

## Liability of Employers, Directors and Managers for Workplace Safety

**John Bell, Partner, Workers Compensation Group and Stephanie Vass, Senior Associate, Employment Law Group Abbott Tout Solicitors, Sydney**

**T**HE *OCCUPATIONAL HEALTH AND Safety Act 1983* (the *OHS Act*) imposes onerous obligations on employers and their directors and managers to ensure the health, safety and welfare of all employees. The New South Wales WorkCover Authority has increased the number of prosecutions against individuals, employees, directors and managers as well as the company itself where it believes that an individual has been culpable for a workplace incident. In this article, John Bell and Stephanie Vass outline the penalties imposed for workplace injuries and the recent move for criminal convictions of company directors and managers in cases of employee injury or death in the workplace.

### THE *OHS ACT*

Section 15 of the *OHS Act* obliges employers to ensure the health, safety and welfare at work of all employees. The obligation imposes a duty on an employer in absolute terms: that is, the prosecution does not have to prove fault to establish a breach.

Section 50 of the *OHS Act* provides that directors and managers of corporations can be in breach of the *OHS Act* on behalf of the company, unless they can demonstrate that they were not in a position to influence the conduct of the corporation in relation to the breach.

### PENALTIES AND DEFENCES

On the enactment of the *OHS Act*, the maximum penalty that could be imposed against an employer was \$50 000. In the space of approximately 15 years, the maximum penalty has been increased four times and now stands at \$550 000 for companies and \$55 000 for individuals such as directors, managerial and non-managerial employees. For second offenders, the maximum penalty is presently \$825 000 for companies and \$82 500 for individuals.

In circumstances where more serious offences occur and the employer has a prior record, the WorkCover Authority is commonly exercising its discretion to institute prosecution proceedings in the jurisdiction of the Industrial Relations Commission in Court Sessions rather than the Chief Industrial Magistrates Court.

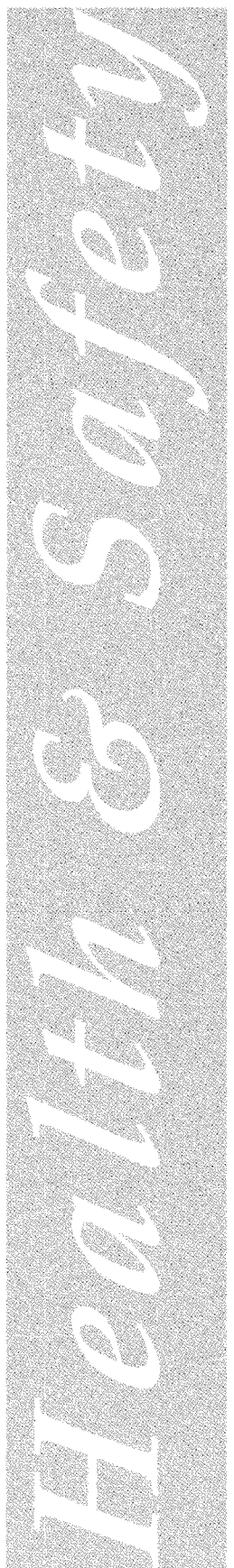
The maximum penalties are decided by the Industrial Relations Commission in Court Session. WorkCover also has a discretion to prosecute in the Chief Industrial Magistrates Court. The maximum penalty in that court is \$55 000 for a corporation or an individual or two years imprisonment or both.

The defence under s.50 is difficult to establish. A court will be reluctant to accept that a director or manager is not in a position to influence the conduct of the corporation in relation to safety matters. However, WorkCover does not prosecute all directors and managers. The prosecution is normally confined to those directors and managers who are involved in the operation of the company where the accident occurred. For example, if a process worker was injured while operating a machine, it would be unlikely that the finance manager would be prosecuted.

### CASE STUDY

A decision by President Fisher of the Industrial Relations Commission of New South Wales in Court Session on 8 October 1997 is an instance where the director of the company and the company itself had no prior convictions, however, the company was prosecuted under s.51(1) of the *OHS Act* and its Managing Director was prosecuted for breach of s.50(1) of the *OHS Act*.

In this case, an employee died as a result of injuries he sustained. Despite the impeccable record of the defendants, and having regard to the fact that after the accident and particularly after the coronial enquiry, steps



were taken to obtain professional advice concerning occupational health and safety, President Fisher found that the young employee had been working at a dangerous unguarded machine and the penalty imposed on the company was \$80 000 and on the Managing Director the sum of \$10 000. President Fisher found that the failure to observe the obvious safety precautions in this particular case was predominantly that of 'management's neglect to direct that elementary steps be taken to achieve safe working practices'. He reinforced that s.50 of the *OHS Act* 'seeks to mark out and underline management's particular responsibility for safe working'.

### CRIMINAL LIABILITY FOR DIRECTORS AND MANAGERS

There have been a number of decisions in Victoria, under different legislation, addressing the utility of criminal proceedings being imposed upon defaulting employers in cases involving breaches of occupational health and safety.

The most noteworthy decision in recent years is *A C Hatrick Chemicals Pty Limited* (26 September 1997). The facts of the case are:

► Robert Hill was employed by Hatrick as the Plant Engineer at its Springvale Plant and Mr De Zilva was the Plant Manager and Safety Coordinator at the plant.

► An explosion caused the death of one man and serious injury to another. As a result of the explosion, the company was charged with manslaughter and negligently causing serious injury. Mr Hill, Mr De Zilva and the company were charged with a number of offences under the Victorian *OHS Act*. They were also charged with manslaughter but these charges were withdrawn before the committal proceedings.

Justice Hampel (Supreme Court of Victoria, Criminal Division) considered whether the company could, in law, be liable to conviction either for manslaughter or negligently causing serious injury. He ruled that the company could not be so convicted.

The Director of Public Prosecutions appealed Hampel's judgement with the view to testing the correctness of the decision *vis-à-vis* the company. The question which was determined was – whose acts or omissions or state of mind are taken to be the act or omissions or state of mind of the corporation itself? The Director of Public Prosecutions withdrew the reference and the decision of the Court of Appeal did not impact or reverse the decision of Justice Hampel at first instance.

It is obvious that a charge of murder or manslaughter against a company is not sustainable and this case demonstrates that courts are not prepared to entertain such a fiction. However, the case illustrates that Public Authorities *will* consider serious charges in relation to industrial accidents, but as yet have not taken the step to proceed with concurrent criminal charges for breaches of relevant occupational health and safety legislation.

### INDEMNITY FOR DIRECTORS AND MANAGERS

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A director or manager who is individually convicted of a breach of the *OHS Act* cannot be indemnified by his or her employer for the amount of any fine which may be imposed as a result of that breach. There is a longstanding general law principle that it would be contrary to public policy for agents, including employees and directors, to be able to be indemnified against the consequences of their own breach of legislation (*Askey v Golden Wine Co. Ltd* (1948)). Sections 241(1) and (2) of the *Corporations Law* would also prohibit

such indemnity being given to directors, secretaries and executive officers where the breach of the *OHS Act* involved a lack of good faith on the part of the relevant individual.

## CONCLUSION

The purpose of this article is to warn directors and managers that they are liable to prosecution in addition to the liability of the corporation where health and safety is an issue. The penalties are severe. The Attorney General of New South Wales has been critical of the courts for not imposing harsher penalties in prosecutions of this nature. WorkCover has on a number of occasions prosecuted managers and directors of employers.

If a director or manager is fined under the *OHS Act* the employer cannot indemnify the director or manager. That is, the fine must be paid personally by the director or manager.

In cases where serious injury or death results from serious misconduct on the part of the corporation and/or its directors and managers, there are indications that the authorities will prosecute those concerned under the *Crimes Acts*. In the case of death, the charge of manslaughter could be laid. It will be interesting to see the developments in Victoria following the enquiry in relation to the ESSO explosion.

Employers are warned that workplace safety is now and will in the future remain a significant issue in New South Wales. The penalties are severe and directors and managers can be made personally liable for payment of fines. It is recommended that consideration be given to conducting a safety audit of the workplace and, if possible, the recommendations of that audit be implemented.

Whilst it is difficult to defend prosecutions under the *OHS Act* it is not impossible. An employer's prospect of successfully defending a prosecution will be improved if it can be established that the employer has actively addressed safety issues and endeavoured to adopt 'state of the art' practices to reduce the risk of workplace injuries. Even if this step will not result in a successful defence, the courts factor in such considerations when imposing penalties. ■

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