

Liability of Directors and Managers under Occupational Health and Safety Law

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Workplace health and safety is not a new topic, but to what extent are you as a director or manager aware that you can be criminally prosecuted for failing to meet your OH&S obligations?

1. In September 2001 the NSW Parliament introduced a new legislative package dealing with occupational health and safety. The *Occupational Health & Safety Act 2000* (the “OH&S Act”) and the *Occupational Health and Safety Regulation 2001* (the “Regulations”), represented a modernisation of the *Occupational Health & Safety Act 1983* and reflected the increasing importance being placed by Parliament on health and safety in the workplace.
2. The legislative mandate has been pursued vigorously by the NSW WorkCover Authority; enforcing its’ provisions through improvement notices, fines and prosecution. However aside from prosecuting corporations for breaches, an increasing number of cases before the Industrial Court of New South Wales demonstrate that WorkCover is also committed to prosecuting directors and even some managers for breaches of OH&S legislation. Indeed, recent case authority suggests that ‘who’ may be liable under the provisions of the OH&S Act may extend further down the management chain than ever before. Accordingly, if you are a director, senior manager or involved in any aspect of safety in your organisation, an understanding of these duties is critical. A failure to discharge your duties may result in a prosecution and if convicted, penalties include significant monetary fines and in circumstances of a second offence, the possibility of a gaol sentence.
3. The operation of the OHS Act so far as directors and managers is concerned, involves punishing a person for their complicity in an offence committed by a corporation. As such, a pre-requisite to a prosecution against a director or manager is that the corporation has breached the OH&S Act. Once this has been established, and subject to some limited defences, section 26 of the OH&S Act deems a director or person concerned in the management of that corporation to have also committed that offence.¹
4. The purpose of s.26 is to prevent persons who direct a company’s illegal acts or omissions from hiding behind the “corporate veil”. In other words, it is a practical recognition of the fact that a corporation acts through living persons and that they are the directing mind of the corporation.²
5. In order to succeed in a prosecution under s.26, the following three elements must be proven:
 - a. There is a corporation.
 - b. The corporation has contravened a provision of the OH&S Act or Regulations, and
 - c. The person is a director or a person ‘concerned in the management’ of the corporation.

¹ *Inspector Jorgensen v Daoud [2005] NSW IR COMM 135 at [25]*

² *Tesco Supermarkets Ltd v Natrass [1972] AC 153*

6. It should be noted that in relation to (b), the corporation need not be proceeded against and convicted.³ In other words, the essential element of the offence is a contravention of the Act and not the conviction of the corporation.
7. Once the Prosecutor has established the above three elements, in order for a director or manager to escape conviction under s.26, s/he must prove one of the following defences:
 - a. They were not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or
 - b. They used all diligence to prevent the contravention by the corporation.
8. Based on current case law these are the only defences available to personal defendants. The OH&S Act does contain some additional defences in s.28; namely, that it was not reasonably practicable to comply with the Act or that the breach was caused by factors over which s/he had no control. In the past, defendants have argued that the onus is on the Prosecutor to disprove these defences in s.28 as a condition precedent to a personal defendant being deemed to have contravened the Act pursuant to s.26. However, such arguments have failed.⁴ Hence, the only defences available to directors and managers are those outlined in s.26.

Who is ‘concerned in the management of a corporation’?

9. The scope of the phrase “concerned in the management of the corporation” is yet to be settled by the Courts. Sub-section (4) specifically excludes local Council members from the definition, but beyond this, the description remains to be determined on a case by case basis.
10. In the recent case of *McMartin v Newcastle Wallsend Coal Company Pty Ltd* [2004] NSW IR COMM 202, Justice Staunton held that a mine manager and a mine surveyor fell within this definition. Her Honour’s reasoning was based on consideration of the surveyor’s decision making powers and authority, whether those powers went directly to the management of the corporation, whether those powers affected the corporation as a whole, or a substantial part of it, whether those powers involved advising management and participating in decision making and not merely carrying out directions as an employee, and whether the exercise of those powers directly influenced the corporation in relation to the act or omission that constituted the offence. Critically, what emerged from that decision was that the individual concerned did not have to be at the highest level of management.⁵ This is arguably a very broad approach to the interpretation of who is ‘concerned in the management of a corporation’ and the decision is currently on appeal.

Defences – What has to be proved?

11. Under s.26(1)(a), a director or manager can escape liability if they were not in a position to influence the corporation. The scope of this defence is yet to be determined conclusively, however it would arguably encompass situations where directors were incapacitated due to illness, outvoted by fellow directors on a decision or perhaps overruled in general meeting.
12. An alternative defence exists under s.26(1)(b), namely, that the director or manager acted with all due diligence to prevent the contravention. Again, the case authority on the meaning of this defence is sparse. A similar provision was considered in *State*

³ *WorkCoverAuthority (Inspector Lane) v Australian Winch and Haulage Co Pty Ltd* (2000) 102 IR40

⁴ *McMartin v Newcastle Wallsend Coal Company Pty Ltd* (2004) NSW IR Comm 202 at [962] and affirmed by the Full Bench in *Morrison and Powercoal Pty Ltd* [2004] NSW IR Comm 297 at [163].

⁵ *McMartin* at [884 -885] and [936-951].

Pollution Control Commissioner v. Kelly (1991) 5 ACSR 607 (regarding section 10 of the *Environmental Offences and Penalties Act 1989*). There, Justice Hemmings said:

“A defendant has the onus to prove not only diligence, but all due diligence.
....

Due diligence, of course depends on the circumstances of the case, but contemplates a mind concentrated on the risks. The requirements are not satisfied by precautions merely as a general matter in the business of the corporation, unless also designed to ‘prevent the contravention’.

Whether a defendant took the precautions that ought to have been taken must always be a question of fact and, in my opinion, must be decided objectively according to the standard of a reasonable man in the circumstances. It would be no answer for such a person to say that he did his best given his particular abilities, resources and the circumstances. This particularly applies to activities requiring experience and acquired skill for proper execution.”

13. In summary, the concept of all due diligence is a question to be determined on the facts of the particular case. However, going forward it is prudent for a director or manager to concentrate their mind on the likely risks in a workplace, to establish a proper system to prevent those risks arising and provide adequate supervision to ensure that the system is properly carried out.⁶

Penalties

14. The maximum penalty faced by a personal defendant is \$55,000 in the case of a first offence and \$82,500 and the possibility of a gaol sentence for any subsequent offence. To illustrate the scope, some of the more recent decisions have resulted in the imposition of the following fines:
 - a. *Inspector Sharpin v A Team Concrete (Aust) Pty Ltd & Ors* [2004] - \$10,000.
 - b. *Inspector McMartin v. Newcastle Wallsend Coal Company Pty Ltd & Ors* [2005] - \$30,000.
 - c. *Inspector Templeton v. Haddon Rig Pty Ltd* [2005] - \$6,500.
 - d. *Inspector Cooper v. Angelucci & Ors* [2005] - \$3,500 and \$4,500.
 - e. *Inspector Robert Mayell v. William McLean and Ors* [2006] - \$6,500, \$5,500 and \$5,500.

What should I do?

15. The cases clearly demonstrate that the concept of directors as purely financial backers or somehow ‘silent’ and not involved or responsible for OH&S will be rejected by the Court. Directors and managers must take an active role in ensuring that OH&S obligations are discharged. This means:
 - Being familiar with the OH&S legislation – obtain a copy of the OH&S Act and Regulations.

⁶ *WorkCover Authority (Inspector Dowling) v Coster* [1997] NSW IR COMM 154; *WorkCover Authority (Inspector Dawson) v Waugh* [1995] NSW IR COMM 14 and *WorkCover Authority (Inspector Gordon) v Abyss Electrical* [1998] NSW IR COMM 161.

- Where the day to day management of the corporation rests with others, maintain regular communication with those people and make enquiries about how health and safety is being maintained and assessed. Has a safety audit been completed? If not, engage suitably qualified OH&S auditors to assess your site and follow up on any recommendations for improvement.
 - Keep a record of all your enquiries and discussions about OH&S. Get regular reports from your managers and discuss OH&S in your Board meetings. Minute those discussions.
 - Remember that your duties are ongoing and that risks may change over time. Therefore, your enquiries need to be regular to ensure safety is being maintained and you are complying with any changes in OH&S legislation.
16. WorkCover also publish a number of industry codes of practice which can assist your organisation in understanding and managing workplace hazards. In recent times, particular emphasis has been given to identifying and dealing with hazards through a 'risk assessment process' and you are well advised to obtain a copy of the 'Risk Assessment Code of Practice 2001' published by WorkCover and available on their website.

The Latest Changes

17. The New South Wales Government has recently prepared a draft amendment to the OH&S Act known as the *Occupational Health and Safety Amendment Bill 2006* ("the Bill"). Importantly, this Bill will see the deletion of the existing s.26 and its replacement as follows:

Liability of officers of corporations

- (1) *If:*
- (a) *a corporation contravenes a provision of this Act or the regulations, and*
 - (b) *a contravention of the provision is an offence, and*
 - (c) *the contravention by the corporation is attributable to an officer of the corporation failing to take reasonable care,*

the officer is guilty of the offence.

Maximum penalty: the same maximum penalty that is applicable to contraventions of the provision by individuals.

- (2) *In determining whether a contravention by a corporation is attributable to an officer of the corporation failing to take reasonable care, regard must be had to the following:*
- (a) *what the officer knew about the matter concerned,*
 - (b) *the extent of the officer's ability to make, or participate in the making of, decisions that affect the corporation in relation to the matter concerned.*
 - (c) *Whether the contravention by the corporation is also attributable to an act or omission of any other person,*
 - (d) *Any other relevant matter.*

- (3) *An officer of a corporation who is a volunteer is not liable to be prosecuted under this section for anything done or omitted to be done by the officer as a volunteer.*
 ...
”

18. The Bill is still being debated and so its final form is yet to be determined. However if it is passed unchanged, it will create significant change. Firstly, the category of persons who may be prosecuted will be confined to ‘Officers of a corporation’ as defined in the *Corporations Act 2001* (Cth). Secondly, under sub-section (2), a Judge will be able to consider a much broader range of factors in determining liability. In particular, under s.26(2)(d), a Judge will be able to take into account “any other relevant matter”.
19. Some see the Bill as a softening by the State on the importance of health and safety in the workplace, others see it as an important re-balancing exercise; injecting some reality and practicality back into the defences available to individuals.
20. There is no question that occupational health and safety is an important matter and that accidents and injuries have a devastating impact on corporations and individuals both financially and emotionally. To that end, directors and managers should be cognisant of their duties under OH&S law and attribute them the same level of importance as any other duty at law. A failure to do so will risk a criminal conviction and possibly a gaol term. The New South Wales State Government appears to be modifying the standard by which officers of corporations are measured and, if passed into law, will allow Judges to take a broader set of factors into account in determining liability. However, irrespective of these amendments, it would be prudent as a director or manager to observe the steps recommended above and adopt a proactive approach to ensuring safety in the workplace.

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