned in management’ offered earlier in the judgment seems to be contradicted by this finding. From her Honour’s judgment the most that can be said is that Mr Robinson was in charge of an area that provided important information that management needed to know. But that seems a long way from the involvement at a high level in overall decision-making and policy that the test previously articulated requires. Mr Robinson was specifically found never to have attended the General Mine Managers’ meetings with Mr Romcke and Mr Porteous.<sup>69</sup> He prepared information for those meetings, but presumably so did many other company officials in the areas of finance or mine production. It seems hard to justify the finding that he was ‘concerned in management’. At most it would seem that perhaps a prosecution under s 19 of the 1983 Act might have been brought in relation to a failure to take ‘reasonable care’ as an employee. The verdict is apparently being appealed.<sup>70</sup>

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64 Including particularly the decision of Ormiston J in *Commissioner for Corporate Affairs v Bracht* [1989] VR 821.

65 Above n 63, at [885].

66 *Ibid.* See the discussion at [910]–[935].

67 Under cl 8 of the Coal Mines Regulation (Survey and Plan) Regulation 1984.

68 Above n 63. See the discussion at [942].

69 *Ibid.*, at [939].

70 News items from 31 January 2005 (see, eg, <<http://www.abc.net.au/am/content/2005/s1292283.htm>>, for which reference I am grateful to a former student, Sean O’Brien) noted that Xstrata, the new owners of the Gretley mine, have filed what

The second decision which provides authoritative guidance on the meaning of ‘concerned in the management’ in this context is the decision of the Full Bench in *Morrison v Powercoal Pty Ltd*.<sup>71</sup> This was another prosecution of a mine manager, a Mr Foster, who had been in charge when a roof caved in and caused the death of a miner. The Full Bench overturned the acquittal of the company and hence had to determine the liability under s 50 of Mr Foster.<sup>72</sup> Unfortunately their Honours, in ruling on the question whether Mr Foster was ‘concerned in the management’ of the corporation, seemed to not have been aware of the extensive analysis of the issue provided by Staunton J in *McMartin*.<sup>73</sup> However, they rely on very similar cases,<sup>74</sup> and in the end agree that someone who is a mine manager fulfills the statutory criteria for being concerned in management. In particular the fact that Mr Foster’s statutory obligations extended to OHS matters was considered important.<sup>75</sup>

### The nature of s 26 liability: Effect of the ‘deeming’ provisions

Given that corporate contravention has been established, and a company officer identified, what is the effect of s 26 being applied? Currently s 26 provides that in relevant circumstances a company officer ‘is taken to have contravened’ a provision which the company has contravened. Former s 50 provided that the officer was ‘deemed’ to be liable for the same offence as the company.

The courts occasionally had difficulties in interpreting the ‘deeming’ aspects of s 50. In *McLachlan*, Bauer J commented:

A difficulty immediately apparent from a consideration of s 50 of the OHS Act is that the section bears no resemblance to any common law criminal offence or, indeed, statute law and demonstrates the rule that draftsmen should put into practice, that of eschewing the use of the word ‘deem’. The application of the rules and procedures under which superior courts reviewed criminal cases are not easily applied to such legislation.<sup>76</sup>

His Honour’s comments about the lack of precedent for a provision like

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seems to be an action for judicial review of this verdict in the NSW Court of Appeal. The action, according to the press reports, will apparently proceed in tandem with a similar action for review in relation to the Full Bench decision in *Powercoal* noted below. In the meanwhile Staunton J on 11 March 2005 handed down the sentence in the proceedings in *McMartin v Newcastle Wallsend Coal Co Pty Ltd* [2005] NSWIRComm 31, a total fine of some \$1.5 million for the companies concerned, and \$102,000 between the three personal defendants.

71 (2004) 137 IR 253. The Full Bench consisted of Walton J (VP), Boland and Staff JJ.

72 Having dismissed the charges against the company, the trial Judge did not go on to further consider Mr Foster’s liability under s 50, the precondition (company contravention) not being met.

73 Above n 63. See the comment in *Powercoal*, above n 57, at [171] that ‘there are no authorities directly in point’ on the issue, all the harder to understand since Staunton J’s judgment is cited previously at [159] on another point related to s 50.

74 See the extensive quotes at [172] from *Bracht*, above n 64, and *Griggs v Australian Securities Commission* (1999) 75 SASR 307, both referred to by Staunton J in *McMartin*, above n 70, at [848]–[854].

75 As noted previously, in *Morrison v Powercoal (No 3)*, above n 57, the Full Bench in sentencing applied s 10 of the Crimes (Sentencing Procedure) Act 1999 to Mr Foster and did not enter a conviction.

76 [1995] NSWIRComm 220.

s 50 may, with respect, be over-stated. There are a number of such provisions in the NSW statute book, although many are perhaps rarely used.<sup>77</sup> The section also has a direct historical precedent in s 147 of the Factories Shops and Industries Act 1962 (NSW), and previous UK legislation. The High Court in *Hookham v R*<sup>78</sup> gave some attention to a very similar provision, and as will be seen below made some comments on the effect of such deeming provisions.

This is not to deny that problems may arise which are unforeseen, however. One problem with the word ‘deem’ may be appreciated from the summons in the *McLachlan* case, which alleged that the accused, being a director of a company which had breached the Act, was:

deemed to have contravened the same provision in that you DID FAIL to ensure the health, safety and welfare at work of all your employees.

Even if Mr McLachlan was a director of the company (he was not, and hence the summons was dismissed), this allegation seems wrong in that *he* did not have any ‘employees’; they were the company’s employees. The intention of the ‘deeming’ provision is not that the court is required to ‘pretend’ that the director is the company, but that the court is required to impose the appropriate penalty which would be imposed if the director had been found guilty of breaching the relevant provision. However, since the director is required to be a natural person,<sup>79</sup> the appropriate level of penalty will be that applicable to an individual rather than to a corporation.<sup>80</sup>

In *Hookham*,<sup>81</sup> the High Court was dealing with s 8Y of the Taxation Administration Act 1953 (Cth), which provided:

(1) Where a corporation does or omits to do an act or thing the doing or omission of which constitutes a taxation offence, a person (by whatever name called and whether or not the person is an officer of the corporation) who is concerned in, or takes part in, the management of the corporation shall be deemed to have committed the taxation offence and is punishable accordingly.

Subsection 8Y(2) then provided a defence if the accused could demonstrate that he or she was not personally involved as an ‘accessory’ to the offence of the company.<sup>82</sup> Mr Hookham conceded that he had been involved in an offence committed by the company of which he was a director, of failing to pay to the Commissioner of Taxation wages deducted from employees. But the issue on which he appealed was that the Commissioner had obtained an order under s 21B of the Crimes Act 1914 requiring that, as well a pecuniary penalty, he pay ‘reparations’ to the Commonwealth — in other words, that he be required to account for the money withheld. Section 21B allowed such an

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77 To take some fairly random examples from the opposite ends of the alphabet, see s 50 of the Agricultural Industry Services Act 1998 and s 27 of the Workplace Video Surveillance Act 1998. There are at least another 150 provisions in between these two.

78 (1994) 181 CLR 450; 125 ALR 23.

79 See Corporations Act 2001 (Cth) s 201B(1), referring to an ‘individual’.

80 Under the OHS Act 2000 s 12, for example, the maximum penalty for a breach of the major duty provisions in Div 1 of Pt 2 of the Act is 500 penalty units for the first offence by an individual (currently \$55,000).

81 Above n 78.

82 The equivalent provisions in s 26 are paras 26(1)(a) and (b), which allow the officer to defend the prosecution on the basis of not being ‘in a position to influence’ the company, or having exercised ‘due diligence’.

order to be made 'where a person is convicted of an offence against the law of the Commonwealth'. Mr Hookham argued that the 'deeming' provision in s 8Y allowed him to be required to pay a fine, but did not allow a s 21B order to be made.

The High Court disagreed. Mr Hookham by virtue of s 8Y was 'deemed' to have committed the offence, not just for the purposes of the 1953 Act, but for all other purposes of Commonwealth law. As Toohey J commented:

The effect of a deeming provision such as s 8Y(1) is that the person concerned is deemed to have committed the offence which the corporation itself committed [*Parker v Churchill* (1986) 9 FCR 334, at 346–7] . . . It follows that the appellant is a person convicted of an offence against a law of the Commonwealth within the language of s 21B of the Crimes Act.<sup>83</sup>

Neither the current s 26 nor the former s 50 is identical to the provision considered in *Hookham*, but there seems no legally relevant difference. The difference in wording between 'is taken to have' (in s 26, OHS Act 2000) and 'shall be deemed to have' (in s 50, OHS Act 1983 and in s 8Y considered in *Hookham*) seems merely semantic.<sup>84</sup> While s 26 does not add the words 'and is punishable accordingly', once it requires a court to treat an officer as 'having contravened' a provision of the Act, the other provisions of the Act would seem to require the imposition of an appropriate penalty. See, for example, s 12, which in relation to the major general safety duties in Div 1 of Pt 2 provides that: 'A person *who contravenes* . . . a provision of this Division is guilty of an offence against that provision and is liable to the following maximum penalty . . .' (emphasis added). Similarly, it would seem to be an unavoidable implication of being 'taken to have' contravened, say, s 13 (or any other provision in later Divisions of the Act), that the penalties set out in that section would be applicable.<sup>85</sup>

Recently, in *Director-General of the Department of Land and Water Conservation v Greentree*<sup>86</sup> the NSW Court of Criminal Appeal provided some guidance on the interpretation of s 65 of the Native Vegetation Conservation Act 1997 (NSW), a provision which is almost identical to s 26 of the OHS Act 2000. The decision of the court in that case confirms that a 'deemed' offence like that created by s 26 of the OHS Act is a different offence to a personal breach of the Act by the officer concerned, and that both charges may be allowed to proceed in an appropriate case. (So an individual could in appropriate circumstances be prosecuted both for an offence under s 20 of the 2000 Act as an 'employee', while at the same time being prosecuted for a s 26

83 Above n 78, at 462–3.

84 This is one of the few areas where s 26 differs from s 50 of the OHS Act 1983. It seems likely that the change was simply one designed to make the legislation more readable, and may have possibly been motivated by the comments of Bauer J noted above.

85 It would seem to be likely, then, that a s 26 conviction would allow the court to use the range of expanded orders available under Div 2 Pt 7 of the OHS Act 2000. For a decision which would seem to favour this result, see also *Lewis v R* (1985) 18 A Crim R 243, where a medical practitioner was held to be liable to the further penalty of disqualification after being found guilty as an accessory to offences under the Health Insurance Act 1973 (Cth), by virtue of s 5 of the Crimes Act 1914 (Cth). Tooma, above n 7, p 128, also takes the view that a s 26 conviction would enliven the power under Pt 7 Div 2.

86 (2003) 140 A Crim R 25.

offence as someone ‘concerned in the management’ of the corporation.) The court commented that if both charges were made out, then at the punishment stage it would be important not to impose double punishment. But the offences created by the two provisions were conceptually different and should both be allowed to proceed to trial.<sup>87</sup>

### Defences: The reversal of onus of proof

Both the structure of s 26 and judicial authority make it clear that the onus of making out the defences in s 26 lies on the accused. Section 26 provides that the relevant officer ‘is taken to have contravened the same provision unless the director or person satisfies the court that . . .’ the defences are applicable. The matter is put beyond doubt by the recent decision of the Full Bench in *Powercoal*: ‘the onus of proving the exceptions . . . falls on the personal respondent’.<sup>88</sup> This could be said to contradict the general policy of the criminal law, that matters relevant to criminal liability should be proved beyond reasonable doubt by the prosecution.<sup>89</sup> However, 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 Natrass*,<sup>90</sup> 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*,<sup>91</sup> 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:

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87 *Ibid.* The court (Sheller JA, Levine J and Smart AJ) commented at [105]–[109] (emphasis added):

Section 65 creates a separate offence. Where a corporation contravenes s 21(2) of the Act, and it would do so by the acts of its servants or agents or both, each director of the corporation is taken to have contravened the same provision unless the person satisfies the Court that he falls within one of the specified exceptions . . . Despite the significant similarities, the *offences charged are different*, having the differences previously mentioned. Double jeopardy has not been established at the prosecution stage.

88 *Morrison v Powercoal*, above n 71, at [157].

89 Indeed, press reports of the challenge to the OHS Act in the NSW Court of Appeal in the *McMartin v Newcastle Wallsend* and *Powercoal* proceedings, above n 71, suggest that this reversal of onus is being put forward as a ground of possible constitutional invalidity of the Act. For reasons which include those set out in the text following, it is considered highly unlikely that this ground will succeed.

90 [1972] AC 153 at 169–70; [1971] 2 All ER 127.

91 (1985) 157 CLR 523; 60 ALR 449.

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.<sup>92</sup>

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*<sup>93</sup> 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'.<sup>94</sup> 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.

Clearly the primary provisions of the OHS Act 2000, imposing obligations on employers and others to 'ensure' safety, are also provisions which reverse the normal onus of proof; once a *prima facie* risk has been identified under, say, s 8, with a causal link to the workplace, then the onus shifts to the accused employer to make out the defences provided in s 28.<sup>95</sup> The relationship between the primary liability-imposing provisions of s 26, and the 'exceptions' contained in paras 26(1)(a) and (b), then, precisely mirrors the relationship between the 'general duties' provisions of the Act, such as s 8, and the defence provisions contained in s 28. (This raises the slightly complex issue of the connection between the two sorts of defence provisions, which is mentioned below.) The policy reasons which justify it for reversal of onus of proof for employers generally also justifies it to company officers. Given the complexity of corporate decision-making, where many decisions may be documented poorly or not at all, it is surely reasonable to ask a company officer to produce the evidence themselves which demonstrates either their lack of influence or their diligence, rather than requiring the prosecution to put the non-existence of these things beyond reasonable doubt.

### **Defences: 'Not in a position to influence'**

The first defence available under s 26, that the accused was 'not in a position to influence the conduct of the corporation', does not seem to have been the subject of detailed judicial consideration. On general principles it would seem to be hard to imagine its application to a formally appointed director, as such

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92 *Ibid*, at 595. See for a recent 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'.

93 [2002] EWCA Crim 2949.

94 *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.

95 See the cases establishing the 'absolute' liability under the Act cited in above n 14.

a person by virtue of their appointment to the board would always be in a 'position' whereby they could bring influence to bear on decisions.<sup>96</sup> Perhaps the defence is best viewed as one that could be mainly used by other persons 'concerned in management'. It would seem to allow a manager who is notionally in charge of certain areas (for example, a safety manager) to establish a defence where he or she could demonstrate that the board made a practice of never consulting with the manager, or continuing to ignore the manager's recommendations.

### Defences: 'Due diligence'

The second defence, available under s 26(1)(b), is that the officer 'used all due diligence to prevent the contravention'. What sort of behaviour will amount to 'due diligence' for the purposes of this defence?

Cases in other areas of the law offer some guidance on the meaning of 'due diligence'.<sup>97</sup> The question of what constitutes 'due diligence' in advertising, for example, was dealt with by the Full Court of the Federal Court in *Universal Telecasters (Qld) Ltd v Guthrie*,<sup>98</sup> where Bowen CJ and Nimmo J referred to the need to lay down an appropriate system, and to take measures to ensure that the system was working.<sup>99</sup> Another case where issues of 'due diligence' by company officers was canvassed is *R v Bata Industries Ltd (No 2)*,<sup>100</sup> a Canadian decision concerning directors' liability for breach of pollution legislation. Ormston PDJ identified a number of factors which were relevant to 'due diligence' by officers:

- (i) Whether or not the officers had established an ongoing system to monitor safety;
- (ii) Whether or not there were reporting mechanisms to ensure that the system was being complied with;
- (iii) While officers were entitled to place reasonable reliance on reports by responsible subordinates, whether they immediately addressed issues of which they became aware?<sup>101</sup>

The issue of 'due diligence' under the OHS Act 1983 itself was considered by Maudment J in *Coster*.<sup>102</sup> The fact that Mr Coster had set up procedures for safety to be monitored and ensured compliance with those procedures, had devoted company resources to the issue, responded quickly to complaints which were brought to his attention, and demonstrated a personal commitment to safety by involvement in a safety committee and occasionally doing a personal inspection, all added up to 'due diligence'.

A similar approach to the issue of due diligence is found in the recent judgment of Staunton J in *WorkCover v Daly Smith Corporation (Aust) Pty*

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96 For a recent decision strongly affirming that every director has a 'core, irreducible requirement of involvement in the management of the company' see *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113; 45 ACSR 332, esp the judgment of Spigelman CJ at [108].

97 See also the discussion of due diligence in Clough and Mulhern, above n 6, pp 151–8.

98 (1978) 32 FLR 360; 18 ALR 531.

99 *Ibid*, at FLR 363, 383.

100 (1992) 70 CCC (3d) 394.

101 *Ibid*, at 429.

102 *WorkCover Authority of NSW (Insp Dowling) v Barry John Coster* [1997] NSWIRComm 154.

*Ltd.*<sup>103</sup> While not directly adopting the reasoning in *Bata Industries*, her Honour seemed to accept the submission that the factors referred to in that decision were relevant.<sup>104</sup> She ruled, however, that the director concerned, Mr Smith, had not met the standards set out in that judgment. While a written safety policy was in place in the company, her Honour commented on the need to ensure that the policy was not just on paper but became an ‘entrenched systemic process’ and that steps were taken to supervise compliance with the policy.

### **Defences: the relationship between s 26 and s 28**

There are some difficult questions raised by the interaction of s 28 of the OHS Act 2000 (the general defence provision) and the specific ‘exculpatory’ clauses in s 26(1)(a) and (b). Can a personal defendant rely on the general defence provisions as well as the specific defences in s 26?

A full discussion of the issues is not possible here, but it should be noted that the relationship between the two provisions was addressed recently in *Powercoal*.<sup>105</sup> In summary, the Full Bench offered three reasons why a personal defendant in s 26 proceedings *cannot* rely on the s 28 defences:

- (i) Section 28 provides a defence in ‘proceedings against a person for an offence’; but a person facing prosecution under s 26 is not the subject of such proceedings, the ‘deeming’ provisions assuming that the person has not in their own right committed an offence.<sup>106</sup>
- (ii) Section 26 assumes a contravention by the company as a precondition, and hence any applicable s 28 defences will have already been considered in relation to the company.<sup>107</sup>
- (iii) Section 26 explicitly enumerates the two exceptions to its operation, and in doing so leaves no room for the operation of any other defences.<sup>108</sup>

The scheme of the legislation, then, is that a person who is charged with an offence under s 26 *cannot* rely on defences under s 28. Those defences will be relevant to the question whether the corporation has contravened the Act. But once that matter is established then, apart from very rare cases, the offence under s 26 will be established by showing that the person is a director or relevant manager, and then the onus will be on that person to establish one of the defences in s 26(1)(a) or (b). This is another area where legislative clarification, however, would be desirable to avoid confusion.

### **Considerations in sentencing under s 26**

Finally, if an officer is convicted of an offence under the OHS Act 2000 pursuant to s 26, what factors should the court take into account in sentencing?

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103 [2004] NSWIRComm 349.

104 *Ibid.*, at [130].

105 Above n 71, at [163]–[167]. Technically the judgment refers to the former legislation, ss 50 and 53. But for the purposes of discussion in the text the current provisions will be cited.

106 *Ibid.*, at [163]. The wording of this paragraph of the judgment is perhaps a little infelicitous; as s 26(2) refers to a defendant being ‘proceeded against and convicted’ it is not entirely accurate to say that ‘a person facing prosecution by virtue of s [26] is not the subject of proceedings for an offence against the Act’.

107 *Ibid.*, at [164].

108 *Ibid.*, at [165].



One issue that arises in the cases is the appropriate allocation of penalty between the company and the director. For a s 26 prosecution to succeed the company itself must be liable under another provision of the Act. The company will often be prosecuted at the same time as the director. But if it is a 'one-person company' where the assets of the company are in reality the assets of the director, the question arises whether imposing separate fines will expose the director to a double penalty. One option would be to adopt an 'overall' approach with the appropriate amount being allocated between the two. Another would be for the company simply to be fined and the director not. In two decisions of Maudment J involving small companies, a fine was imposed on the company but not on the director.<sup>109</sup> In a similar vein, Heerey J in the Federal Court ruled that where a company was the 'alter ego' of the director only one fine would be imposed, on either the company or the director, but not on both.<sup>110</sup>

Another way of looking at the matter, however, is to note that Parliament has seen fit to make the director of a company personally liable as a *separate* matter from the company's liability. Directors would presumably be keen to argue that they and the company ought to be treated as separate legal entities when the question of taxation or liability under contract arose; why should they then in this case be allowed to rely on the unity of interest between themselves and the company to escape a penalty that parliament has prescribed?<sup>111</sup> From a purely company law perspective Ramsay and Noakes refer to this use of the 'piercing the veil' doctrine as 'controversial', and submit that:

Recourse to piercing principles in order to reduce the penalty . . . is, in the absence of evidence that the company is unable to pay the fine and other relevant factors, an inappropriate use of the doctrine.<sup>112</sup>

In *McCabe*,<sup>113</sup> the company and the individuals charged had adequate resources. Counsel nevertheless made a submission that the company should bear the burden of the penalty, and the two directors involved be given a reduction. Kavanagh J commented in response to this submission that parliament had set the level of penalty in a differential way between companies and individuals, and that each of the individuals involved had been in some way culpable.

Recent decisions of the NSW IRC now make it clear that, even where the funds for the company will have to be found from the resources of an

109 *Brkic* [1998] NSWIRComm 246; *Martin* [1998] NSWIRComm 619.

110 *ACCC v Commercial and General Publications Pty Ltd (No 2)* (2002) ATPR 41-905, esp at [27], [29].

111 See *R v Ovenell* [1969] 1 QB 17; [1968] 1 All ER 933 at 939F per Blain J: 'If a guilty man makes himself into two entities and commits a crime in both capacities the court has to deal with both.'

112 I M Ramsay and D B Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 *Company and Securities L Jnl* 250 at 255. They add at n 51: 'The "reality" of the circumstances may be that the shareholder will pay the fine, but that should not mean that the appropriate level for the fine should be reduced to the amount of a fine for an individual'. They refer to *WorkCover v Baker-Duff Pty Ltd* (Fisher CJ, 2 April 1993) [reported as *Workcover Authority v Baker* [1993] NSWIRC 19] where the policy of treating a company as if it were the director for the purposes of setting a penalty under the OHS Act 1983 was adopted.

113 [1999] NSWIRComm 515.

individual defendant, the court may still impose separate fines on company and individual — see, for example, the comments of the Full Bench in *Inspector McColl v John Watson Building Services Pty Ltd and Dowdon Contracting Pty Ltd*.<sup>114</sup> A similar approach was taken, outside the area of workplace safety, in *ACCC v ABB Transmission & Distribution Ltd (No 2)*,<sup>115</sup> where Finkelstein J noted that it was appropriate to have regard to the fact that a fine to be imposed on a company would fall heavily on the director, who was its main shareholder. However, this did not lead to either the company or the director being excused from penalty; it was simply a matter which was taken into account in the overall allocation of penalty.

Another situation where a financial penalty on a director must be assessed separately to the company's penalty is where the company itself effectively has no assets. In such a case then it clearly will be appropriate to impose a penalty which will effectively punish the director personally, rather than simply imposing a fine on a company which will never be paid. This seems to have been the course followed in *Frankel*,<sup>116</sup> where the company concerned had been dissolved before the prosecution was brought.

Should the court in sentencing a manager take into account the actual degree of involvement in the injury or fatality concerned? The decision of Wright J, President of the Commission, in *Page v Walco Hoist Rentals Pty Ltd (No 2)*<sup>117</sup> provides guidance in this area. Wright J took the view in sentencing a manager under s 50 of the OHS Act 1983 that, despite the fact that the accused's liability was based on the company's liability, the accused's degree of culpability was not necessarily to be equated with that of the company.<sup>118</sup> His Honour went on to say that an assessment of the culpability of a manager would involve consideration of:

- (i) the role of the defendant in the management of the corporation;
- (ii) the gravity of the offence committed by the company; and
- (iii) the role played in that offence by the manager.<sup>119</sup>

In that case, while the manager played a key role in the company, it was a company that was primarily under the control of another highly experienced manager who was the main director. Matters of general policy were not primarily the responsibility of the accused manager, and in particular the system of work that primarily led to the fatality was not his responsibility. This approach sensibly requires the court to consider, where there is a finding of

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114 [2004] NSWIRComm 553. See also the comments of the UK Court of Appeal in *R v Rollco Screw & Rivet Co Ltd* [1999] EWCA 1354, also reported at [1999] 2 Cr App R (S) 436; [1999] IRLR 439.

115 (2002) 190 ALR 169 at [45].

116 Above n 33.

117 (2000) 99 IR 163.

118 His Honour commented at para [29]:

I consider that, notwithstanding the deeming nature of s 50(1) of the Act in relation to a person such as the second defendant, it does not follow from the fact that an individual is, in circumstances such as those here present, deemed to be guilty of the offences resulting from the guilt of the corporate defendant, that his degree of culpability is to be assessed necessarily at the same level as the culpability of the corporation.

119 *Ibid*, at [39].

guilt, the degree of control able to be exercised by the specific officer.<sup>120</sup>

Other recent decisions where similar considerations have been applied include *R & D Enterprises*<sup>121</sup> and *Berrima Coal*.<sup>122</sup> In both those decisions the court ruled that, while the company officer concerned was guilty, it was appropriate to enter no conviction in accordance with s 10 of the Crimes (Sentencing Procedure) Act 1999. In *Berrima Coal* this decision was made taking into account the personal situation of the accused as well as the higher degree of culpability of the company.<sup>123</sup> In *R & D Enterprises* the decision was made because the court accepted evidence that a \$30,000 fine which was being imposed on the company would largely have to be met out of the director's personal resources.<sup>124</sup>

On the other hand the Commission has stated on a number of occasions that s 10 (as was the case with its predecessor, s 556A of the Crimes Act) should not be applied too readily.<sup>125</sup> Marks J in *Power*<sup>126</sup> gave a broad review of the law in the area in refusing to apply the provisions of s 10 to a director. In brief his Honour concluded that where an offence was objectively a serious, not a 'trivial', one, then special circumstances would need to be shown to warrant the application of s 10. Prosecutions under the UK legislation have raised similar issues.<sup>127</sup>

Finally, while there is always a degree of judicial sympathy for a director convicted under the relevant provisions on the basis of the company's liability, the courts need to be careful not to 'water down' the effect of the provisions. The decision of Finkelstein J in the Federal Court in a trade practices matter provides a useful correction here. In *ACCC v ABB Transmission & Distribution Ltd (No 2)*,<sup>128</sup> his Honour was sentencing directors who were at the highest level in companies which had engaged in deliberate anti-competitive behaviour and had been found guilty. The directors had been convicted as being 'knowingly concerned' in the corporate contraventions. A number of his Honour's comments seem directly applicable to the sentencing of a company officer whose lack of due diligence has led to workplace injury

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120 The Full Bench in *Maddaford v Coleman* (2004) 138 IR 21 substantially adopted these remarks in considering sentencing issues relating to individual directors. There differential penalties were applied to two directors whose involvement in the incident concerned (a severe case of workplace bullying) differed.

121 *WorkCover Authority of New South Wales (Inspector Dall) v R & D Enterprises (Newcastle) Pty Ltd* (2001) 110 IR 469.

122 *Department of Mineral Resources (Chief Inspector McKensy) v Berrima Coal Pty Ltd* (2001) 105 IR 348.

123 *Ibid.* See the discussion at [181]–[203].

124 Above n 121. See discussion at [20] of the judgment. For other cases dealing with similar issues see *WorkCover Authority of New South Wales (Inspector Dall) v Litchfield Roofing Pty Ltd; Joseph Andrew Litchfield* [2003] NSWIRComm 240 and *Morrison v Powercoal (No 3)*, above n 57.

125 See in particular the comments of the Full Bench of the IRC in *WorkCover Authority of New South Wales (Inspector Hopkins) v Profab Industries Pty Ltd* (2000) 49 NSWLR 700; 100 IR 64.

126 *Inspector Carmody v Power* [2002] NSWIRComm 286.

127 *R v Ceri Davies* [1999] 2 Cr App R (S) 356; *R v Rollco Screw and Rivet Co Ltd* [1999] 2 Cr App R (S) 436.

128 Above n 115, esp at [28].

or death. In particular his Honour pointed out that the court must keep in mind:

- (i) the gravity of the harm caused (even more apparent in a workplace safety case);
- (ii) the danger of allowing the apparent 'respectability' of the officer to obscure that fact that they have made choices to act (or not to act) which have led to this harm to others;
- (iii) the need to focus primarily on the character of the offence, rather than the offender, to give effect to the aim of deterrence of such behaviour by others in the future; and
- (iv) the need to avoid erosion of public confidence in the judicial system if it is perceived that there is differential treatment afforded to 'blue collar' and 'white collar' offenders.

In short, those who accept the benefits of management status must also accept the responsibility of paying careful attention to the way that their decisions impact on the health, the safety and the very lives of those who work for their company, or who are unavoidably affected by the company's decisions.

## **Conclusion**

This article has raised a number of significant issues about the personal liability of company directors under s 26 of the OHS Act 2000 (NSW), and directed attention to areas which require either judicial or legislative clarification.

If the existing law is correctly applied, a person with a senior management role in a company should only ignore the issues of safety in the workplace at their great peril. As has been seen, the provision imposes potentially grave personal criminal responsibility on a company officer who allows systems to remain in place which create risks to safety. This is a matter which needs to be clearly brought to the attention of directors by those charged with the improvement of safety in the workplace.

Unfortunately the impact of these provisions has been blunted in the past by the lack of prosecutions undertaken at the senior level. In New South Wales, the overwhelming majority of prosecutions under former s 50 of the OHS Act 1983 involved small companies, usually where the director or manager prosecuted was closely involved with the specific incident.

The provisions discussed here should be much more widely invoked in the case of senior managers in large corporations, rather than simply in the case of small companies. In that way attention will be drawn to the need for review of overall management policies on workplace safety, rather than merely to the placing of blame for the occurrence of specific incidents.

A number of uncertainties in the application of the current provisions need resolution by the courts or the legislature. High level judicial guidance is needed on the appropriate allocation of penalty between the company and the director in the case of smaller companies. It may be appropriate, for example, for the NSW Attorney-General to invoke the so-far unused provisions of Div 4 of Pt 7 of the OHS Act 2000 and seek a 'guideline judgment' on the issue from the Full Bench of the Industrial Relations Commission in Court Session.

Further indication of what amounts to 'due diligence' by officers would

greatly assist improvement of workplace safety by focusing attention on specific changes in managerial activity. Some technical drafting problems have been identified in the provisions relating to self-incrimination which may hinder appropriate prosecution of both companies and officers unless addressed. The relationship between the specific defences provided under the personal liability provision in s 26, and the more general defences allowed under the Act by s 28, could be clarified.

Despite these areas of uncertainty, the NSW experience with s 50 of the OHS Act 1983, and now with s 26 of the OHS Act 2000, shows that provisions imposing personal liability can be used and prosecutions successfully mounted. These provisions provide a crucial weapon in the fight for improved workplace safety, and their application should be extended to ensure that the safety 'culture' of companies is addressed more effectively by reminding board members of their heavy responsibility to look out for the safety and the lives of their workers.