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Recent Developments in Occupational Health and Safety Case Law

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SUMMARY

This paper builds upon papers published in the 2004 AMPLA Yearbook. However, it is anticipated that the paper will expand upon these in a complementary way.

Given the significant legislative developments and increased focus upon the workplace safety agenda in the past year this paper will provide an insight into current trends identifying the direction of future developments in the area. The paper will undertake an examination of legislative changes and proposals in each State, the debates about these changes and the background to the changes and the current workplace safety agendas. There will be an analysis of the relationship between the specific mining safety legislation and the general safety legislation, clarifying any conflicts/obstacles the obligations raise specific to the mining industry. The paper will identify the potential impact of the changes and assess, in light of those changes, the practical operation of industry safety on a day-to-day basis – concentrating upon the mining and petroleum industries.

Further, the paper will review major occupational health and safety case law (in the mining and petroleum industries) over the past 12-18 months in a range of different jurisdictions. This analysis will allow a review of the different standards in each jurisdiction. There will be a detailed review of the Gretley decision, among others, and the impacts of the decision upon industry participants. Through an analysis of relevant case law, we will attempt to identify the trends which the legislature/courts are moving and the impact of this upon industry participants.

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INTRODUCTION

Occupational health and safety (OHS) has been thrust to the forefront of the political, legislative and public arenas in all States of Australia over recent years and the last 12 months has seen very significant legislative interest and intervention in the area. Since the 2004 AMPLA Conference alone, there have been significant amendments, redrafting or implementation of new OHS legislation in New South Wales, Victoria and Western Australia, as well as a number of proposals and inquiries in other States.

The last 12 months have also witnessed the handing down of a number of significant decisions by the New South Wales Industrial Relations Commission in Court Session (NSWIRC) with wide reaching implications for the mining and resources sector (as well as other industries). The impact of these decisions has the potential to be far reaching. This is likely to come about as a consequence of the standards of occupational management reflected in the various decisions and the impact that they could have on the wider legislative and regulatory debate. This paper will concentrate on an analysis of some of the major decisions and attempt to identify the substantive issues raised by each of them. However, before undertaking that task is it necessary to at least identify the breadth of legislative change that has been introduced in the recent past in the occupational health and safety area.

The mining industry is an inherently dangerous industry which as a consequence is highly regulated, not only by general OHS legislation but also by mining specific legislation, rules and regulations. This specific legislation is generally prescriptive in nature and addresses wide ranging safety related issues such as responsibilities of mine management, obtaining of authorities to carry out various operations, standards in relation to machinery, practices and systems as well as many other aspects of mining and its practice. The extent of this body of rules and regulations is vast, particularly when considered on an Australia-wide basis. As a consequence, it is beyond the scope of this paper and it will not be explored in any great detail.

THE LAST 12 MONTHS

In the last 12 months, there have been inquiries, proposed legislation, reviews, ministerial reports, as well as some important new legislation in the OHS field. In addition, the courts have delivered some landmark appeal decisions. In order to comprehend the importance and significance of recent OHS case law, one must have an understanding of the current climate in which these decisions are being handed down.

A significant topic presently on the agenda is the appropriate way to treat workplace incidents which result in death. Amidst much debate in New South

Wales, the *Occupational Health and Safety (Workplace Deaths) Act 2005* (Workplace Deaths Amendment) commenced in June 2005. This amendment to the *Occupational Health and Safety Act 2000* (NSW) (2000 OHS Act) contained in s 32A introduces an additional offence to those that already apply to all workplace incidents, including those involving death. The new provision operates in circumstances where there is a workplace fatality and a person who owes a duty under the 2000 OHS Act both causes the death of the person and is reckless as to the danger of death or serious injury. The amendment also provides for increased penalties, both monetary and penal,[1] for individuals and corporations who are found to be in breach.

While it was stated that the legislation was "aimed at the very small minority of rogues whose indifference to health and safety in the workplace results in death,"[2] it remains to be seen whether this description will serve to define the limits of its operation or whether the new provisions will be given an expansive interpretation and consequent effect by the NSWIRC. Furthermore, it remains the case that both individuals and corporations can also be prosecuted under the existing strict liability sections for incidents that involve a death.[3] The application of these earlier sections does not require any recklessness on the part of the accused, nor that the conduct of the person caused the death.

In addition to the Workplace Deaths Amendment, the New South Wales Government has also recently released a discussion paper and requested submissions[4] from the public on the operation of the 2000 OHS Act, addressing a number of perceived issues and exploring proposed alternative and additional provisions. The report resulting from this review is required to be tabled in each House of Parliament.[5]

In addition to the general OHS legislation, there has also been a review of particular mining legislation, including the passing of the *Mine Health and Safety Act 2004* (NSW) which has yet to commence. The mining industry has also been under scrutiny through a review conducted by Neville Wran AC QC, his findings being released earlier this year in a report titled the "NSW Mine Safety Review". This review, among other things, examined the operation of the recommendations that arose from the 1997 Mine Safety Review and the Gretley Inquiry Report. The review also examined legislation including the *Coal Mine Health and Safety Act 2002* (NSW), the *Mine Health and Safety Act 2004* (NSW), and the proposed Regulations to accompany these Acts. Safety issues involving the increased use of contractors in the mining industry and fatigue management associated with hours of work were also addressed in the review and resulting recommendations.

1 A maximum penalty of $1,650, 000 for a corporation and $165, 000 for an individual, or imprisonment for five years, or both.
2 Second Reading Speech, "Occupational Health and Safety Amendment (Workplace Deaths) Bill", NSW Legislative Council, 8 June 2005
3 Section 50 of the 1983 OHS Act and s 26 of the 2000 OHS Act.
4 Pursuant to s 142 of the 2000 OHS Act.
5 Section 142 (3) of the 2000 OHS Act.

In Victoria, as a result of a review of the *Occupational Health and Safety Act 1985* (Vic) by Chris Maxwell QC in 2004, the Government drafted new legislation, the *Occupational Health and Safety Act 2004* (Vic), which has now commenced in Victoria as of 1 July 2005. This Act has introduced increased penalties, further defined duties and introduced additional powers for prosecutors.

The Australian Capital Territory (ACT) has enacted industrial manslaughter legislation, the *Crimes (Industrial Manslaughter) Amendment Act* 2003 (ACT).[6] The Commonwealth Government[7] has sought to exempt Commonwealth employers and employees from the operation of the industrial manslaughter provisions now applicable in the ACT.

In South Australia a private member's Bill[8] has been introduced into the Parliament seeking to establish a new offence of industrial manslaughter by amending the *Occupational Health, Safety and Welfare Act 1986* (SA). The Bill has raised to a serious level the debate on this topic within South Australia.

The Western Australian Government has also significantly amended the existing *Occupational Safety and Health Act 1984* (WA), which now includes increased penalties and introduces imprisonment as an option in prosecutions where "gross negligence" of executives is proven. There has also been a strong government response to the deaths of three miners in May 2004 at the BHP Billiton Iron Ore and Boodarie Iron sites in Western Australia. A ministerial inquiry was conducted and a report was released in November 2004.[9] A subsequent interim report has been released by the Mines Safety Improvement Group in April 2005 examining the operation and effectiveness of existing mine safety legislation.[10]

Proposals and discussions regarding OHS have also increased in Tasmania where, in the last 12 months, there has been a proposal by the Attorney-General to amend the *Coroners Act 1995* (Tas) so that coronial inquiries will be held in all circumstances involving workplace deaths that are not certified by a medical practitioner as a natural death. The Tasmania Law Reform Institute is looking into options for punishing instances of industrial manslaughter, and has published an issues paper on the use of criminal sanctions against organisations.

The developments outlined above are only a snapshot of the impact that OHS is having upon Australia's legislature. What is clear is that various aspects of OHS are being considered widely by all governments, a trend that appears likely to

6 Which amends the *Crimes Act 1900* (ACT).

7 Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005 (Cth).

8 Occupational Health, Safety and Welfare (Industrial Manslaughter) Amendment Bill 2004 (SA).

9 Mark Ritter, "Ministerial Inquiry into Occupational Health and Safety Systems and Practices of BHP Billiton Iron Ore and Boodarie Iron Sites in Western Australia and Related Matters," 15 July 2004.

10 Interim Report Stage One: Advice to the Minister for State Development on matters arising out of the Ministerial Inquiry into Occupational Health and Safety systems and practices of BHP Billiton Iron Ore and Boodarie Iron sites in Western Australia and related matters", Mines Safety Improvement Group, April 2005.

continue. Developments are occurring on a rapid scale and employers must contend with the effects of all of these developments upon their work practices and business structures. The differences in approach to OHS taken by the various States and Territories has established varying standards, the application of which has the potential to create confusion and inconsistency in dealing with this important area. The Commonwealth has also entered the arena, at least in a preliminary way, by suggesting that the Commonwealth Compensation Scheme might be expanded and also by putting the topic of a national approach to OHS on the agenda for further discussion.

The extensive nature of these changes and the speed with which they have been introduced has had the impact of limiting the debate, a consequence which in my view should be avoided. The New South Wales system has been the most active jurisdiction, if that is measured by the number of prosecutions commenced each year.[11] This has resulted in a prominence within Australia being attributed to the New South Wales system and the influences of that system can be seen as the basis for many of the discussions presently being held and some of the changes introduced in other areas.

THE LEGISLATIVE REGIME IN NEW SOUTH WALES

The decisions that will be explored in this paper are prosecutions brought under the *Occupational Health and Safety Act 1983* (NSW) (1983 OHS Act). This Act was repealed by 2000 OHS Act. However, the sections under which the prosecutions were brought remain in very similar terms to those replacing them in the 2000 OHS Act and the approach by the NSWIRC to the corresponding duties under the 2000 OHS Act has been identical to the approach it took to the earlier provisions.

In exploring the terms of the duties of employers under the legislation, reference will be made to the duties under the 2000 OHS Act. However for the purposes of the case law, the corresponding provisions under the 1983 OHS Act are outlined below:

2000 OHS Act	**1983 OHS Act**
section 8(1)	section 15
section 8(2)	section 16
section 26	section 50
section 28	section 53

Section 8 of the 2000 OHS Act, imposes an absolute duty[12] upon employers to ensure the health and safety of employees and other persons at all places of work.

[11] WorkCover NSW CEO John Blackwell said in a recent address to IPQC's Integrated Safety Management Conference in Sydney that 400 prosecutions a year were launched in NSW, more than all other Australian prosecutions combined.

[12] *Drake Personnel Ltd t/as Drake Industrial v WorkCover Authority of NSW (Insp Ch'ng)* (1990) 90 IR 432.

This duty has been held to be a requirement that employers guarantee, secure or make certain[13] that persons are not exposed to a "risk" to their health or safety.

In addition, duties are imposed on self-employed persons to ensure that persons other than employees are not exposed to a relevant risk.[14] Controllers of work premises are required to ensure that the premises are safe and without risk as are persons who have control over plant or substances which must also be safe and without risk.[15] Designers, manufacturers and suppliers of plant and substances at work must ensure that the plant or substance is safe and without risk to health when properly used. Further they must provide adequate information about the plant or substance for its safe use.[16]

A director or person concerned in the management of a corporation is taken to have contravened the same section as the corporation, is liable to be found guilty of the breach[17] and made subject to a penalty.[18]

RECENT CASE LAW DEVELOPMENTS

Over the last 12 months, a large number of significant decisions were handed down by the NSWIRC. As with the legislative initiatives it is not possible in a paper of this kind to consider in detail every one of those decisions. I have chosen three decisions, all of which involve mining operations, and each of which raises in my view some important matters for further consideration. I have not attempted to identify and deal with every legal point in each of the cases, rather I have concentrated on the aspects of each that raises a fundamental matter going to the system of OHS regulation. The decisions which I have reviewed in this way are:

1. S*tephen Finlay McMartin v Newcastle Wallsend Coal Company Pty Ltd & Ors* (the *Gretley* decision)[19]
2. *Morrison v Powercoal Pty Ltd & Foster* (*Powercoal/ Foster*) [20]
3. *Rodney Dale Morrison v Coal Operations Australia Ltd* (*Coal Operations*)[21]

Before dealing with each of the decisions individually, there are some matters which should be considered. In the *Powercoal/Foster* and *Coal Operations* matters all the charges were dismissed at first instance. In each matter the prosecutor (the Department of Mineral Resources, (the Department)) appealed to

[13] *Carrington Slipways Pty Ltd v Callaghan* (1985) 11 IR 467.
[14] Section 9 of the 2000 OHS Act.
[15] Section 10 of the 2000 OHS Act.
[16] Section 11 of the 2000 OHS Act.
[17] Section 26 of the 2000 OHS Act.
[18] Section 12 of the 2000 OHS Act prescribes a maximum penalty of $55,000 for a first offender. Higher penalties including imprisonment apply to other persons.
[19] [2004] NSWIR Comm 202.
[20] (2004) 137 IR 253.
[21] (2004) 137 IR 375.

a Full Bench of the NSWIRC and was successful. A review of these matters has now been heard by the New South Wales Court of Appeal. The challenge has been complicated by a privative clause[22] which on its face protects the decisions (including purported decisions) of the NSWIRC from challenge or being called into question in any other court, even on jurisdictional grounds. The decision of the Court of Appeal is pending in relation to each of these matters. In the *Gretley* matter an appeal has been lodged on behalf of those found guilty to the Full Bench of the NSWIRC and an application for review has been lodged in the New South Wales Court of Appeal. Neither matter has been heard at this stage.

There are a number of other OHS matters in which applications for review have been lodged with the New South Wales Court of Appeal. Those matters are awaiting hearing. These attempts to have the Court of Appeal review the decisions of the NSWIRC for error are a demonstration of a growing unease with the way the NSWIRC deals with prosecutions under the 2000 OHS Act. Although there are defence provisions in the 2000 OHS Act[23] the invoking of them has rarely been successful. A further perception is that the standard being applied is so strict that every incident results in a successful prosecution. The NSWIRC has a number of different, but potentially overlapping roles, and is seen as being overly influenced by its industrial relations role and the necessary participation by the members of the Commission in the Industrial Relations field, to have conferred upon it this substantive criminal jurisdiction. This perception has caused significant pressure for the OHS jurisdiction to be moved into the mainstream criminal courts or at least be made the subject of full appeal rights to the Court of Criminal Appeal.

The Gretley Decision

This matter arose from the holing into of a long abandoned mine during otherwise normal mining operations. The inrush of water and gas that resulted killed four miners. These circumstances surrounding the inrush have been the subject of an Inquiry and a Coroners Inquest which took a year to complete. They have also been the subject of a significant amount of union pressure and some political intrigue.

The OHS proceedings were ultimately commenced in 2000 by the issuing of 52 charges being the total number of changes brought against all 10 defendants (including the corporate defendants). Although the inrush occurred on a particular shift which spanned the 13th and 14th of November 1996, the charges included allegations that there had been failures to research and plan from as early as March 1994.

Although extensive debate can be had as to the relevance or impact of any of the extremely large number of factual matters disclosed in the proceedings, it is beyond doubt that the area in which the mining operation was taking place on the 13th and 14th of November 1996, was an area over which the right to mine had

[22] Section 179 of the *Industrial Relations Act 1996.*
[23] See generally s 28 and in relation to directors see s 26.

been granted by the Department. Further, the plans that depicted the position of the abandoned colliery had been provided by the Department not only to the defendants in these matters but also to other mining companies. The mining plan upon which the operations were proceeding included a buffer between the old and new workings of 50 metres. That buffer was considered by all, including the Department who approved the plan to be more than sufficient to preclude any problem arising as a result of the vicinity of the old workings. The plans provided by the Department were inaccurate in that the old workings were in fact 107 metres closer to the new workings than they were depicted on the plan provided by it. Throughout the various proceedings including the Inquiry, the Department had failed to provide any reason for this discrepancy.

Although prosecutions were brought against eight individuals (one of whom had not worked on the site for two years before the inrush) and the two corporations, no proceedings were ever brought against the Department. No explanation has been provided as to why this is the case. In other matters and in the other cases reviewed in this paper, the Department is the prosecutor in relation to alleged breaches associated with mines. In the *Gretley* matter a special appointment was made of an individual, who was provided with an indemnity by the WorkCover Authority of New South Wales for any liability arising from the proceedings rather than have the Department act as prosecutor.

The way in which the proceedings were commenced, the scope of them, and the lack of proceedings against the Department, were decisions made at a political level. The fact that such decisions can be made and cannot be reviewed by the courts raises questions as to the independence of the prosecutors and to the potential that criminal proceedings, at least so far as their commencement is concerned, is subjected to political scrutiny and interference. This situation is to be contrasted with other criminal matters, where an independent prosecutor, the Director of Public Prosecutions, is established by legislation so as to be able to make informed decisions as to the appropriateness of the commencement and maintenance of all criminal proceedings. The integrity of the criminal system relies on a number of factors, an important one of which is that the community, including defendants and potential defendants, is able to be confident that decisions made in relation to proceedings are made on a fair and equal basis uninfluenced by pressures created politically. Without a sufficient level of transparency, the system itself is brought into disrepute. In other circumstances, similar issues arise as a consequence of a government department being allocated responsibility for prosecution of criminal matters in the OHS field when at the same time, that department is both the regulator responsible for ensuring that industry is run appropriately and safely and the recipients of the fines generated as a consequence of successful prosecution. This perception, even if only a perception, has the real potential to undermine public confidence in the system.

Prior to the inrush in the Gretley Mine, reliance upon plans provided by the Department was accepted throughout the industry in New South Wales. This was largely the case because if the Department considered the plans to be in any way

inaccurate, they either did not issue them or in the alternative, they indicated upon the plans themselves the inaccuracy they suspected. Neither of these things happened in relation to the plans provided in the *Gretley* matter. However, reliance on industry practice, even acceptance of materials issued by a government department charged with the regulation of the relevant industry, was not considered to be sufficient to either break the causal nexus between the actions of the employer and the risk, or to constitute a defence for the corporations or any of the individuals. The fact of the inrush experienced in the Gretley Mine altered the approach of the Department towards its own plans. Indeed, the Department commenced a systematic review of all plans depicting any colliery workings contained within its archives. In addition, the Department ensured that those seeking plans were informed that unless they had been independently checked and verified, there could be inaccuracies. In this sense, the entire industry was changed as a result of the very incident which was made some years later the subject of the prosecution.

The relevant terms of the 2000 OHS Act[24] are expressed as broad obligations intended to cover all aspects of health, safety and welfare whilst at work. As obligations, the provisions have been described as requiring a proactive approach[25] on the part of employers so as to avoid the risks arising whilst persons are engaged in work. It is appropriate to express obligations of this kind, if they are intended to impose a requirement for a proactive approach by employers in the broad terms in which the sections are expressed. However, the section also creates the foundation for any allegation (and finding) of breach.

The *Gretley* matter exposes a difficulty created by this approach to the imposition of an obligation which will create a criminal liability. Unlike the majority of crimes which are defined by particular elements giving rise to different degrees of severity or complexity, the obligations of the 2000 OHS Act are not so defined. What constitutes a breach often becomes a "pleading" exercise left totally to the discretion of, and in the hands of, the prosecution. In the *Gretley* matter the prosecutor laid 52 separate charges which contained 832 particulars. One set of allegations was that there had been a breach created by an inadequacy of research, which was supported by the proposition that research included visiting local libraries and reviewing newspaper articles from the late 1800s and early 1900s. This type of broad allegation was only available because what constitutes a breach is not defined. In order to deal with such broadly based allegations the "Prosecutor's Brief" was in excess of 20 volumes. The hearing ran over 90 days and the defence costs were many millions of dollars. In my opinion, the role of the NSWIRC and the integrity of its decisions is not assisted by the capacity of prosecutors to bring broadly framed charges that span vast areas of factual material. Cases of this kind are lengthy, costly and tend to involve many factual considerations that appear to have little to do with the actual risk the subject of the charges. This approach to broad based pleadings also results in the

[24] Section 8, the text of which is Appendix A hereto.

[25] *Haynes v CI & D Manufacturing* (1994) 60 IR 149, *Ferguson v Nelmac* (1999) 92 IR 188.

NSWIRC not having the capacity to require the same degree of precision in the formulation of the allegations being prosecuted as that which is required in every other criminal jurisdiction.

Whilst it is argued that the present approach provides a flexibility sufficient to encompass all circumstances as they might arise in all industries, that same flexibility makes achieving compliance difficult. Further, it makes the circumstances which might constitute a breach often impossible to anticipate, thereby creating an inability to proactively introduce work procedures to deal with the unknown circumstances.

Of the two corporations involved, Newcastle Wallsend was a subsidiary of Oakbridge. By the time the prosecutions had been commenced, Oakbridge had in turn been sold although Newcastle Wallsend remained its subsidiary. The prosecutor chose to bring charges against both corporate entities without attempting to, or being required to, determine which of the corporations was in fact culpably responsible for the risk of inrush said to be the basis upon which the charges were brought. This exposes another difficulty with the way in which OHS matters have been approached under the 2000 OHS Act. Much discussion has been had in relation to the industrial manslaughter debate relating to the need to impose penalties upon "rogue", "reckless" or other culpably responsible employers. However, the present broadly based charges do not require proof of a level of culpability on the part of the employer said to be in breach, only that persons have been exposed to a risk (however it has arisen) whilst at work. It is enough that the risk arose as a consequence of the action of a careless, hasty, foolish,[26] or disobedient employee or contractor.[27] In this way, the proactive obligation to ensure that an employer is providing a safe workplace, has been turned into an often impossible burden.

Powercoal/Foster

In this matter the operator of a continuous miner was killed when the roof collapsed. The mining crew had been engaged in the extraction of coal through partial pillar stripping according to a mine plan about which they had been made aware. However, rather than comply with the mining plan which required the leaving of a pillar of coal (known as a "stook") between the area that had been stripped and the roadway, the operator, in the presence of the deputy for reasons unidentified, removed the stook that was designed to support the roof. The roof fall happened whilst the stook was being mined.

The investigation after the fall found that there was a geological weakness in the roof over what was intended to be the goaf[28] area. This is an area in which no

[26] *WorkCover Authority (Insp Twynam-Perkins) v Maine Lighting Pty Ltd* (1995) 100 IR 248.

[27] *WorkCover Authority (Insp Mulder) v Arbor Products International (Aust) Pty Ltd* (2001) 105 IR 81.

[28] Goaf: the area abandoned an left to collapse after the extraction of coal.

work takes place and no workers go. The stook had been included in the plan so as to prevent any fall of roof in the goaf area from entering the roadway or other places where persons were engaged in work. Once it was removed there was nothing to prevent the fall of roof entering into the work area which is what happened. The risk alleged in the proceedings was the risk of roof fall and the prosecution argued that the robbing of the stook was irrelevant.

Prosecution in the *Powercoal/Foster* matter throws up quite starkly the proposition that there is no need for the corporation to be "culpable" in relation to the incident that gives rise to the matter. The fact that there was a risk and it was not prevented was said to be enough to constitute a breach of the 1983 OHS Act.

The mine manager, Mr Foster, was also prosecuted on the basis that he was a person concerned in the management of the corporation and therefore deemed to have committed the same contravention as the corporation.[29]

At the trial, evidence was called going to the structure of Powercoal as a corporation. This evidence demonstrated that although Mr Foster had certain responsibilities in relation to the particular mine, it was but one of a number of mines operated by Powercoal and there was a management hierarchy in place. Mr Foster had to report to persons within that hierarchy which operated at a level above all persons involved in the running of a single one of those mines. Mr Foster had severe restrictions on his capacities, he was unable to set his own budget, he was unable to engage in expenditures except within certain small limitations and he was unable to hire and fire employees or set industrial conditions for those working at the mine. There were other significant restrictions on his responsibilities as manager.

In considering the matter, the Full Bench of the NSWIRC did not pay any significant attention to these limitations but rather concentrated on the fact that Mr Foster had supervisory control over all matters at the colliery and in particular over OHS matters at the colliery. This was consistent with the approach enunciated by Staunton J in the *Gretley* decision when she determined that not only were the mine managers "persons concerned in the management of the corporation", but that the under-managers and surveyor were also "persons concerned in the management of the corporation", because they had the capacity to influence the circumstances said to constitute the breach in those matters. The approach of the Full Bench was the subject of significant debate in the New South Wales Court of Appeal (decision reserved) when the matter was heard by that court in early July of this year.

An important issue is the scope of s 50 of the 1983 OHS Act[30] given that this section has the effect of deeming an individual guilty of the same offence as that committed by the corporation.[31] The approach adopted by the NSWIRC is to read the terms of s 50 expansively and, as a consequence to make a very large group of

[29] Under s 50 of the 1983 OHS Act which has equivalent s 26 of the 2000 OHS Act.
[30] Now s 26 in the 2000 OHS.
[31] Subject only to the defences contained in s 50 and those contained in s 53.

persons liable for prosecution. If this approach is ultimately found to be correct then every person who has any level of "management" responsibility might be deemed guilty of a contravention committed by an employer corporation if that person's responsibilities included the area in which the contravention is said to have arisen. The contrary proposition that was advanced on behalf of Mr Foster is that the words properly understood are to be confined to those persons who have the capacity to and are truly responsible for guiding the corporation as a whole and not merely part of it.

If the section is not limited in this way then individuals will have imposed upon them criminal liability even in circumstances where neither the corporation or themselves are "culpably" liable for the breach. There is already some evidence that people are reluctant to enter the industry or take on even minor management roles for fear that they might be prosecuted.[32] If this trend continues the industry is likely to suffer from a shortage of suitable experienced and qualified managerial personnel.

Coal Operations

This matter involved a fall of roof which killed one person and injured another. During the driving of primary headings, what appeared to be a minor area of instability in one corner was noticed. The particular seam of coal being mined at the time ran below a level of conglomerate which after the mining operation formed the roof and was in the majority of circumstances found to be self-supporting and stable.

At the time (and it remains the case) the accepted and only method of testing the stability of the roof was to sound it with a metal bar, a process in which all of the relevant miners had been trained. Having noticed the small area of instability at the face, steps were taken to sound the roof in accordance with the registered and Department approved roof support rules. The under manager on shift checked the area and determined that it would be best to retreat from the area and put in roof bolts in order to ensure roof stability. During the process of retreat there was a small fall of roof material near the face. Sometime later a second fall took place. The remaining roof was sounded on numerous occasions in order to ascertain its integrity. On each occasion those engaged in the operation reported that the roof "rang true" indicating that it was stable. During the roof bolting operation the steel drill being used became jammed and whilst trying to free it the roof fell.

The *Coal Operations* case throws up the difficulty created by the broad approach utilised in the 1983 OHS Act[33] when compared with prescriptive legislation such as the *Coal Mines Regulation Act 1982* (NSW) pursuant to which the roof support rules had been developed and approved by the Department. A difficulty with the approach adopted in the 1983 OHS Act is to know what it is that is required to be done so as to ensure compliance. Whereas in circumstances

[32] Submission by Professor J Galvin to the NSW OHS Act Review 2005.
[33] Sections 15, 16. The equivalent in the 2000 OHS Act is s 8.

where there is prescriptive legislation, compliance with the legislation provides clarity in relation to what is expected.

Under the 1983 OHS Act where any act or omission is expressly required or permitted to be done,[34] then a person (including a corporation) cannot be found guilty of an offence. In this case there had been compliance with the requirements of the *Coal Mines Regulation Act 1982* (NSW) in that it prohibited persons from going into any area of a mine unless they did so in compliance with the approved roof support rules. The actions taken to sound the roof and move forward as a consequence of it "ringing true" were done in compliance with the roof support rules and as a result, entry to that part of the mine allowed under the *Coal Mines Regulation Act 1982* (NSW).

At trial compliance with the approved roof support rules was thought to operate so as to render the corporation not guilty of an offence, although on appeal the Full Bench of the NSWIRC took a different approach, finding Coal Operations guilty. The Full Bench read down the operation of s 33(2) by suggesting that it only applied after "all possible precautions are taken".[35] This approach renders compliance with the prescriptive terms of appropriate legislation (which is mandatory) of little or no assistance creating two different standards to be applied to the same circumstances. Such an approach to compliance with prescriptive standards can be expressed by reference to the old saying "damned if you do and damned if you don't". This issue is also a matter awaiting determination by the New South Wales Court of Appeal.

The broader but related issue that is raised for consideration is the appropriateness of compliance with prescriptive legislation in circumstances where the OHS Act has adopted the wide (non-prescriptive) approach to defining the area of obligation created by it. The 2000 OHS Act is accompanied by a Regulation[36] which is prescriptive. That Regulation covers significant areas of obligation, breaches of which will themselves render persons liable to a criminal penalty, but compliance with which does not amount to a defence[37] to an allegation of a breach of the 2000 OHS Act. This creates, in my opinion, a very significant area for confusion. There does not appear to be any sound reason why if a corporation is able to establish that it has in fact complied with each of the relevant aspects of the Regulation that this compliance should not amount to a defence. This is particularly so given the positive obligation to comply with the Regulation and given the fact that in order to comply with the Regulation an employer will have to identify all hazards and risks and introduce systems for the elimination or control of those hazards and risks.

It is the case that employers would have a much greater degree of certainty in the approach that they should adopt to meet their obligations if compliance with the Regulations was in fact a defence. The Regulations themselves would act as a

[34] Section 33(2), 1983 OHS Act.
[35] *Rodney Dale Morrison v Coal Operations Australia Ltd* (2004) 137 IR 375 at [48].
[36] The *Occupational Health and Safety Regulation 2001* (NSW).
[37] Section 29, 2000 OHS Act.

detailed plan to be followed by employers so as to ensure that they were proactively controlling or eliminating risks in the workplace.

SENTENCING FLEXIBILITY

The sentencing options available to courts entrusted with an OHS jurisdiction need, in my opinion, to be reviewed. Sentencing options and procedures have largely been transported from the general criminal law system (applicable, in the vast majority of cases, to individuals). Little consideration appears to have been given to the appropriate type of punishment that should accompany OHS legislation.

In my view, there needs to be a significant degree of flexibility in options available to courts during the sentencing process. That flexibility should have as its guiding aim the very objects of the OHS legislation, being the provision of safer, and where possible, risk free workplaces. At the present time the imposition of a penalty, and in relation to individuals the possibility of goal sentences, might be appropriate in a number of matters but will not, in my view, be appropriate in all cases.

The purpose of criminal punishment is "protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform".[38] The sentence should reflect "the moral sense of the community", and "the sentence should bear a reasonable proportionality to the facts of the crime itself".[39] The sentence must not exceed that which is appropriate to the objective seriousness of the offence.[40] Those principles can be accommodated by sentencing options other than the infliction of penalties, which in the main go either into consolidated revenue or, alternatively, into the revenue coffers of a particular government department that is responsible for the prosecution. The transfer of moneys from the offender's pocket into the government coffers does nothing to aid safety in the workplace although, as I have earlier accepted, such a penalty regime may be appropriate and warranted in a number of circumstances.

OHS legislation applies not only to the private sector but also to the public sector who are often charged with some of the more difficult aspects associated with the maintenance of our society. It cannot be said a policeman, a fireman or an ambulance officer engaged in the normal discharge of their duties may not be exposed to a risk, even if it is only the risk of being involved in a motor vehicle accident whilst on their way to discharge their functions or whilst carrying out what is required of them on the roadway itself.

Healthcare professionals look after a wide variety of patients including those suffering from mental and behavioural disabilities which result in unprovoked aggression and anti-social behaviour. Again it is not possible to guarantee that the

[38] *Veen v The Queen (No 2)* (1988) 164 CLR 465.
[39] *R v Geddes* (1936) 36 SR (NSW) 554.
[40] *Veen v The Queen (No 2)* (1998) 164 CLR 465.

unprovoked aggression demonstrated by a patient does not expose the healthcare worker to a risk whilst at work. The Department of Education is responsible, not only for looking after students who are prepared to comply with society's standards and norms, but also those who for a great variety of reasons are either not able to, or not willing to, comply with those norms and as a result demonstrate aggressive or anti-social behaviours that can properly be said to expose workers in the education field to a risk to their health and safety.

A person who provides a "home service" cannot be expected to undertake a risk assessment of each of the homes in which they enter and ensure that the home itself is completely safe and without risk to health. There are many examples that could be raised along similar lines.

The real problem arises where, as a result of a prosecution, a defendant (and in particular a public sector defendant) that is providing a much needed and not necessarily commercially remunerative service, is subjected to punishment in the nature of a penalty. All this achieves is the transfer of moneys often from significantly constrained budgets to the government coffers without any perceivable difference being achieved to workplace safety. In some circumstances it can properly be argued that the payment of a fine will reduce the available monies that can be expended on the enhancement of workplace safety. It takes little imagination to conceive of circumstances where a court might order as an alternative to a penalty, although commensurate with the need to meet appropriate sentencing criteria, that moneys be expended directly on areas that would in fact enhance workplace safety either specifically within particular areas of endeavour or generally. Such orders could provide as an alternative to a penalty and could be regulated by the WorkCover Authorities so as to ensure compliance outcomes for the expenditure could be agreed and monitored. Particularly in the government sector, this type of remedy would seem to more appropriately reflect the corporate nature of the defendant and to ensure that budgets are not depleted without benefit.

In New South Wales the 2000 OHS Act did introduce some additional sentencing options.[41] However, these options appear to be only in addition to any penalty[42] and not in substitution for a penalty. It is not clear from the terms of the provisions that the penalty is otherwise reduced as a consequence of an order being made pursuant to them. It is also not clear how an order could be made pursuant to those provisions in addition to a penalty without effectively penalising the defendant twice for the same breach.

CONCLUSION

In a year of significant developments one can only anticipate OHS regulation to continue evolving, in both the legislative provisions themselves and the

[41] See Pt 7 Div 2 of the 2000 OHS Act.
[42] See s 112(2) of the 2000 OHS Act.

interpretation of those provisions by the courts. The judgments in the New South Wales Court of Appeal may offer long awaited guidance as to the scope of the powers and the jurisdiction of the NSWIRC and also as to the interpretation of the duties and defences outlined in the New South Wales OHS legislative regime. While these developments have their origins in the New South Wales jurisdiction, they may also have wide ranging implications across all States and industries.

There are identified in the recent cases, a number of very fundamental issues going to the very structure of OHS regulation. These issues require further consideration and debate so that appropriate, workable resolutions to them can be introduced as part of the continuing development in this very important area.

In New South Wales in particular, the "Review of the OHS Act 2000" to be reported by the end of the year, may also provide clarity to employers, directors and managers of their obligations under the legislation. While in the mining industry nationwide, the results of State specific reviews of mining practices and relevant mining legislation may too result in change. Expect another year of transformation.

APPENDIX A

Section 8 of the 2000 OHS Act sets out the duties of employers in regard to workplace safety:

"**8 Duties of employers**

(1) Employees

An employer must ensure the health, safety and welfare at work of all the employees of the employer.

That duty extends (without limitation) to the following:

(a) ensuring that any premises controlled by the employer where the employees work (and the means of access to or exit from the premises) are safe and without risks to health,

(b) ensuring that any plant or substance provided for use by the employees at work is safe and without risks to health when properly used,

(c) ensuring that systems of work and the working environment of the employees are safe and without risks to health,

(d) providing such information, instruction, training and supervision as may be necessary to ensure the employees' health and safety at work,

(e) providing adequate facilities for the welfare of the employees at work.

(2) Others at workplace An employer must ensure that people (other than the employees of the employer) are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work."

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