# Broader OHS trap for management

By Alex Boxsell

A LANDMARK case concerning occupational health and safety (OHS) legislation has broadened the net used to catch managers, including the possible application of criminal convictions, merely for being "concerned in the management" of a corporation.

Such was the fate of two mine managers who remain convicted of criminal offences under the *NSW Occupational Health and Safety Act* 2000 and have been refused special leave to appeal to the High Court, their lawyer Fiona Inverarity said. Though in refusing leave last month, the High Court said it might consider privative clauses under the *Industrial Relations Act* in some circumstances, but would not be bound by them.

"The High Court has indicated that in the right case, they won't be stopped by these privative clauses," Inverarity said.

"The interesting thing about that is that the Act says there is a very limited right of appeal from the Industrial Relations Court (IRC). You can go from one judge to three judges, and basically it's very limited from there. They have put in … privative clauses to stop you from appealing."

Inverarity said the High Court had questioned whether New South Wales could prevent it from hearing an appeal through legislation designed to preserve the role of the IRC.

"Chief Justice [Murray] Gleeson, when asking a question of the prosecutor's counsel, said 'are you telling me, that NSW could set up a court, which only had internal appeal mechanisms, and could go no further, that could charge terrorism offences'?"

A litigation partner at Truman Hoyle, Inverarity, together with senior lawyer Karen Bohm, was engaged in the six-year case before the IRC for the two managers and a number of other employees of the Newcastle Wallsend Coal Company, who were eventually acquitted.

The case followed the deaths of four of the company's employees in the Gretley mine in Newcastle in 1996. The men were using incorrect maps provided by the Department of Mineral Resources, which meant old workings marked as being approximately 150 metres away were actually on the other side of a rock wall they were drilling into. When the men burst through the wall, the old workings, which were full of water, drowned them.

"There is no dispute that the maps provided by the [department] were incorrect," Inverarity said. "It certainly led to a change in the way the [department] does things. But everyone relied on the maps, as everybody had done previously."

The two with criminal convictions were managers working at the same mine owned by the company. According to Inverarity, one of the two had not been at the mine in question for two years before the accident occurred. Some of the other employees who were charged were surveyors and under-managers (the most junior rank of management at a mine).

"It is important [to note] that they weren't being charged with anything they themselves did," Inverarity said. "They were only being charged with being concerned in the management of a corporation that breached the law."

Following the case, the Truman Hoyle partner said the meaning of "concerned in the management" has broadened.

"Basically, you can be fairly low down the tree and be found to be concerned in the management of a corporation, if you have anything to do with safety," she said. "A lot of people will be caught by this, who can now be prosecuted for breaches of what their corporation does."

Fiona Inverarity, Truman Hoyle

Along with criminal convictions, one of the managers has been fined $42,000, while under the law, a second offence can attract a jail sentence.

Inverarity said there was a push for reform, "but … the unions are very strong on the OHS Act – everyone's very strong on the OHS Act. No one says it's not a good piece of legislation to prevent accidents. But it is very difficult to get the defences interpreted, and it's very strict. And it's very hard, especially in the mining industry, to get people to work in management positions because you can be prosecuted."