

# International comparison of health and safety responsibilities of company directors

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This report looks at whether the law in nine different countries imposes health and safety duties upon boardroom directors (and other senior managers), and if so, what these duties comprise and whether they assist in the prosecution of directors.

The main finding is that seven out of nine countries contain safety legislation that imposes positive safety obligations upon either directors or senior managers of companies. These are: Germany, France, Italy, Sweden, Japan, Canada (four out of fourteen jurisdictions) and Australia (two out of nine jurisdictions).

There is in addition another category of jurisdictions which, whilst not imposing explicit positive duties upon directors, do impose significant responsibilities through the creation of offences that are targeted at directors. This category includes four Australian states.

There are also, however, jurisdictions which either impose minimal or no duties upon directors. Two countries – USA and Holland – do not impose any obligations.

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## Executive Summary

This report looks at whether the law in nine different countries imposes health and safety duties upon boardroom directors (and other senior managers), and if so, what these duties comprise and whether they assist in the prosecution of directors. In relation to each jurisdiction, the CCA researched:

- the architecture of safety legislation, the duties imposed upon different natural and legal persons and how enforcement takes place;
- details about when and in what circumstances enforcement action is taken against directors;
- whether any research had been undertaken on the impact of legal duties on directors in different jurisdictions.

The main finding is that seven out of nine countries contain safety legislation that imposes positive safety obligations upon either directors<sup>1</sup> or senior managers of companies. These are: Germany, France, Italy, Sweden, Japan, Canada (four out of fourteen jurisdictions) and Australia (two out of nine jurisdictions). These jurisdictions can be divided into two categories:

- Those with legislation that imposes direct and clear positive safety obligations upon directors (Germany, the Canadian jurisdictions of Ontario, British Columbia and the Northwest Territories, and the Australian state of Queensland).

The manner in which this is done is relatively similar in each of the jurisdictions. A duty is imposed upon a director to ensure that the company, the primary duty holder, complies with the obligations that are imposed upon it. In at least two of these jurisdictions notices can be imposed directly upon directors. The duties are imposed upon all directors of the company.

- Those with legislation that impose positive duties upon a person who is either a director or senior manager (France, Italy, Sweden, Japan, the state of South Australia and the Canadian state of Alberta). There are some but not many similarities in the manner in which duties are imposed in these different jurisdictions.

In both France and Italy – the legal entity of the company is almost entirely bypassed as an object upon which duties are imposed and instead duties are imposed upon individuals within the company. In Sweden the legislation imposes its principal duties upon an employer who will, in relation to incorporated businesses, be the company; but case law says that this responsibility is ‘borne primarily by the highest manager i.e. in a limited company usually by its managing director’. In France, Italy and Sweden, the law allows directors to delegate their responsibilities – in each, however, certain conditions (set out in case law) need to apply, principally that the person to whom responsibility has been delegated has sufficient control and autonomy.

The situation in Japan and South Australia is relatively similar to each other – in both the legislation imposes its principal duties upon the company (as the employer) and requires the company to appoint a particular person with safety responsibilities. In the Canadian province of Alberta, duties are imposed upon employers who are defined to include not only

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<sup>1</sup> Or where companies do not have directors, an equivalent person (for example, some companies in France)



companies but also the director or officer of the company who “oversees the occupational health and safety of the workers”. It is notable that Alberta and Japan are the only jurisdictions that talk about companies appointing a senior company manager/ director with particular responsibilities for safety.

There is in addition another category of jurisdictions which, whilst not imposing explicit positive duties upon directors, do impose significant responsibilities through the creation of offences that are targeted at directors. This category includes the four Australian states of Victoria, Tasmania, New South Wales, and Australian Capital Territory, and Canadian Federal law,

There are also, however, jurisdictions which either impose minimal or no duties upon directors. These can be grouped into three categories.

- Those that create an offence similar to that of section 37 of the Health and Safety at Work Act 1974. This category includes two Australian states of Western Australia and Northern Territories, and seven Canadian jurisdictions of New Brunswick, Manitoba, Saskatchewan, Prince Edward Island, New Foundland and Labrador, Nova Scotia and Quebec;
- Those that impose duties upon an employer or supervisor that could theoretically apply to directors but either do not in practice, or only do so rarely. In this category are the Canadian provinces/territories of New Brunswick, Northwest Territories, Yukon, Manitoba and Saskatchewan;
- Those that do not impose any duties and do not create any relevant offences. These are the Netherlands and the United States.

# CHAPTER ONE

## INTRODUCTION

This report looks at whether the law in nine different countries imposes health and safety duties upon boardroom directors (and other senior managers), and if so, what these duties comprise and whether they assist in the prosecution of directors.<sup>1</sup>

### BACKGROUND

In a speech in Parliament in 1996, the then opposition Environment Spokesperson, Michael Meacher MP stated:

“I emphasise that responsibility for health and safety must be vested at the highest level of each organisation ... companies should appoint an individual at board level with overall responsibility for health and safety.”<sup>2</sup>

Although this demand was made in a speech on the need to reform the law of corporate manslaughter, those in Britain who have argued in support of a change in the law to impose safety obligations upon directors have been motivated as much by the importance of prevention (and the need to ensure directors take an active interest in the safety of their companies) as with the need to facilitate criminal accountability.<sup>3</sup>

With the election of a Labour Government in 1997, Michael Meacher M.P., now a Minister, published a strategy statement, *Revitalising Health and Safety*, which stated:

“Health and Safety Commission will develop a code of practice on Directors' responsibilities for health and safety, in conjunction with stakeholders. It is intended that the code of practice will, in particular, stipulate that organisations should appoint an individual Director for health and safety, or responsible person of similar status (for example in organisations where there is no board of Directors).

The Health and Safety Commission will also advise Ministers on how the law would need to be changed to make these responsibilities statutory so that Directors and responsible persons of similar status are clear about what is expected of them in their management of health and safety. *It is the intention of Ministers, when Parliamentary time allows, to introduce legislation on these responsibilities.*” (Emphasis added)<sup>4</sup>.

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<sup>1</sup> This report does not look at the situation of partnerships.

<sup>2</sup> Hansard 26 March 1996, column 898. He was speaking in the context of corporate manslaughter.

<sup>3</sup> See, for example, <http://www.corporateaccountability.org/directors/duties/main.htm>. The levels of prosecution of company directors is generally acknowledged to be low. As of February 2005, eleven company directors had been convicted of manslaughter following a work-related death. Five of the directors were sentenced to imprisonment, another five had a suspended sentence and one was given a community service order. In the two and a half years between April 2002 and November 2004, HSE's prosecution database showed that 27 directors had been convicted of a health and safety offence brought by the Health and Safety Executive. See: [http://www.corporateaccountability.org/press\\_releases/2005/feb24director.htm](http://www.corporateaccountability.org/press_releases/2005/feb24director.htm)

<sup>4</sup> Document published by the Health and Safety Commission and the Department of Environment and Transport, as it was then.

Subsequent to this publication, the Health and Safety Commission (HSC) focused on the first part of this commitment by publishing a leaflet on voluntary guidance for directors and commissioning research to consider its effectiveness. This research formed the basis for the HSC agreeing in October 2003 to advise ministers that a change in the law was *not* required.<sup>5</sup>

Two years later, the Select Committee on Work and Pensions undertook an inquiry into the work of the Health and Safety Executive (HSE) and recommended that the law should be changed. The report stated that

“the Government reconsiders its decision not to legislate on directors duties and brings forward proposals for pre-legislative scrutiny in the next session of Parliament.”<sup>6</sup>

In its response to the select committee, the Government stated that:

“The Government believes that there is already an appropriate balance of legislative and voluntary responsibilities on directors for occupational health and safety, and has no immediate plans to legislate as recommended. It, along with HSC, will continue to encourage and persuade directors in organisations across all sectors to take their responsibilities seriously and to provide leadership on occupational health and safety. ...

The Government has asked HSC to undertake further evaluation to assess the effectiveness and progress of the current measures in place, legislative and voluntary, and to report its findings and recommendations by December 2005.”<sup>7</sup>

The current research report is part of the overall research that the HSE has commissioned to assist it to provide advice to the HSC on this matter.<sup>8</sup>

## THE LEGAL POSITION IN BRITAIN

Although this research report is about the law in other countries, it is important to be able to compare the legal situation in these countries with the situation in Britain. Understanding British law is also particularly useful when considering the law in certain Australian and Canadian states and provinces which is based on Britain’s Health and Safety at Work Act 1974 (1974 Act).

The main source of health and safety law in Britain is the 1974 Act itself and its associated regulations. The principle obligations are imposed upon “employers”<sup>9</sup> – though they are also imposed upon other actors including manufacturers, suppliers and employees.

When businesses, or other organisations, establish themselves as companies, a new legal entity is created distinct from the natural persons who either own the company (the ‘shareholders’) or who are appointed by the shareholders to manage the company (the ‘directors’). The company will be

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<sup>5</sup> *Minutes of HSC meeting, October 2003. HSC/03/105*

<sup>6</sup> *Para 60, House of Commons Work and Pensions Committee, Fourth Report into the Work of the Health and Safety Commission and Executive, (2004)*

<sup>7</sup> *p.4, House of Commons Work and Pensions Committee, Government Response to the Committee (2004)*

<sup>8</sup> *See: <http://www.hse.gov.uk/corporateresponsibility/directorsresearch.htm>. This report was finalised after the decision in early December 2005 by the Health and Safety Commission to support the principle of legal duties on directors and to ask the HSE to undertake further work.*

<sup>9</sup> *Section 2 and 3 of the 1974 Act.*

a legal ‘person’– capable, just like a human person, of having duties, and civil and criminal liabilities.<sup>10</sup>

It is this distinct legal entity, ‘the company’, which will be the ‘employer’, ‘manufacturer’ etc. upon whom the 1974 Act imposes obligations. Sections 2-6 of the 1974 Act therefore do not impose duties upon company directors. In the context of incorporated businesses, they impose duties upon the legal entity of the company.

## Section 7 of the 1974 Act

As mentioned, duties are also imposed upon ‘employees’. Section 7 of the 1974 Act states:

“It shall be the duty of every employee while at work

- (a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work; and;
- (b) as regards any duty or requirement imposed on his employer or any other person by or under any of the relevant statutory provisions, to co-operate with him so far as is necessary to enable that duty or requirement to be performed or complied with.”

Company directors are ‘officers of the company’ with responsibilities to “manage the company.”<sup>11</sup> However company directors may not only be officers of the company but also company employees under a contract of employment.

Does section 7 of the 1974 Act impose duties upon these ‘executive directors’?<sup>12</sup> On the face of it, section 7 of the Act does indeed impose the same duties upon executive directors as it imposes upon any other employee of the company. The HSE has recently indicated that this is its view.<sup>13</sup> Assuming this is correct, a number of *caveats* need to be mentioned:

- the HSE has never actually prosecuted a director for breach of section 7 – and instead have preferred taking action through section 37 of the 1974 Act;
- HSC’s voluntary *Guidance to Directors on their Health and Safety Responsibilities* does not mention the application of section 7;
- it is unclear what this duty would consist of in relation to executive directors, how in practice it would apply to them, and what they need do to comply with the duty;
- it would appear that this duty would only apply to directors when acting as employees rather than officers of the company.

There is also a view that the courts would not accept that section 7 applied to directors as this was clearly never parliament’s intention.<sup>14</sup> There is no case-law on the application of section 7 to directors.

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<sup>10</sup> There do remain some differences in the way the law treats legal as opposed to natural persons.

<sup>11</sup> Companies Act 1985

<sup>12</sup> This is a term commonly used to describe those directors that are employed. Those directors that are not employed are known as ‘non-executive directors’.

<sup>13</sup> Operational Circular 130/8, “Prosecuting Individuals”

<sup>14</sup> Advice to the CCA from Dechert LLP (2004)

## Section 37 of the 1974 Act

Section 37(1) of the 1974 Act enables directors to be prosecuted in certain circumstances. It states that:

“Where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.”

This section not only allows directors to be prosecuted but also managers – however case-law has limited the meaning of ‘managers’ to those who:

"are in a position of real authority, the decision-makers within the company who have both the power and responsibility to decide corporate policy and strategy. It is to catch those responsible for putting proper procedures in place; it is not meant to strike at underlings."<sup>15</sup>

Does section 37 impose duties upon directors or these senior managers? By setting out the circumstances in which prosecution can take place, it does by inference impose duties upon those persons *not to allow those circumstances to take place*.

When can a director be prosecuted?

- **Neglect:** Neglect presupposes a positive duty to act. The 1974 Act itself does not impose any such duty. In the leading case on the meaning of neglect, the judge held that the duty to act can be inferred from responsibilities imposed by the company itself – that is to say from the ‘scope of the functions of the office which he holds’. The judge stated that:

“the search must be to discover whether the accused has failed to take some steps to prevent the commission of the offence by the corporation to which he belongs if the taking of those steps either expressly falls or should be held to fall within the scope of the functions of the office which he holds. In all cases accordingly the functions of the office of the person charged with a contravention of section 37 (1) will be a highly relevant consideration for any judge or jury and the question whether there was on his part, as the holder of the particular office, a failure to take a step which he could and should have taken will fall to be answered in light of the whole circumstances of the case including his state of knowledge of the need for action or the existence of a state of fact requiring action to be taken of which he ought to have been aware.”<sup>16</sup>

In a ruling by the judge presiding over the prosecution that took place following the Hatfield rail crash, the judge stated that the offence of ‘neglect’ could only be prosecuted if all the following circumstances exist:

- a) the commission of an offence by the company;

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<sup>15</sup> *R v Boal*, [1992] 3 All ER 177

<sup>16</sup> *Wotherspoon v HM Advocate* 1978 JC 74

- b) that the officer had a duty to inform himself of the facts that constituted the predicate offence;
- c) that he had a duty to act in relation to those facts;
- d) that he was neglectful of those duties in the sense that he either knew or ought to have known but shut his eyes to the fact that there were reasonably practicable steps that he could have taken but he did not take them; and
- e) that the commission of the predicate offence could be attributed to that neglect.<sup>17</sup>

Whether the officer had a ‘duty to inform himself or herself of the facts’ or a ‘duty to act in relation to those facts’ would depend upon the scope and functions of his or her job at the company and the knowledge that he or she had. The judge also stated:

“There is no reported case, as far as I am aware, where a manager or director has been held personally liable for failure to devise or enforce safe systems of work. However, I see no principle reason why there should not be such a case given appropriate facts. For example, if a director of a haulage company told his drivers as a matter of practice to ignore restrictions on the hours they could drive, or knowingly allowed them to follow such a practice.”

However, it is arguable that such a set of facts is more appropriately covered by the consent and connivance section of the offence.

- **Consent/Connivance:** Consent requires that a person is aware that an offence is taking place, and agreement to it. In the Hatfield ruling, the judge stated that consent:

“requires proof of an awareness of the risk attaching to the conduct of the undertaking, and of reasonably practicable steps which could be taken to avert it, coupled with an agreement that the company should carry on without taking such steps.”<sup>18</sup>

Connivance requires awareness and a turning of a blind eye, rather than agreement. In the Hatfield case, the judge stated:

“[this] requires the same awareness [as with consent] plus allowing the company to carry on regardless, but without active encouragement or agreement, a state of what has been termed ‘wilful blindness’ ...”<sup>19</sup>

The wording of section 37 would therefore indicate that a director has an implicit obligation not to consent or connive in an offence by the company since to do so would be an offence. In effect, what that means, is that if the director becomes aware of the risk attached to the conduct of the company and of the steps to avert the risk, he or she has a duty to take steps to stop the company committing an offence. A director also has a duty not to allow an offence by the company to take place though ‘any neglect’ on his or her part, though whether or not he or she has a duty depends on the scope of his or her duties within the company.

However, to appreciate the content of those duties, it is not only necessary to look at the legislation – but also the circumstances in which the enforcing bodies say that prosecutions will

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<sup>17</sup> Unpublished transcript

<sup>18</sup> Unpublished transcript

<sup>19</sup> Unpublished transcript

take place. This is because the duties contained in section 37 exist only in the context of a prosecution. Two documents set out the criteria that will be taken into account when considering prosecution.

HSC's Enforcement Policy Statement sets out when it would be in the public interest to prosecute the company – which can be summarised as requiring that the breach by the company be either (a) serious or (b) resulted in a death.<sup>20</sup> An HSE Operational Circular sets out further criteria that will be taken into account when deciding whether to prosecute a director.<sup>21</sup>

- the director/manager had personal awareness of the circumstances surrounding, or leading to, the offence;
- the director/manager failed to take obvious steps to prevent the offence;
- the director/manager has had previous advice/warnings regarding matters relating to the offence; (This may also include whether previous advice to the company meant that he/she had the opportunity to take action. In such a case you would need to show that he/she knew, or ought reasonably to have known, about the advice/warning.)
- the director/manager was personally responsible for matters relating to the offence, e.g. had the individual manager personally instructed, sanctioned or positively encouraged activities that significantly contributed to or led to the offence;
- the individual knowingly compromised safety for personal gain, or for commercial gain of the body corporate, without undue pressure from the body corporate to do so.

These criteria have the effect of limiting the nature of the implicit duty imposed by section 37.

In summary, the 1974 Act may impose some duties upon company directors:

- to take action to stop the company committing an offence if they were aware that the company was so doing and they were aware of reasonable and practicable steps that could be taken
- not to act with neglect in relation to those obligations imposed upon them by the company through their contract of employment or safety policy;
- if they are employed, to comply with section 7 of the 1974 Act.

This is at best a confused situation – a situation perhaps reflected in that neither the HSC nor HSE have published any document setting out what in law directors should do to abide by their obligations.

## **DIRECT AND INDIRECT DUTIES**

A consideration of section 37 of the 1974 Act indicates the clear distinction that needs to be made between direct and indirect duties. Sections 2-7 impose direct and positive duties upon different duty holders to do particular things. They exist independent of any criminal offences, and breaches can be dealt with not only through prosecution but also enforcement notices.

However, offences like those created by breaches of section 37 of the Act – and there are similar offences that exist in some Canadian and Australian states – create indirect duties, so that the duty only exists in the context of a prosecution, and the content of the duty is very much dependent upon the prosecution policy of the regulatory body.

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<sup>20</sup> Paragraph 41 of HSC's Enforcement Policy Statement

<sup>21</sup> Operational Circular 130/8

## **PROPOSALS FOR REFORM IN GREAT BRITAIN**

Detailed proposals for reform in Great Britain have been published and in 2005, Stephen Hepburn M.P. introduced a Private Members Bill. This bill, had it become law, would have amended the Companies Act 1985 and:

- imposed a duty on all directors to “to take all reasonable steps to ensure that the company acts in accordance with the obligations” under health and safety law;
- gives the HSC power to publish an Approved Code of Practice setting out what is required of directors to comply with this duty;
- imposed a duty upon directors of ‘large’ companies to appoint amongst themselves a ‘health and safety information director’ with responsibilities to keep himself and other members of the board informed about health and safety issues in the company.

It also amended health and safety law so that

- enforcement notices could be imposed upon directors for breaching their duty;
- these duties could be taken into consideration when applying section 37 of the Act that allows directors to be prosecuted.

The Bill did not create any new criminal offences. The Bill did not gain sufficient parliamentary support to go beyond the first reading – and so did not become law.

## **COMPARING BRITAIN TO OTHER COUNTRIES**

All the countries considered in this report are similar to Great Britain in that they allow businesses to ‘incorporate’ and create a separate legal entity. In most, the primary duty holder is the employer (the exception being France where the duty is imposed upon the ‘Head of the Establishment’). In most of the countries surveyed the employer is (in relation to incorporated businesses) the legal entity of the company (the exception here is Italy where the employer is always a natural person within the company).

In addition, the concept of ‘directors’ – which is understood in British law and practice as those individuals appointed to manage the company – is also common to most of these countries. If companies don’t have directors, as is the case with some companies in France, there are other individuals who in effect perform functions similar to those of directors (in France these individuals are known as ‘legal managers.’)<sup>22</sup>

## **NON-EXECUTIVE/EXECUTIVE DIRECTORS AND SENIOR MANAGERS**

The focus of the research is the duties imposed upon directors as ‘officers of the company’, that is to say boardroom directors. A boardroom director can sometimes also be an employee of the company – known in Britain as an ‘executive director’. When boardroom directors are not employed they are known as ‘non-executive directors’.

In many companies, senior managers who are not boardroom directors, may confusingly be given the title of ‘director’. In relation to health and safety law in Britain, senior managers of companies

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<sup>22</sup> Known as ‘Gerants’.



– whatever titles they are given – are in essentially the same position as directors,<sup>23</sup> though as employees they must certainly abide by section 7 of the 1974 Act. However, as with the situation with directors, no senior manager has been prosecuted for breaching section 7.

Although a boardroom director is in a different legal position vis-à-vis the company than a senior manager, our research has encouraged us to look at the position of senior managers – since in many countries a duty may be placed on either a boardroom director or a senior manager, depending on the nature of company.

## **METHODOLOGY**

The research for this report had to be completed in time for two consultation conferences that the HSE were undertaking on the subject. It therefore had to be undertaken in a two month period between July and September 2005.

In relation to each jurisdiction, the CCA researched:

- the architecture of safety legislation, the duties imposed upon different natural and legal persons and how enforcement takes place;
- details about when and in what circumstances enforcement action is taken against directors;
- whether any research had been undertaken on the impact of legal duties on directors in different jurisdictions.

It did this work through:

- Establishing a steering group, consisting of legal and socio-legal experts from CCA Board and Advisory Group
- undertaking extensive literature searches via libraries, legal databases and internet resources (and, where necessary, arrange for translation)
- identify key contacts within each country able to guide the research,
- identify and contact the key regulatory bodies within each jurisdiction to obtain information on the issue of directors' duties

A summary of the law in each country was first drafted on the basis of internet and library research materials. Relevant individuals within regulatory bodies were then identified and tailored interview schedules were drafted and sent to them. These were completed either through a telephone interview or through written answers. In addition, independent lawyers and academics were identified and asked to provide further clarification of the law and practice when necessary.

Drafts of each of the sections were sent to the regulatory bodies and to the lawyers for their comment.

The advisory groups comprised Prof. Steve Tombs, Dr Dave Whyte and Richard Tudway.

## **STRUCTURE OF REPORT**

This report is divided into nine chapters.

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<sup>23</sup> They can, like directors, for example, be prosecuted under section 37 of the HSWA 1974

Chapter two considers those countries and those state jurisdictions (within the federal systems of Canada and Australia) which impose duties directly upon boardroom directors. This section includes Germany, three jurisdictions in Canada (Ontario, British Columbia, Northwest Territories), and one state in Australia (Queensland)

Each of the sections on the European states is divided into four parts:

- (a) Forms of Company and Company Organisation
- (b) Legal Framework of Occupational Health and Safety (OHS) Duties
- (c) Offences
- (d) Enforcement

The sections on the Canadian and Australian states do not include details of forms of company and company organisation – since the companies are very similar in form to those in Britain.

Chapter three considers those jurisdictions that imposes duties upon individuals who are either company directors or senior managers. This includes France, Italy, Sweden, Japan, the state of South Australia and the Canadian province of Alberta.

Chapter four considers those jurisdictions that impose significant duties through the creation of offences.

Chapter five considers those jurisdictions that impose some implicit duties upon company directors through the creation of offences similar to section 37 of the Health and Safety at Work Act 1974.

Chapter six considers those jurisdictions that impose duties on supervisors and employers – that can in principle, and sometimes in practice, applies to directors. This includes five Canadian jurisdictions of New Brunswick, Northwest Territories, Yukon, Manitoba, and Saskatchewan.

Chapter seven considers those jurisdictions that do not impose any duties upon directors. This section includes the Netherlands, the USA.

Chapter eight sets out the findings (along with a summary table) and chapter nine is the conclusion.



## CHAPTER TWO

### POSITIVE SAFETY OBLIGATIONS PLACED DIRECTLY ON COMPANY DIRECTORS

Germany, three Canadian provinces/territories<sup>1</sup> (Ontario, British Columbia, and Northwest Territories) and one Australian state (Queensland) have introduced legislation that imposes clear, explicit and unambiguous positive safety obligations on company directors.

- In Germany, occupational health and safety (OHS) legislation imposes explicit duties upon directors in parallel to duties that are imposed upon companies.
- In the Canadian provinces/territories and the Australian state of Queensland, legislation imposes an obligation upon directors to ensure that their company complies with the duties that are imposed upon it. In addition, it imposes duties upon directors to ensure that any order imposed on the company by a regulatory inspector is complied with.

## GERMANY<sup>2</sup>

### FORMS OF COMPANY AND COMPANY MANAGEMENT

There are two main types of company. The most common form is the limited liability company,<sup>3</sup> which is appropriate for small and medium sized enterprises or large ones with only a few shareholders. A limited liability company is managed by its ‘managing directors’<sup>4</sup> who are its legal representatives.<sup>5</sup> It may have a supervisory board, and one is required if the company has more than 500 employees.

Stock corporations<sup>6</sup> are used by enterprises that access the public capital market. A stock corporation is managed by a management board<sup>7</sup> that consists of one or more people who are appointed by a supervisory board<sup>8</sup> which is itself composed of representatives of the shareholders (though they are usually not shareholders themselves) and employees (or their representatives).<sup>9</sup> The management board is the legal representative of the company.<sup>10</sup> In relation to both limited

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<sup>1</sup> Ontario, British Columbia and Alberta are provinces; Northwest Territories is a territory. The Federal government has more control over territories than provinces.

<sup>2</sup> Interviews and correspondence with the following people have assisted with research for this section. Achim Duve and Michael Koll from the German Ministry of Economics and Labour, Dr Valeri Barth/Giovanni Russo from Dechert LLP Germany, and Klaus Heuvels/Julia Pfeil from CMS LLP Germany.

<sup>3</sup> Gesellschaft Mit Beschränkter Haftung (GmbH).

<sup>4</sup> Geschäftsführer.

<sup>5</sup> Article 35 of the German Act.

<sup>6</sup> Aktiengesellschaft (AG).

<sup>7</sup> Vorstand.

<sup>8</sup> Aufsichtsrat.

<sup>9</sup> If the company employs more than a certain number of employees as defined by statute.

<sup>10</sup> Article 78 of the German Stock Corporation Act.

liability and stock companies, there is no distinction made between ‘executive’ and ‘non-executive’ directors.

## FRAMEWORK OF OHS DUTIES

Health and safety duties are located in two different types of legislation.

- There are duties set out in statutes passed by the federal parliament – the most important of these being the framework legislation, the Occupational Safety Law 1996 (the 1996 Law)<sup>11</sup> which contains general health and safety obligations. This legislation is enforced by the Labour Inspectorate, which has regional branches.
- There are more specific and detailed duties set out in ‘accident prevention rules’ which are enforced by inspectors from occupational accident insurance funds.<sup>12</sup>

### Occupational Safety Law

The main obligations under this 1996 Law are imposed upon “employers”, which can be either natural or legal persons.<sup>13</sup> In the context of an incorporated business, the employer will be the legal entity of the company. Article 3 of the Law<sup>14</sup> states, for example:

- (1) “It is the employer’s obligation to take all occupational protection measures in consideration of the conditions that influence safety and health of employees at work. He has to review the measures for their effectiveness and adapt them to changing conditions as required. He has to strive for an improvement of occupational protection of the employees.
- (2) For planning and execution of measures as per para. 1, and in consideration of the type of work and the number of employees, the employer has to:
  1. provide a suitable organisation and the required funds and
  2. make provisions that measures are observed in all activities and be incorporated into the management structure of the firm and the employees can fulfill their obligation to participate;

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<sup>11</sup> Arbeitsschutzgesetz (ArbSchG) - also known as the ‘Law for Implementation of Occupational Safety Measures for Improvement of Safety and Health Protection of Employees at Work’. Other health and safety legislation includes Personal Safety Equipment Regulations (PSA-Verordnung); Protection of working Mothers Act (Mutterschutzgesetz); Working House Act (Arbeitszeitgesetz); Protection of Minors at Work Act (Jugendarbeitsschutzgesetz); Load Handling Regulations (Lastenhebungsverordnung); Construction Site Health and Safety Regulations (Baustellenverordnung); Video Display Workstation Regulations (Bildschirmarbeitsverordnung); Work Equipment Regulations (Arbeitsmittelbenutzungsverordnung); Workplaces Regulations (Arbeitsstättenverordnung); Equipment Safety Act (Geräte- und Produktsicherheitsgesetz); Hazardous Substances Regulations (Gefahrstoffverordnung); Biological Agents Regulations (Biostoffverordnung); Seventh Book of the Social Code.

<sup>12</sup> The insurance funds have the responsibility for paying for any claims of compensation arising out of work-related injuries. This includes costs for medical treatments, vocational, social and supplementary benefits for rehabilitation, benefits in the case of long terms needs etc. The funds produce codes, which have the force of law, that set out duties that ‘entrepreneurs’ should abide by and they are enforced by inspectors. Heuvels K and Pfeil J (2005); Duve (2005).

<sup>13</sup> Article 2(3) of the Law. Article 15 also impose duties upon employees. “(1) The employees are responsible for their own safety and health at work, as far as possible and in accordance with the employer’s instructions and directives. As per sentence 1, the employees are also responsible for the safety and health of those persons who are affected by their activities or omission at work. (2) With reference to para 1, the employees have to especially use machines, equipment, tools, materials, transport means and other working material and protective devices as well as personal protective equipment in accordance with the regulations”.

<sup>14</sup> All quotes from this law are from an unofficial translation

3. the employer shall not pass on the costs of measures required under the law to the employee”.

Article 4 deals with general principles and states that:

“For occupational protection measures, the employer shall apply the following general principles:

1. The work shall be planned such that danger to life and health is avoided wherever possible and the remaining hazards are reduced to a minimum;
2. Hazards are to be fought at their sources;
3. Measures shall consider the state of the technology, occupational medicine and hygiene as well as other proven scientific findings;
4. Measures shall be planned with the goal of properly incorporating technology, working organisation, other working conditions, social relationships and the influence of the environment upon the working place;
5. Individual protective measures have lower priority than other measures;
6. Special hazards for occupational in need of particular protection must be considered;
7. Employees must be given proper instructions ...”

### **Obligations of ‘Responsible Persons’**

However, although these duties are placed upon the ‘employer’, article 13 of the Law, titled “Responsible Persons”, states the following:

- (1) “Responsible for fulfillment of duties arising from this section in addition to the employer are:
  1. his legal representative;<sup>15</sup>
  2. the authorised representative organ of a legal person;
  3. the authorised representative of a partnership;<sup>16</sup>
  4. persons in charge of the management of a company or business in the framework of assigned duties and authorities;
  5. other persons commissioned according to para 2 or a legal provision based upon this law or person in charge according to the Accident Prevention Regulations in the framework of their duties and authorities.
- (2) the employer can commission reliable and expert persons in writing with the performance of his duties from this law, within his sphere of responsibility.”

In relation to companies the relevant articles are:<sup>17</sup>

- paragraph (1)2 which applies to the ‘managing directors’ of a limited company and to the members of the management board of a public limited company. In relation to a public limited company, each of the members of the management board have the same responsibility;

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<sup>15</sup> A legal representative is a person whose authorisation to represent another person or a company is not based on a certificate of authority but on a statutory provision. Since the representatives of the various German companies are expressly mentioned in section 2 and 3 of Article 13 of the Law, the main scope of this paragraph is likely to be an insolvency administrator who is the legal representative of a company being insolvent. Berth V and Russo G (2005).

<sup>16</sup> The legal representatives of German business partnership (Personenhandels-gesellschaften) is/are the managing partners (Articles 105, 164, 170 of the German Commercial Code).

<sup>17</sup> Berth V and Russo G, (2005); Heuvels K and Pfeil J, (2005).

- paragraph (1)4 which applies to ‘executive level managers’ – one rung down from the managing directors or the management board of a company. They could be the senior most executive manager or other senior managers that are responsible for separate sites, branches or factories of the company.<sup>18</sup>
- paragraph (1)5 which applies to those individuals not covered by the other subsections but who, as experts, are allocated responsibility either by the employer<sup>19</sup> or as a result of an obligation laid down by the accident prevention rules.<sup>20</sup>

The effect of this article is to make ‘company directors’ responsible for complying with the same duties as those imposed upon the employer.<sup>21</sup> Medium and large sized companies may of course have senior company managers (as defined by paragraph (1)4) who will, in addition to the directors, be ‘responsible persons’ with the duty to comply with employer duties. The presence of these other senior managers within a company does not generally dilute the responsibility of the directors.<sup>22</sup>

### Delegation

If, however, there is an appointment of a person to undertake specialised services (para (1)5), the company director will be considered to have ‘delegated’ his or her responsibility in relation to the specific activity for which the person has been selected. However even when delegation does take place, the directors will continue to have a control and supervisory obligation. In fact to describe this process as one of delegation may be misleading since German law generally takes the approach that duties cannot be delegated but the original responsible person can employ others to help him or her fulfill their responsibilities.<sup>23</sup>

However it is clear that even when delegation does take place a supervisory duty remains with the legal representatives of the company. This duty is for example reflected in Section 130 of the Administrative Offences Act which states that:

“Whoever, as the owner of a firm or an enterprise, willfully or negligently fails to take the supervisory measures required to prevent contravention of duties in the firm or the enterprise which concern the owner in this capacity, and the violation of which is punishable by a penalty or a fine, shall be deemed to have committed an administrative offence if such a contravention is committed which could have been prevented or made much more difficult by proper supervision. *The required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel.*”<sup>24</sup> (emphasis added)

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<sup>18</sup> Heuvels K and Pfeil J ( 2005); Duve, (2005).

<sup>19</sup> Such a person could be engaged to ensure that the employer complies with article 5 of the Act which requires employers to undertake an ‘evaluation of working conditions’. Koll (2005)

<sup>20</sup> Such as the safety inspector required by the Construction Site Ordinance 1998. Berth V and Russo G (2005a)

<sup>21</sup> If para 1 s. 2. applies, then s. 1 and s. 3 cannot apply.

<sup>22</sup> This is the general principle that applies in administrative law in Germany when more than one person is given the same responsibility. Heuvels K and Pfeil J (2005).

<sup>23</sup> Pfeil (2005).

<sup>24</sup> Unofficial translation.

In the context of a company, the owner will be the company's legal representatives (that is to say its directors).<sup>25</sup> The Labour and Economics Ministry explains the extent of this duty in the following manner:

“There are no general rules on the extent or limits of employers' supervisory duties and control obligations. They largely depend on the conditions prevailing in the specific case at hand. An indication of the implementation intensity of supervisory duties may be whether there is a functioning control effort in the form of an in-house system for managing workplace safety and health protection and whether employers periodically and regularly monitor compliance with health and safety at work requirements or make unannounced, random inspections. An unusual state of affairs or irregularities increases the control intensity required of employers.”<sup>26</sup>

The supervisory duty may include for example:

- supervising the supervisors;
- random inspections;
- enforcement of company rules including, where appropriate, warnings and termination of work contracts of unreliable employees;
- maintenance of operational equipment;
- clear and definite division and assignment of responsibilities;
- establishment of auditing department if necessary.<sup>27</sup>

Although this supervisory duty in principle could apply to the Occupational Safety Act, it is mostly applied in relation to financial and accountancy matters.<sup>28</sup>

## Accident prevention regulations

Accident Prevention Regulations impose duties upon a person called “the entrepreneur”.<sup>29</sup> In the context of an incorporated business, the entrepreneur will be the ‘company’. These regulations do not have an equivalent section 13 that imposes direct duties upon the legal representatives of the entrepreneur. However, duties do appear to be imposed upon legal representatives in an indirect fashion.

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<sup>25</sup> This is the result of section 9 of the Administrative Offences Act.

<sup>26</sup> Koll (2005).

<sup>27</sup> Pfeil (2005). This summarises what one legal commentary says the courts have so far considered necessary. See Bohnert, *Ordnungswidrigkeitengesetz*, 2003, § 130 Rn 20.

<sup>28</sup> The following measures have so far been considered necessary by the courts in relation to this supervisory duty: (a) Designation, diligent choice and supervision of supervisors. The owner cannot, however, delegate his duty by nominating supervisors; his duties are, however, limited to supervising the supervisors. (b) General attention to development of legal and technical norms and publication of such norms within the enterprise. (c) Random inspections. (d) Enforcement and implementation measures, like admonitions, directions and (if legally possible) termination of work contracts of unreliable employees. (e) Establishment of an enterprise security centre (f) Maintenance of operational equipment; (g) Clear and definite division and assignment of responsibilities, and establishment of an auditing department if necessary. See the legal commentary: Bohnert, *Ordnungswidrigkeitengesetz*, 2003, § 130 Rn. 20. Heuvels K and Pfeil J (2005).

<sup>29</sup> See Social Security code (SGB) VII, sections 14 to 25. Duties in these regulations, for example, concern “facilities, arrangements and action, which employers need to make or take in order to prevent industrial accidents, occupational illnesses and work-related health risks, together with the method of transferring such tasks to other people”.



The Social Security Code gives accident insurers the power to prescribe what action the company or employee should take in order to fulfill the obligations in the accident prevention regulations or to prevent “specific accident and health risks.”<sup>30</sup> The insurance inspector will impose the order upon the person whom the inspector considers most appropriate to carry out the particular task. It could be the legal representative of the company or another person.

## OFFENCES

### Occupational Safety Law offences

There is no offence for breach of the general duties in the 1996 Law itself – only for breach of an ordinance or an enforceable order. Section 18 states that the German Federal Government can enact ‘ordinances’<sup>31</sup> that:

“dictate the measures to be taken by the employer and other responsible persons and the behaviour of employees in fulfilling their duties arising from the this law.”<sup>32</sup>

In addition section 22(3) allows the competent public authorities to impose “enforceable orders” which ‘direct’:<sup>33</sup>

- “1. which measures must be taken by the employer and the responsible persons or the employees for fulfillment of their obligations resulting from this law and ordinances issued as a result of this law
- 2, which measures must be taken by the employer and the responsible persons to deter a particular hazard to life and health of the employees.”

Unless danger is imminent the authority can set a reasonable time for the implementation of the order. If the order is not complied with the authority can prohibit the activity taking place until the changes are made.

The 1996 Law creates two kinds of offences – administrative and ‘penal’<sup>34</sup> – both of which can only be committed by natural persons. An administrative offence is committed in the following ways:

- if either the employer or a natural person, “intentionally or negligently” acts “contrary to an ordinance” enacted according to section 18 or 19. The maximum fine is €5,000;
- if an employer or responsible person or employee, ‘intentionally or negligently’ acts contrary to an enforceable order imposed by section 22(3). The maximum fine for an offence by the employer or responsible person is €25,000, for the employee €5.000.

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<sup>30</sup> Section 17 (1) of the Code.

<sup>31</sup> These appear similar to regulations (Statutory Instruments).

<sup>32</sup> Emphasis added. Similar ordinances can be imposed to ensure compliance with European or other international law or decrees of international organisations or bilateral agreements.

<sup>33</sup> These ordinances can be written in the name of the company or responsible person. Barth/Russo (2005). In deciding whether to issue an enforceable order against the company or a director, the inspector will consider who is best suited to fulfil the order.

<sup>34</sup> These penal offences are dealt with in the same way as the penal code offences (see below).

It is entirely at the discretion of the inspector whether he or she imposes an administrative fine (see below).

A ‘penal’ offence – which can result in imprisonment of up to one year or a fine - can be committed in the following ways:

- by a responsible person who “continuously” fails to comply with an enforceable order;<sup>35</sup>
- by a responsible person or employee who “risks life and health of an employee by intentionally failing to comply with an ordinance enacted according to §18 or §19”;

Whilst a Labour Inspector may exercise discretion when deciding whether or not to levy an administrative fine, an inspector has no discretion when he or she suspects that a penal offence has been committed – he or she must report it to police or prosecutor (see below). One violation can result in an administrative fine or in a prosecution for a penal offence – but not both.<sup>36</sup>

The inspector decides upon whom to impose the enforceable order or to impose the fine by looking at which person is best suited to bring about compliance with the relevant obligation. It may be the legal representative, senior manager or specialist.<sup>37</sup>

An administrative fine can only be imposed upon the employer (as legal entity) if a ‘responsible person’ has committed either an administrative or penal offence.<sup>38</sup> If the legal representative is found guilty (of a penal offence), the company can be fined up to €1 million (if there is evidence of intention) or €500,000 (in the case of negligence).

### **Accident prevention codes**

Section 209 of the Social Security code V11 creates a series of offences. It is an offence for ‘a person’ to ‘deliberately or negligently’ breach certain duties set out in a safety regulation or to be in contravention of an ‘enforceable order’ imposed by the insurance fund inspectors. These are administrative offences, which can result in a fine of up to €10,000. In order for action to be taken against a company for this offence, it would be necessary, as above, to identify a legal representative to prosecute.

### **Penal code offences**

Responsible persons and others can also be prosecuted for a number of offences in the penal code. The offence of negligent homicide states that:

“Whoever through negligence causes the death of a human being, shall be punished with imprisonment for not more than five years or a fine.”<sup>39</sup>

A similar offence exists when injury has taken place:

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<sup>35</sup> Section 26 para 1 of the Law

<sup>36</sup> Duve (2005). *Prosecutions for penal offences may or may not go to a trial. It is possible for a prosecutor to simply get a judge to make a written order imposing a particular sentence. This process is more likely to be used if the offence is not serious, a custodial sentence is not likely to be imposed or the prosecutor does not want the defendant to testify.* Heuvels K and Pfeil J (2005).

<sup>37</sup> Heuvels K and Pfeil J (2005).

<sup>38</sup> See section 30 of the Administrative Offences Act.

<sup>39</sup> Section 222 of the Penal Code.

“Whoever negligently causes bodily injury to another person shall be punished with imprisonment for not more than three years or a fine.”<sup>40</sup>

Negligence is not explicitly defined in German law. It is assumed that a person has been negligent if they have violated a duty that was imposed to avoid the harm that did take place, and the harm was foreseeable.<sup>41</sup>

There are a number of other offences involving injury. The offence of “bodily injury” states that:

“Whoever physically maltreats or harms the health of another person, shall be punished with imprisonment for not more than five years or a fine”.<sup>42</sup>

There is also an offence of Serious Bodily Injury.

- “(1) If the bodily injury has, as a result, that the injured person:
1. loses his sight in one eye or in both eyes, his hearing, his speech or his procreative capacity;
  2. loses or permanently can no longer use an important bodily member;
  3. is permanently disfigured in a substantial way or becomes infirm, paralysed, mentally ill or disabled, then the punishment shall be imprisonment from one year to ten years.
- (2) If the perpetrator intentionally or knowingly causes one of the results indicated in subsection (1), then the punishment shall be imprisonment for not less than three years.
- (3) In less serious cases under subsection (2), imprisonment from six months to five years shall be imposed, in less serious cases under subsection (2), imprisonment from one year to ten years”.

The bodily injury offences above can only be prosecuted following a petition of the injured party or when there is sufficient public interest.<sup>43</sup>

## **ENFORCEMENT OF OFFENCES**

Enforcement of the 1996 Law and associated ordinances is undertaken by Labour Inspectorates which are based in each of the sixteen ‘Landers’ of Germany.<sup>44</sup> Accident Insurance Association Inspectors enforce the accident prevention regulations.

Enforcement by the Labour Inspectorate takes place in the following manner. If an inspector identifies a breach of the law, the inspector will ask the legal representative of the company about the nature of the violation. If it appears that legal representative or another person to whom the responsibility has been delegated is not co-operating, or if perhaps the violation is serious, the

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<sup>40</sup> Section 229 of the Penal Code.

<sup>41</sup> Heuvels K and Pfeil J (2005b).

<sup>42</sup> Section 223 of the penal code

<sup>43</sup> Section 230 of Penal Code.

<sup>44</sup> Article 83 of the Basic Law (Grundgesetz). They coordinate their work as much as possible with the insurance funds inspectors (see below).

inspector will impose an order in the name of the person whom the inspector considers responsible. If the responsible person does not agree with the order, the inspector can ask another inspector who has had no dealings with the matter to assess whether the ordinance is appropriate. Alternatively, if changes by the legal representative or other person are not made, the inspector can impose an administrative fine upon the company, legal representative or other appropriate person. There is a right of appeal to the district court.<sup>45</sup>

As soon as an inspector considers that a penal offence may have been committed, the inspector *must* report this to the police/prosecutor who will investigate and take action.<sup>46</sup> Whilst the inspector has discretion over when to impose an administrative fine, the prosecutor has no discretion over the investigation and prosecution of a penal offence. If there is sufficient evidence a prosecution must take place.

Enforcement – as in the use of orders and imposition of administrative fines – is seen:

“as the last resort in a sequence of graduated measures available to the inspectors. These methods must be threatened beforehand ... If the Government office for workplace health and safety concludes that the public interest requires the prosecution of a violation of obligations to protect health and safety at work, it fines the employer under section 25”.<sup>47</sup>

If there has been a death, or an injury resulting in more than three days off work, the company must notify the accident insurance funds which will forward the information to the regional Labour Inspectorates. In the case of major incidents, severe injuries and fatalities, the inspectorates are informed directly – often by the police – and are required to undertake an investigation of the cause of the incident immediately. If there is suspicion that a penal offence has been committed, the inspector must contact the prosecutor who will initiate a full investigation with the assistance of government authorities and the accident insurance funds.

### **Levels of enforcement**

In 2003, the Labour Inspectorate imposed 1,292 administrative fines on responsible persons and others, and reported 106 cases to the police. The inspectors of the occupational accident insurance funds issued a further 1,810 cases.<sup>48</sup>

### **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

The Ministry of Economics and Labour considers that their system of duties and accountability works well. It is their view that the existence of legal duties upon company directors gives them real incentives to comply with the legislation, and that this explains the low level of penal cases. One senior official interviewed stated that:

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<sup>45</sup> *The court can allow a decision without oral presentations or announce judgment in a public trial. Duve 2005.*

<sup>46</sup> *“If in the framework of supervisory activities by the authorities responsible for the protection of workplace safety and health any leads arise concerning prosecutable acts on the part of the employer, a responsible person, or an employee, such authorities must inform the police and/or district attorney, who then begins investigative proceedings.” Duve (2005).*

<sup>47</sup> *Duve (2005).*

<sup>48</sup> *Duve (2005).*

“I think it is good to have health and safety duties upon individuals in the company because it stresses the need for health and safety in a better way if they know that they are responsible.”<sup>49</sup>

There are however no studies in Germany as to the response by directors to the imposition of legal duties. The official also stated that:

- that it may be the case that the system of duties makes it easier to prosecute directors of large companies – but that there was no evidence on this point.
- that there was “no evidence or indication to believe” that individuals in Germany might be unwilling to take up the position of director because of the existence of legal obligations.

## **CANADIAN PROVINCES OF ONTARIO AND BRITISH COLUMBIA AND TERRITORY OF NORTHWEST TERRITORIES**

There are three Canadian jurisdictions that impose duties directly upon ‘directors’ and ‘officers’ of a company. For all three jurisdictions, the Canadian Business Corporations Act 1985 defines a director as a:

“person occupying the position of director by whatever name called ...”<sup>50</sup>

An “officer” is defined as:

“an individual appointed as an officer under section 121, the chairperson of the board of directors, the president, a vice-president, the secretary, the treasurer, the comptroller, the general counsel, the general manager, a managing director, of a corporation, or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any of those offices.”<sup>51</sup>

It should be noted, however, that it appears action can only be taken against a director if the director is present in the relevant state. Directors who are based outside the state cannot be prosecuted. It is also notable that convictions for these offences are not deemed to be ‘crimes’ and do not appear on a defendant’s criminal record.

In addition to the duties imposed by occupational health and safety law at a provincial level, the Canadian Criminal Code imposes duties upon directors and others in relation to safety. This duty cannot, if breached, result in prosecutions for occupational health and safety offences (as set out in provincial and territorial law) but only in prosecutions under the federal criminal code.<sup>52</sup>

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<sup>49</sup> Koll (2005)

<sup>50</sup> Section 2(1) of the Canadian Business Corporations Act 1985.

<sup>51</sup> Section 121 states that “Subject to the articles, the by-laws or any unanimous shareholder agreement, (a) the directors may designate the officers of the corporation, appoint as officers persons of full capacity, specify their duties and delegate to them powers to manage the business and affairs of the corporation, except powers to do anything referred to in subsection 115(3); (b) a director may be appointed to any office of the corporation; and (c) two or more offices of the corporation may be held by the same person.”

<sup>52</sup> This duty is discussed on p.83

## ONTARIO, CANADA<sup>53</sup>

### FRAMEWORK OF OHS DUTIES

In Ontario, the Occupational Health and Safety Act 1990 (the 1990 Act), imposes duties upon a number of different actors including constructors, licensees, employers, owners, project owners, and suppliers. When these actors are incorporated businesses, the duties will be placed upon the legal entity of the company. The 1990 Act also imposes duties on ‘supervisors’ and ‘workers’ – who will all be natural persons. In relation to employers – on whom the main duties are imposed – section 25, for example, states in part that:

- “(1) An employer shall ensure that,
  - (a) the equipment, materials and protective devices as prescribed are provided;
  - (b) the measures and procedures prescribed are carried out in the workplace;
  - (c) the equipment, materials and protective devices provided by the employer are used as prescribed; and
  - (d) a floor, roof, wall, pillar, support or other part of a workplace is capable of supporting all loads to which it may be subjected without causing the materials therein to be stressed beyond the allowable unit stresses established under the *Building Code Act*.
- (2) Without limiting the strict duty imposed by subsection (1), an employer shall,
  - (a) provide information, instruction and supervision to a worker to protect the health or safety of the worker;
  - (b) in a medical emergency for the purpose of diagnosis or treatment, provide, upon request, information in the possession of the employer, including confidential business information, to a legally qualified medical practitioner and to such other persons as may be prescribed;
  - (c) when appointing a supervisor, appoint a competent person;
  - (d) acquaint a worker or a person in authority over a worker with any hazard in the work and in the handling, storage, use, disposal and transport of any article, device, equipment or a biological, chemical or physical agent;
  - (e) afford assistance and co-operation to a committee and a health and safety representative in the carrying out by the committee and the health and safety representative of any of their functions;
  - (f) only employ in or about a workplace a person over such age as may be prescribed;
  - (g) not knowingly permit a person who is under such age as may be prescribed to be in or about a workplace;
  - (h) take every precaution reasonable in the circumstances for the protection of a worker; ...
  - (i) prepare and review at least annually a written occupational health and safety policy and develop and maintain a program to implement that policy; ....
  - (l) provide to the committee or to a health and safety representative the results of a report respecting occupational health and safety that is in the employer’s

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<sup>53</sup> Research for this section has been assisted by correspondence with Brian Blumenthal, Crown Counsel to the Ministry of Labour in Ontario.

possession and, if that report is in writing, a copy of the portions of the report that concern occupational health and safety; ....”

## **Duty on Directors and Officers**

Section 32 of the Occupational Health and Safety Act states;

“Every director and every officer of a corporation shall take all reasonable care to ensure that the corporation complies with,

- (a) this Act and the regulations;
- (b) orders and requirements of inspectors and Directors;
- (c) and orders of the Minister.”

This duty is placed upon each director and officer of a company. This section applies not only to companies that are employers - but also any incorporated businesses upon whom duties are imposed by the legislation. It is notable that this duty not only requires that the director/officer takes steps to ensure that the company complies with the law but also ‘orders and requirements’ of inspectors. So section 57(1) of the Act allows an inspector to require a company to comply with an order that the inspector has issued and section 32 imposes a duty upon directors to take ‘all reasonable care’ to ensure that this order is complied with.

It should also be noted that a duty is also imposed upon ‘supervisors’<sup>54</sup> who are defined as “a person who has charge of a workplace or authority over a worker.” A supervisor could include a director.<sup>55</sup>

## **Meaning of ‘Reasonable Care’**

There is no specific case law concerning the meaning of these words in the 1990 Act. However the meaning of almost identical words was considered in an environmental case of *R v Bata Industries*<sup>56</sup> which involved the discharge of waste outside the premises of Bata Industries shoe manufacturing operations at Batawa, Ontario. The liquid was discharged into the ground and impaired the quality of the groundwater.

Section 75(1) of the Ontario Water Resources Act 1980 and section 147a(1) of the Environmental Protection Act 1980 both create an offence which can be committed by a director or company officer if they fail “to take all reasonable care to prevent the corporation” from causing or permitting unlawful discharge into the environment.<sup>57</sup>

Three directors of Bata Industries – the chairman, the president and the vice-president were prosecuted for these offences. The court ruled that to secure a conviction the Crown must first prove that a discharge of contaminant into the natural environment has occurred, and, once this has been established, the defendant director must show that he or she was duly diligent in preventing the corporation from causing or permitting an unlawful discharge. In effect the

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<sup>54</sup> Section 27.

<sup>55</sup> *Blumenthal* (2005). It is unclear whether a director has in fact ever been prosecuted as a ‘supervisor’

<sup>56</sup> 1992, 9 OR (3d) 329.

<sup>57</sup> See section 182.1 of the Environment Protection Act 1980.

concept of 'reasonable care' and 'due diligence' were conflated; proof of 'due diligence' was proof of 'reasonable care'.

The judge stated that he would ask himself the following questions in assessing the conduct of the directors and whether they had in fact acted with 'due diligence':

- “(a) Did the board of directors establish a pollution prevention ‘system’ .... i.e. was there supervision or inspection? Was there improvement in business methods? Did he exhort those he controlled or influenced?
- (b) Did each director ensure that the corporate officer have been instructed to set up a system sufficient within the terms and practices of its industry of ensuring compliance with environmental laws, to ensure that the officers report back periodically to the board on the operation of the system, and to ensure that the officers are instructed to report any substantial non-compliance to the board in a timely manner?”

In addition, the judge considered that the directors had the following responsibilities:

- “(c) The directors are responsible for reviewing the environmental compliance reports provided by the officers of the corporation, but are justified in placing reasonable reliance on reports provided to them by corporate officers, consultants, counsel or other informed parties,
- (d) The directors should substantiate that the officers are promptly addressing environmental concerns brought to their attention by government agencies or other concerned parties including shareholders.
- (e) The directors should be aware of the standards of their industry and other industries which deal with similar environmental pollutants or risk.
- (f) The directors should immediately and personally react when they have noticed the system has failed.

Within this general profile and dependent upon the nature and structure of the corporate activity, one would hope to find remedial and contingency plans for spills, a system of ongoing environmental audit, training programs, sufficient authority to act and other indices of a pro-active environmental policy.”<sup>58</sup>

While, in this particular case, the convicted directors clearly knew of the discharge, the court's judgment makes it clear that if a corporation did not have a functioning pollution prevention system, the directors could be still convicted even if they were *not* aware of the discharge. The Court found that:

- Mr. Bata, the company chairman, should be acquitted. The judge considered that he had discharged his responsibilities. Once he was aware of problems, he had made money

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<sup>58</sup> 1992, 9 OR (3d) p.362



available to correct them. He did not have personal knowledge of this problem and he was aware of his environmental responsibilities and gave directions accordingly;

- Mr Marchant, the company's president, was convicted. He had visited the facility on an average of once a month and the storage and disposal problems had been brought to his attention. However, he took no temporary measures even though money was available, and took no action until the Ministry arrived on the scene. As President, he had a duty to give instructions and see that the instructions were carried out. The court said:

"due diligence requires him to exercise a degree of supervision and control that demonstrate that he was exhorting those whom he may be normally expected to influence or control to an accepted standard of behavior."'<sup>59</sup>

- Mr Keith Weston, an on-site vice-president, was also convicted. The court held that he had failed to take all reasonable care. As on-site general manager, he was in control of the particular facility where the environmental problems were created and he did not address the problems directly. He had knowledge of the environmental problems and should have been alerted to their significance after he received the first quote for costs to clean up this particular problem. In addition, Mr. Weston had the duty to perform personal inspections of the plant on a regular basis and to do so in a diligent manner. Lastly, he was the person with authority to expend funds for remediation. Therefore, he could not rely on his subordinate to carry out the entire responsibility and if he was going to delegate such responsibility it was still incumbent on him to receive detailed reports from that delegate. In respect of the conviction of the vice-president, the court stated that:

"As the "on-site" director, Mr. Weston had a responsibility in this type of industry to personally inspect on a regular basis, i.e., "walkabout". To simply look at the site "not too closely" 20 times over his four-year tenure does not meet the mark. He had an obligation, if he decided to delegate responsibility, to ensure that the delegate received the training necessary for the job, and to receive detailed reports from that delegate."<sup>60</sup>

## OFFENCE

A failure to comply with section 32 of the Act is an offence and can result in a maximum fine of \$25,000 or imprisonment for a term of not more than 12 months or both.<sup>61</sup> Prosecutions must be initiated within one year of the last act or failure upon which the prosecution is based.<sup>62</sup>

## ENFORCEMENT

The 1990 Act is enforced by the Ministry of Labour. In practice, the prosecutors will tell the court that there are a number of things that the director could have done and didn't do to prevent the

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<sup>59</sup> 1992, 9 OR (3d) p.365

<sup>60</sup> 1992, 9 OR (3d) p.367.

<sup>61</sup> Section 66.

<sup>62</sup> Section 69.

death or injury, and that if the court agrees that he didn't do one of them and it was reasonable for the director to have done that, a conviction is appropriate.<sup>63</sup>

Prosecutions for this offence do take place – but they are not frequent. It is a summary offence and prosecutions must start within a year – which can limit the possibility of prosecution. The enforcement/prosecution policy which set out criteria for prosecution are not publicly available documents.<sup>64</sup>

In addition, although it is known that in 2002, prosecutions by the Ministry of Labour under this Act resulted in 459 convictions, and in 2003 resulted in a total of 618 prosecutions, there are no details available on the numbers of these convictions that involved directors/officers.<sup>65</sup>

There are no published regulations or guidance specifically directed at explaining how company directors can comply with their obligations.

An issue that is considered important in deciding whether or not to prosecute is “whether the directors in question had any practical influence on operational matters, not just on policy”. However this is considered by the prosecutor to be a very case specific question since management boards of companies are considered to function differently.<sup>66</sup>

## **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

No information is available on why this duty was imposed, or on whether it is believed to be successful or not.

## **BRITISH COLUMBIA, CANADA<sup>67</sup>**

### **FRAMEWORK OF OHS DUTIES**

Division 3 of Part 3 of the Worker Compensation Act 1996 (1996 Act) sets out the health and safety obligations of the different parties. Duties are imposed upon owners, suppliers, workers and supervisors, but the principal duties are imposed upon employers. Section 115, for example, states:

- “(1)Every employer must:
- (a) ensure the health and safety of
    - (i) all workers working for that employer, and
    - (ii) any other workers present at a workplace at which that employer's work is being carried out, and
  - (b)comply with this Part, the regulations and any applicable orders.

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<sup>63</sup> *Blumenthal (2005).*

<sup>64</sup> *Blumenthal (2005).*

<sup>65</sup> <http://www.labour.gov.on.ca/english/hs/stats/index.html>.

<sup>66</sup> *Blumenthal (2005).*

<sup>67</sup> *Research for this section has been assisted by correspondence with Nick Bower, Workers Compensation Board, British Columbia.*

- (2) Without limiting subsection (1), an employer must
- (a) remedy any workplace conditions that are hazardous to the health or safety of the employer's workers,
  - (b) ensure that the employer's workers
    - (i) are made aware of all known or reasonably foreseeable health or safety hazards to which they are likely to be exposed by their work,
    - (ii) comply with this Part, the regulations and any applicable orders, and
    - (iii) are made aware of their rights and duties under this Part and the regulations,
  - (c) establish occupational health and safety policies and programs in accordance with the regulations,
  - (d) provide and maintain in good condition protective equipment, devices and clothing as required by regulation and ensure that these are used by the employer's workers,
  - (e) provide to the employer's workers the information, instruction, training and supervision necessary to ensure the health and safety of those workers in carrying out their work and to ensure the health and safety of other workers at the workplace,
  - (f) make a copy of this Act and the regulations readily available for review by the employer's workers and, at each workplace where workers of the employer are regularly employed, post and keep posted a notice advising where the copy is available for review,
  - (g) consult and cooperate with the joint committees and worker health and safety representatives for workplaces of the employer, and
  - (h) cooperate with the Board, officers of the Board and any other person carrying out a duty under this Part or the regulations”.

It is an offence to contravene this section – though it is a defence for the company to show that it “exercised due diligence to prevent the commission of the offence.”<sup>68</sup>

## **Duty on Directors and Company Officers**

Section 121 states:

"Every director and every officer of a corporation must ensure that the corporation complies with this Part, the regulations and any applicable orders".

This section would not only apply to companies that are employers - but also incorporated businesses that are, for example, 'owners' and 'suppliers'.<sup>69</sup> It is also notable that directors have obligations not only to ensure that the companies comply with its legal duties but also “orders” imposed by the Workers Compensation Board upon a company. The Board has the power to “make orders for the carrying out of any matter or thing regulated, controlled or required by this Part [of the Act] or the regulations and may require that the order be carried out immediately or within the time specified in the order.”<sup>70</sup>

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<sup>68</sup> Section 215 of the Act.

<sup>69</sup> Duties are set out in sections 199 and 120 of the Act

<sup>70</sup> Section 187(1) of the Act. The kinds of orders that can be made by the Workers Compensation Board are further detailed in section 187(2) of the Act

Directors can not delegate their legal responsibilities.<sup>71</sup>

## OFFENCES

It is an offence for a director to be in contravention of this duty.<sup>72</sup> An individual will be acquitted if he can prove that he “exercised due diligence to prevent the commission of the offence.” There appears to be no case law in British Columbia setting out what ‘due diligence’ means – however it is likely that the principles set out in the Ontario Court of Appeal case of *R v Bata Industries*<sup>73</sup> would apply. However, a manual published by the Workers Compensation Board (WCB) provides guidance on the meaning of ‘due diligence’ in the context of imposing administrative fines upon ‘employers’ (companies). This states that:

“The Board will consider that the employer exercised due diligence if the evidence shows on a balance of probabilities that the employer took all reasonable care. This involves consideration of what a reasonable person would have done in the circumstances. Due diligence will be found if the employer reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if the employer took all reasonable steps to avoid the particular event.”<sup>74</sup>

In addition, other guidance produced by the WCB states that, in relation to a criminal offence, an accused will be acquitted if he or she can establish that “on a balance of probabilities all reasonable precautions were taken to comply in the circumstances.”<sup>75</sup>

If a prosecution does take place, a fine of up to \$569,000 can be imposed - though in the case of a continuing offence, a further fine of not more than \$28,400 for each day during which the offence continues after the first day.<sup>76</sup> In addition - or as an alternative - a term of imprisonment not exceeding six months can be imposed.<sup>77</sup>

It is also possible to prosecute a director through another route. The Act states that if a corporation commits an offence, “an officer, director or agent of the corporation who authorizes, permits or acquiesces in the commission of the offence also commits an offence.”<sup>78</sup>

## ENFORCEMENT

This Act is enforced by the WCB. It can impose administrative fines of up to a maximum of \$520,000 rather than prosecute but these can only be imposed upon ‘employers’ (i.e. not individual company directors).<sup>79</sup> These penalties can be imposed when the employer has either failed to take sufficient precautions for the prevention of work-related injuries or illnesses, the

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<sup>71</sup> Bower (2005)

<sup>72</sup> Section 215 of the Act

<sup>73</sup> See p.22 of this report

<sup>74</sup> Workers Compensation Board: Manual: Administrative Penalties – ITEM: D12-196-10

<sup>75</sup> “Effective Health and Safety Programmes. The key to a safe workplace and due diligence”.

<sup>76</sup> Section 217 of the Act.

<sup>77</sup> Subsequent conviction can result in higher penalties and increased term of imprisonment.

<sup>78</sup> Section 213(2) of the Act.

<sup>79</sup> Section 196 of the Act.

employer has not complied with the general duties imposed upon it, or the employer's workplace or working conditions are unsafe.<sup>80</sup>

Any prosecutions that do take place are undertaken by the Crown Prosecutor rather than the WCB. When a health and safety breach occurs, the WCB tends to go through their own administrative procedures rather than referring the case to the crown prosecutor for prosecution.<sup>81</sup>

There is no published guidance setting out the circumstances when prosecutions will take place. However, the WCB prevention manual gives some guidance when an order will be imposed upon a director:

“The Board will not automatically issue an order to officers, directors or agents of a corporation each time an order is written to the corporation. The Board will, however, issue orders to officers, directors or agents where there is evidence that they were responsible for the failure by the corporation. Being “responsible” includes authorizing, permitting or acquiescing in the failure.”<sup>82</sup>

There are no publicly available statistics on the numbers of prosecutions against directors for breach of the duty. Prosecutions do happen, but they are unusual. One of the reasons for this is that the offence is summary and must be prosecuted within a six month time period that is not sufficient for many prosecutions to take place under this section.

## **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

No information is available on why this duty was imposed, or on whether it is believed to be successful or not.

## **NORTHWEST TERRITORIES, CANADA**

### **FRAMEWORK OF OHS DUTIES**

The main Northwest Territories Safety Act 1988 (1988 Act) imposes duties upon employers and others – but does not impose any duties upon directors.<sup>83</sup> However mining legislation does impose duties on directors. The Consolidation of Mine Health and Safety Act 1994 (1994 Act) imposes its principal duties upon mine ‘owners’ (and also upon ‘managers’, supervisors and workers). When the business is incorporated, the owner of the mine will be the company. Section 2 for example states:

- “(1) The owner of a mine shall take every reasonable measure and precaution to protect the health and safety of employees and other persons at the mine.
- (2) The owner of a mine shall:

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<sup>80</sup> *There is a defence of due diligence.*

<sup>81</sup> *Bower (2005).*

<sup>82</sup> *Prevention Manual. D3-121-1, p.61.*

<sup>83</sup> *See page 92 for discussion of this.*

- (a) implement and maintain work practices that are safe and that do not present undue risk to health; and
  - (b) provide and maintain healthy and safe worksites.
- (3) The owner of a mine shall ensure that
- (a) provision is made for such supervision, instruction and training as is necessary to protect the occupational health and safety of the employees;
  - (b) the mine is constructed, developed, reconstructed, altered or added to in accordance with this Act and the regulations;
  - (c) machinery, equipment, material and protective devices that are required, by the regulations, to be used at the mine or available for the use of employees at the mine, are available for such use;
  - (d) personal protective equipment required by the regulations to be provided to employees is so provided; and
  - (e) the mine is operated in accordance with this Act and the regulations.”

### **Duty on Director and Company Officer**

Section 3 of the Act states:

“Every director and officer of a corporation that is the owner of a mine shall ensure, to the extent practicable, that the corporation complies with:

- (a) this Act and the regulations; and
- (b) orders of inspectors and the orders and directives of the chief inspector.”<sup>84</sup>

This is similar wording to that contained in legislation in Ontario. It should also be noted that the 1994 Act specifically requires that where the owner of a mine is a corporation, “the owner shall designate a senior officer of the corporation “to serve as a liaison between the corporation, the board, and the regulator.”

### **OFFENCE**

Section 39 states that it is a summary offence for any individual “to contravene or fail to comply with a provision of this Act or the regulations, an order of an inspector or an order or directive of the chief inspector,” It is punishable by a fine not exceeding \$50,000 or by imprisonment for a term not exceeding six months, or both.

In addition where a corporation has committed an offence<sup>85</sup>, any “officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence” and is liable to the same penalty as above.

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<sup>84</sup> In addition, the ‘manager’ of the mine is under a duty to take “every reasonable measure and precaution to protect the health and safety of employees and other persons at a mine”.

<sup>85</sup> Section 41 states that: “A company commits an offence when there is “sufficient proof of the offence to establish that it was committed by an employee or agent of the defendant, whether or not the employee or agent is identified or prosecuted for the offence”.

## ENFORCEMENT

The 1994 Act is enforced by the Workers Compensation Board (WCB)– which is responsible for inspection and for investigating deaths and injuries. The WCB initiates prosecutions but the federal prosecution service undertakes the prosecution on behalf of the WCB. It appears that this offence may never have been used against directors.<sup>86</sup>

## PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE

No information is available on why this duty was imposed, or on whether it is believed to be successful or not.

## STATE OF QUEENSLAND, AUSTRALIA<sup>87</sup>

### LEGAL FRAMEWORK OF OHS DUTIES

The Workplace Health and Safety Act 1995 (1995 Act) imposes duties on a number of 'actors', including employers, persons in control of workplaces, principal contractors, designers, manufacturers and suppliers of plant, erectors and installers of certain plant, manufacturers and suppliers of substances, designers of buildings or other structures to be used as workplaces, persons in control of relevant workplace areas, persons in control of fixtures, fittings or plant included in relevant workplace areas, and owners of specified high risk plant.<sup>88</sup> In relation to employers, for example, the 1995 Act imposes the following duty:

- “(1) An employer has an obligation to ensure that none of the employer’s workers are exposed to risks to their health and safety arising out of the conduct of the employer’s business or undertaking.
- (2) An employer has an obligation to ensure the employee is not exposed to risks to their health and safety arising out of the conduct of the employer’s business or undertaking.
- (3) An employer has an obligation to ensure other persons are not exposed to risks to their health and safety arising out of the conduct of the employer’s business or undertaking.”<sup>89</sup>

When these businesses are incorporated, all the above duty holders will be companies. A failure to discharge the obligation by the company under the act is an offence.<sup>90</sup>

### Duty of ‘executive officers’

The 1995 Act goes onto state:

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<sup>86</sup> Grundy (2005).

<sup>87</sup> Research for this section has been assisted by correspondence with Aldo Raineri, Manager, Strategic Policy Workplace Health and Safety Queensland.

<sup>88</sup> Section 23 of the Act.

<sup>89</sup> Section 28 of the Act.

<sup>90</sup> Section 24(1) of the Act.

"The executive officers of a corporation must ensure that the corporation complies with this Act."<sup>91</sup>

An executive officer is defined as:

"a person who is concerned with, or takes part in, the corporation's management, whether or not the person is a director or the person's position is given the name of executive officer."<sup>92</sup>

## OFFENCES

### Workplace Health and Safety Act 1995

The 1995 Act states:

"If a corporation commits an offence against a provision of this Act, each of the corporation's executive officers also commits an offence, namely, the offence of failing to ensure that the corporation complies with the provision."<sup>93</sup>

It goes on to say that evidence that the corporation has been convicted of an offence:

"is evidence that each of the executive officers committed the offence of failing to ensure that the corporation complies with the provision."

It is, however, a defence for an executive officer to prove that —

- "(a) if [he or she] was in a position to influence the conduct of the corporation in relation to the offence—[he or she] exercised reasonable diligence to ensure the corporation complied with the provision; or
- (b) [he or she] was not in a position to influence the conduct of the corporation in relation to the offence."

Conviction can result in the following sentences:

- if the breach causes multiple deaths - 2,000 penalty units or 3 years imprisonment;
- if the breach causes death or grievous bodily harm - 1,000 penalty units or 2 years imprisonment;
- if the breach causes bodily harm - 750 penalty units or 1 year's imprisonment;
- if the breach involves exposure to a substance likely to cause death or grievous bodily harm - 750 penalty units or 1 year's imprisonment; or
- otherwise - 500 penalty units or 6 months imprisonment.<sup>94</sup>

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<sup>91</sup> Section 167 of the Act.

<sup>92</sup> Schedule 3 of the Act.

<sup>93</sup> 167(2) of the Act.

<sup>94</sup> Section 24 of the Act.



## Penal offences

There are a number of penal offences in the state criminal code<sup>95</sup> that individuals, including executive officers, could be prosecuted for – however, there have been no successful prosecutions. The offence of manslaughter is defined as follows:

“A person who unlawfully<sup>96</sup> kills another under such circumstances as not to constitute murder is guilty of manslaughter.”<sup>97</sup>

The offence of grievous bodily harm is defined as follows:

“Any person who unlawfully does grievous bodily harm to another is guilty of a crime, and is liable to imprisonment for 14 years.”

The offence of ‘negligent acts causing harm’ is defined as follows:

“(1) Any person who unlawfully does any act, or omits to do any act which it is the person’s duty to do, by which act or omission bodily harm is actually caused to any person, is guilty of a misdemeanour, and is liable to imprisonment for 2 years.  
(2) The offender may be arrested without warrant.”<sup>98</sup>

In addition, there are the following offences relating to breaches of more general duties:

### *Duty of persons in charge of dangerous things*

“It is the duty of every person who has in the person’s charge or under the person’s control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.”<sup>99</sup>

### *Duty to do certain acts*

“When a person undertakes to do any act the omission to do which is or may be dangerous to human life or health, it is the person’s duty to do that act: and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.”<sup>100</sup>

## ENFORCEMENT

The duty contained in the 1995 Act, along with the offence provision and defence, therefore imposes an enforceable duty upon every executive officer of a company, in relation to those

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<sup>95</sup> It is important to note that in Australia, in contrast to Canada, each state has its own criminal code.

<sup>96</sup> The test of unlawfulness is one of ‘gross negligence’. Ranieri (2005).

<sup>97</sup> Section 303 of the Penal Code.

<sup>98</sup> Section 328 of the Penal Code.

<sup>99</sup> Section 289.

<sup>100</sup> Section 290 of the Penal Code.

activities of the corporation that he or she is in a position to influence, to exercise reasonable diligence to ensure that the company complies with the 1995 Act.

In theory, every executive officer could be prosecuted along with the company, and if the company is convicted, it would be for each executive officer to establish either that he or she was not in a position to influence the company's conduct, or if he or she was, that he or she exercised reasonable diligence. Guidance to WorkCover's inspectors states the following:

“When investigating workplace incidents where the alleged offender is a corporation, the inspector should always consider the culpability of executive officers of the corporation. In doing so the inspector should elicit evidence to confirm or negate the defences available to the executive officers.

In circumstances where the evidence indicates that an executive officer was in a position to influence the conduct of the corporation and the executive officer did not exercise reasonable diligence to ensure the corporation complied with the provisions of the Act, it is appropriate that the executive officer is charged with the offence.

Factors that ought to be considered include:

- the approach to health and safety of the company
- management systems instigated by the corporation's board for reporting health and safety issues;
- knowledge of the executive officer or any failed system causing the accident or whether the executive officer should have known of the failure.”<sup>101</sup>

In practice, however, WorkCover's prosecution protocol only prosecutes those officers “actively involved in the day to day business activities of the company, and in particular that activity or those activities resulting in the breach.”<sup>102</sup> Between 2001 and 2004 there have been 22 convictions of executive officers involving 19 cases. Six of these also involved a conviction of a company.<sup>103</sup>

There have never been prosecutions of directors or other company officers for criminal code offences. The police are involved in the investigation of every death – but they are only concerned about ‘foul-play’ and, once this has been ruled out, will hand the investigation to workplace health and safety inspectors. Police do sometimes get called to investigate again after a coroner's inquest. In addition, regulatory inspectors could refer deaths or injuries to the police for their investigation, it is not known to have happened in practice.<sup>104</sup>

## **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

The apparent reason for the introduction for the section on executive officers was that “corporations often turn out to be straw men.” It was felt that such a provision was necessary to ensure an effective penalty was exacted on the most appropriate 'person' responsible for a breach.<sup>105</sup>

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<sup>101</sup> *Workplace Health and Safety Procedure, DWHS/PROC/01/14, 'Executive officer prosecutions'.*

<sup>102</sup> *Ranieri (2005).*

<sup>103</sup> *Details of prosecutions provided by Ranieri (2005).*

<sup>104</sup> *Ranieri (2005).*

<sup>105</sup> *Ranieri (2005).*

It should be noted that the duty placed upon executive officers is common in other legislation.<sup>106</sup> An identical provision is contained in the Electrical Safety Act 2002;<sup>107</sup> the Dangerous Goods Safety Management Act 2001;<sup>108</sup> Coal Mining Safety and Health Act 1999;<sup>109</sup> and the Mining and Quarrying Safety and Health Act 1999.<sup>110</sup>

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<sup>106</sup> *The introduction of such a section is now 'virtually de rigeur since 1995', Ranieri (2005).*

<sup>107</sup> *Section 199. This is the first and only 'stand alone' piece of electrical safety legislation Australia and is administered by the Electrical Safety Office in the Department of industrial Relations.*

<sup>108</sup> *Section 173, enforced by the Department of Emergency Services.*

<sup>109</sup> *Section 262.*

<sup>110</sup> *Section 241, enforced by Department of Natural Resources and Mines.*

## CHAPTER THREE

### SAFETY OBLIGATIONS PLACED DIRECTLY ON A PERSON WHO IS EITHER A COMPANY DIRECTOR OR SENIOR MANAGER

In a number of jurisdictions, duties are imposed upon a person who, depending on the nature of the company and other factors, will be either a director or senior manager. In these jurisdictions, it is not clear from the relevant legislation itself exactly upon which person duties are imposed – but that person will either be a director or senior manager.

**France:** most safety obligations are placed upon an individual, termed the Head of the Establishment, who will be either a company director (or equivalent) or a senior manager.

**Italy:** duties are placed upon the employer, but the employer (unlike the situation in all the other countries being discussed) is not the legal entity of the company, but will be either a company director or senior manager.

**Sweden:** duties are placed upon the employer (which is a legal entity) but the obligation upon the company must be carried out by either a director or the most senior employed manager in the company.

**Japan:** duties are placed upon the General Health and Safety Manager who is the person that “exercises overall management over the execution” of a workplace. This person will be either a director or senior manager.

**South Australia, Australia:** companies must appoint ‘responsible officers’ with duties to take ‘reasonable steps’ to ensure that the company complies with its obligations under safety legislation. This responsible person will be either a company director or senior manager.

**Alberta, Canada:** duties are imposed upon the ‘employer’, which is defined to specifically include directors or company officers with specific responsibility for health and safety.

## FRANCE<sup>1</sup>

### FORMS OF COMPANY AND COMPANY ORGANISATION

There are two main types of company in France.<sup>2</sup> Limited liability companies (SARLs)<sup>3</sup>, a common structure for small and medium companies, do not have directors<sup>4</sup> but instead the

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<sup>1</sup> Interviews and correspondence with the following people have provided some of the background research for this section: Odile Lautard from the Ministry of Labour; Sara Delon-Bouquer, a Lawyer at the Paris Bar at Dechert Price and Rhoads, Francel; Francois Meisartm a Lawyer of the Paris Bar; and Florence Theodose/Jacques Isnard/Thomas Bartoil, lawyers at CMS LLP.

<sup>2</sup> These are detailed in the Commercial Code.

company's shareholders appoint one or more legal managers<sup>5</sup> to run it. A legal manager – and there are not usually more than two – is “invested with the most extensive powers to act on behalf of the company in all circumstances.”<sup>6</sup>

Public limited companies (SAs)<sup>7</sup> have two different forms. The most common arrangement is through the formation of a single board of directors<sup>8</sup> comprising of at least three individuals<sup>9</sup> elected by the shareholders.<sup>10</sup> The directors cannot become employees.<sup>11</sup> The board of directors is given the responsibility to determine “the broad lines of the company's business activities and ensures their implementation... [I]t deals with all matters relating to the conduct of the company's business and decides all pertinent issues through its deliberations.”<sup>12</sup>

The board of directors must elect a chairman of the board of directors<sup>13</sup> and, either he or she, or another board member called a general manager,<sup>14</sup> is given the responsibility for the “general management of the company.”<sup>15</sup> The person appointed as general manager will be “invested with the most extensive powers to act on behalf of the company in all circumstances.”<sup>16</sup> A chairman of the board of directors can also act as the managing director.<sup>17</sup> The board can also appoint up to five ‘assistant general managers.’<sup>18</sup>

The second option by which an SA can operate is through a ‘management board’<sup>19</sup> that operates under the supervision of a supervisory board.<sup>20</sup> This management board is not a board of directors. The board consists of up to five shareholders or employees who are appointed by a supervisory board.<sup>21</sup> One of the members of the management board is appointed as chairman. If the management board is one person, that person is known as the ‘Sole General Manager.’<sup>22</sup>

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<sup>3</sup> *Des sociétés à responsabilité limitée (SARL).*

<sup>4</sup> *Administrateurs.*

<sup>5</sup> *Known as ‘gérants’.*

<sup>6</sup> *Article L-223-18 of the Commercial Code.*

<sup>7</sup> *Known as ‘des sociétés anonymes’.*

<sup>8</sup> *Known as ‘conseil d'administration’.*

<sup>9</sup> *Articles 225-17 to 225-56 of the Commercial Code.*

<sup>10</sup> *Each of them must have shares in the company – the level of which must be set out in the Memorandum of Association.*

<sup>11</sup> *Though an employee can become a director as long as he or she has been employed for more than two years. No more than one third of directors can hold an employment contract with the company. (Article L-225-22 of the Commercial Code). Employee-shareholders can be elected to the Board if more than 3% of the shares are owned by employees and an employee-shareholder can be elected if the Memorandum of Association allows it (Articles L-225-23 and 27 of the Commercial Code).*

<sup>12</sup> *Article L-225-35 of the Commercial Code.*

<sup>13</sup> *Known as the ‘président du conseil d'administration’ (Article L-225-47 of the Commercial Code) .*

<sup>14</sup> *Known as the ‘directeur général’ (Article L-225-51-1 of the Commercial Code). This person may or may not be a member of the Board, and may or may not be employed.*

<sup>15</sup> *Article L-225-47 of the Commercial Code.*

<sup>16</sup> *Article L-225-56 of the Commercial Code.*

<sup>17</sup> *Then he or she is known as the ‘président directeur general’.*

<sup>18</sup> *Known as ‘directeurs généraux délégués’. See L225-53 of the Commercial Code.*

<sup>19</sup> *Known as a ‘directoire’.*

<sup>20</sup> *Known as a ‘conseil de surveillance’.*

<sup>21</sup> *It should consist of at least three people appointed by the shareholders. It has the responsibility to monitor the ‘management of the company’ by the management board.*

<sup>22</sup> *known as the ‘directeur général unique’. The members of the management board can be dismissed by the general meeting or, if the Memorandum of Association so provide, by the supervisory board.*

The management board is given “the widest powers to act on the company’s behalf in any circumstances.”<sup>23</sup> The chair of the management board or the sole General Manager (whichever is the case) shall represent the company in dealings with third parties<sup>24</sup> – though the Memorandum of Association may allow the supervisory board to appoint other members of the management board to be a general manager<sup>25</sup> with the same power of representation.

It is important to note that directors within an SA are not particularly powerful people in French companies. The key person in an SA will be either the chairman of the board or, if one is appointed, the general manager; they are equivalent in power to the legal manager in the SARL. A person in one of these positions is known as Head of the Enterprise.<sup>26</sup>

## ORGANISATION OF OHS DUTIES

The main health and safety obligations are set out in the Labour Code.<sup>27</sup> Some duties are imposed upon ‘the employer’<sup>28</sup> which, if it is an incorporated business, is represented by the legal entity of a company – an SA or SARL. The main duties are however not imposed upon a legal entity but instead upon a natural person called the ‘head of establishment.’<sup>29</sup> This person becomes “personally responsible for always ensuring the strict and permanent application of the statutory provisions aimed at guaranteeing the safety of his workforce ... .”<sup>30</sup>

### Nature of Duties

The duties that are placed on the head of the establishment are extensive and are the same kind of duties that are imposed upon the ‘employer’ in Britain. The Labour Code requires the head of the establishment to “take the necessary action in order to ensure the safety and protection of the physical and mental health of the people working in the respective establishment, including temporary workers.”<sup>31</sup> It goes on to say that in doing so he or she should adopt the following general preventative principles:

- “a) Avoid risks;
- b) Assess the risks that cannot be avoided;
- c) Tackle risks at source;
- d) Adapt work to the respective person, in particular as regards workplace design, the choice of equipment and working and production methods, with a view in particular to limiting monotonous and rhythmical work and reducing the impact of these on health;
- e) Take account of changes in the state of technology;
- f) Replace what is dangerous with something that is not dangerous or less dangerous;

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<sup>23</sup> Article L-225-64 of the Commercial Code.

<sup>24</sup> Article L-225-66 of the Commercial Code.

<sup>25</sup> Known as ‘directeur général’.

<sup>26</sup> Known as ‘chef d’entreprise’.

<sup>27</sup> This code contains all the occupational health and safety obligations. See <http://www.legifrance.gouv.fr/>. There is no English translation available.

<sup>28</sup> Known as ‘l’employeur’.

<sup>29</sup> Chef d’établissement.

<sup>30</sup> Cass. Crim, May 30 2000, Appeal No. 99-87.578, Ruling no. 3612. (“de veiller personnellement et à tous moments à la stricte et constante application des dispositions réglementaires destinées à assurer la sécurité de son personnel ..”).

<sup>31</sup> Labour Code, Art. L-230-2 para 1.

- g) Plan for prevention by incorporating technology, working structures, working conditions, labour relations and the influence of environmental factors, in particular as regards the risks associated with harassment in the workplace as defined in Article L. 122-49, into a coherent whole;
- h) Implement collective protective measures by giving these priority over individual protective measures;
- i) Give workers appropriate instructions.”<sup>32</sup>

It goes onto say that:

“heads of establishments must, depending on the nature of the respective establishment’s activities:

- (a) Assess the health and safety risks to workers including in the choice of manufacturing procedures, equipment, chemical substances or preparations, in the planning or redesign of workplaces or facilities and in the definition of workplaces;
- (b) Following this analysis and, as required, the preventative measures and the working and production methods implemented by the respective employer must guarantee a better level of health and safety protection for workers and be included in all the activities of the respective establishment and at all managerial levels;
- (c) When a head of an establishment entrusts tasks to a worker, he/she must take into consideration the skills of the party concerned and implement the necessary precautions in terms of health and safety;
- (d) Consult workers or their representatives on the planned introduction and actual introduction of new technology referred to in Article L. 432-2, as regards their consequences in terms of health and safety.”<sup>33</sup>

### **Imposition of Duties on Directors or Senior Managers**

The head of the establishment will either be the legal manager of a SARL, or the chairman of the board or general manager of an SA, unless the company has a number of different sites/factories/workplaces, in which case the head of the establishment will be a senior manager<sup>34</sup> at each particular workplace.

Therefore in small or medium sized companies where the business is sited at one location, the head of the establishment of the whole company will either be the legal manager, the chairman of the board, or the general manager. However, where the company has several sites or workplaces, these individuals will only have the responsibilities of head of the establishment at the office or factory where they themselves are based; in relation to all the other workplaces, the head of the establishment will be the senior manager of each workplace.

However, if the senior manager in charge of a particular workplace does not have sufficient technical ability, power to manage staff or financial autonomy, then he or she will not be considered the head of the establishment and the responsibility will remain with the head of the enterprise.

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<sup>32</sup> *Labour Code, Art. L-230-2 para 2. All Labour Code quotes are from an unofficial translation.*

<sup>33</sup> *Labour Code, Art. L-230-2 para III.*

<sup>34</sup> *This person is often known as a ‘directeur’.*

## Delegation

It is important to appreciate that the head of establishment can delegate responsibilities to others within their workplaces – as long as there is a good reason to delegate. This could be, for example, because of the size of the workplace or the complexity of its operations. Case law indicates that in a small company with a simple structure, a delegation by a head of the establishment is unlikely to be considered valid. Delegation intended simply to allow that person to escape accountability for violations would not be permitted.

Even if there is good reason for a head of the establishment to delegate, there are certain conditions that must exist before the delegation is considered valid:

- **Competence:** responsibility cannot be delegated to just anyone, it must be delegated to someone within the company who is in actual “possession of the necessary competence, authority and means”<sup>35</sup> to ensure that the statutory obligations are observed. The courts have held that responsibility could not be validly delegated to:
  - a site manager, responsible for over 100 workers, who had received no health and safety training and whose level of salary indicated that “he did not have the necessary sufficient status and authority to be able to effectively ensure that the statutory provisions were respected;”<sup>36</sup>
  - a health and safety officer who had no power of authority over employees;<sup>37</sup>
  - a manager who was not in control of the payment of the invoices concerning the purchase of safety equipment, even though he or she had the authority to order the equipment;<sup>38</sup>
  - a manager who could not make decisions regarding who should be employed under him or her, even though he or she played a part in the pre-selection process.<sup>39</sup>
- **Specificity:** the delegation must be specific to the person. So a delegation which had been typed on a “standard document that was never adapted to the competencies, authority and profile” of the particular person was not considered appropriate;<sup>40</sup>
- **Clarity:** the delegation must be unambiguous;<sup>41</sup>
- **Proof:** there must be proof of delegation – though it need not be in writing;<sup>42</sup>
- **Autonomy:** the person to whom powers have been delegated must have autonomy in his or her decision-making powers – and any interference on the part of the head of the establishment will bring the delegation to an end. As it was stated in one case:

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<sup>35</sup> Cass Crim 11 March 1993 (4 judgments): Appeal no 90-84.931: Appeal No. 99-87.578, Ruling no. 3612: Appeal no 91-80.958..

<sup>36</sup> Cass Crim, 9 Nov 1988.

<sup>37</sup> Cass. Crim 11 Dec 1996.

<sup>38</sup> Cass. Crim 25 Jan 2000.

<sup>39</sup> Cass. Crim 25 Jan 2000.

<sup>40</sup> Cass Crim, 9 Nov 1988.

<sup>41</sup> Cass. Crim., 30 May 2000, 2<sup>nd</sup> Judgment.

<sup>42</sup> Cass. Crim. 39 May 2000, 2<sup>nd</sup> Judgment.



“An employee who has been delegated powers in occupational safety matters cannot be blamed for an error in his organisation and monitoring mission that has been entrusted to him, when the head of the establishment or one of his hierarchical superiors interferes in the carrying out of the tasks relating to that missions by removing the independent initiative inherent to any effective delegation.”<sup>43</sup>

It is permissible for sub-delegation to take place – but the same principles above of competence, authority, and resources would need to apply.<sup>44</sup>

## OFFENCES AND PENALTIES

The Labour Code states that the heads of establishment, senior managers, legal managers or their delegates<sup>45</sup> can be prosecuted, if by their “personal fault” they have violated any of the safety obligations set out in the Code.<sup>46</sup> In effect this means that either those designated as heads of establishment or those to whom responsibilities have been delegated can be prosecuted.

It should be noted that although the section states that there should be some “personal fault” on the part of the head of the establishment or his/her delegates, French judges have interpreted this broadly and the head of the establishment can be held liable for failing to personally ensure that rules are being complied with. His or her absence from the premises at the time of the incident is not considered a valid excuse as the courts have ruled that he should have delegated supervision in his or her absence.<sup>47</sup>

Those convicted can be sentenced to a fine of €3,750, which can be multiplied by the number of employees affected by the breach.<sup>48</sup> If the offence is repeated, the sanction will be doubled.<sup>49</sup>

In addition, the head of the establishment and any other individuals can be prosecuted for a number of offences under the penal code, which are specifically linked to “breach of an obligation of safety.”<sup>50</sup> The offence of ‘manslaughter’ is defined as:

“Causing the death of another person by clumsiness, negligence, carelessness, recklessness or breach of an obligation of safety or prudence imposed by statute or regulations, constitutes manslaughter punished by three years’ imprisonment and a fine of €45,000.

In the event of a deliberate violation of an obligation of safety or prudence imposed by statute or Regulations, the penalty is increased to five years’ imprisonment and to a fine of €75,000.”<sup>51</sup>

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<sup>43</sup> Cass. Soc 21 Nov 2000, Appel No 98-45420.

<sup>44</sup> A sub-delegation to a ‘team leader’ who was not informed about the sub-delegation and who was not granted appropriate authority, was not considered valid. Cass. Crim., 28 Jan. 1997.

<sup>45</sup> That is to say: “Les chefs d’établissement, directeurs, gérants ou préposés”.

<sup>46</sup> Labour Code, Art. L. 263-1. In relation to civil liability, the Chef d’établissement is held responsible for any violations on the part of “directeurs, gérants ou préposés”.

<sup>47</sup> See Cass. Crim, December 8 1987, no 87-83.595. Correspondence with Delon Bouquet (2005). Paris. Other people can also be prosecuted for breaching other. See Articles L-231-6, L-231-7, L-232-2, L-233-5-1, L-233-5-3 and L-233-7

<sup>48</sup> Art. L. 263-2: “The fine shall be applicable as many times as there are employees in the company who are affected by the breach or breaches noted in the official report ...”.

<sup>49</sup> Article L-263-2-3 of the Labour Code.

<sup>50</sup> An English version is at: [http://www.legifrance.gouv.fr/html/codes\\_traduits/code\\_penal\\_soman.htm](http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_soman.htm).

<sup>51</sup> Article 221-6 of the Criminal Code.

If serious injury rather than death results, the following offence will apply:

“Causing a total incapacity to work in excess of three months to another person through clumsiness, negligence, carelessness, recklessness or violation of a safety or prudence obligation imposed by statutes or regulations is punished by two years’ imprisonment and a fine of €30,000.”<sup>52</sup>

“In the event of a deliberate violation of a safety or prudence obligation imposed by statute or regulation the penalty to be imposed is increased to three years’ imprisonment and to a fine of €45,000.”<sup>53</sup>

When no injury has actually taken place, there is another offence of “endangering other persons.”

“The direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the manifestly deliberate violation of a specific obligation of safety or prudence imposed by any statute or regulation is punished by one year’s imprisonment and a fine of €15,000.”<sup>54</sup>

## ENFORCEMENT

Enforcement of the Labour Code is undertaken by inspectors employed by the Ministry of Labour.<sup>55</sup> If during the course of an inspection, an inspector finds “a dangerous situation resulting from non-compliance with the provisions in Article 230-2”, the Ministry may:

“give heads of establishments formal notice to take any necessary action to remedy this. This formal notice shall be given in writing and shall be signed and dated. It shall stipulate a deadline for completion taking account of any inherent difficulties. If, at the end of this period, the labour inspector notes that the dangerous situation has not been remedied, he may send an official report to the respective head of establishment, who shall then be subject to a penalty for a summary offence.”<sup>56</sup>

It is common in practice to require the changes to be made within one month. Recommendation does not itself have the power of law, but if it is not complied with, the inspector can then initiate proceedings. However, if the inspector considers the violation serious enough, proceedings can be initiated without having issued a recommendation.<sup>57</sup>

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<sup>52</sup> Article 222-19 of the Criminal Code. It should be noted that companies may be convicted of these two penal offences. See Article 221-7 and 222-21 of the Criminal Code. Companies cannot be convicted of breaches of the Labour Code.

<sup>53</sup> In addition, article 222-20 of the Criminal Code states that: “Causing a total incapacity to work of three months or less to another person by a deliberate violation of a safety or prudence obligation imposed by Statutes or Regulations, is punished by one year’s imprisonment and a fine of 15,000 Euro”. And Article 223-1 states that: “The direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the manifestly deliberate violation of a specific obligation of safety or prudence imposed by any statute or regulation is punished by one year’s imprisonment and a fine of 15,000 Euro.”

<sup>54</sup> 223-1 of the Criminal Code.

<sup>55</sup> This section is primarily based on an interview with the Department of Labour in France.

<sup>56</sup> L230-5 of the Labour Code.

<sup>57</sup> Another option is for an inspector to order that a workplace be closed down. In order to do this the inspector needs to obtain an order from a judge. This power is rarely used.

Proceedings are initiated by the inspector sending a report, called ‘minutes’, to the prosecutor.<sup>58</sup> This will contain the details of the violation, the inspector’s assessment, and any relevant employee comments.<sup>59</sup> The minutes will also contain information provided by the company, including the names of the head of the enterprise and that of any other person to whom safety responsibilities may have been delegated.<sup>60</sup> The inspector himself or herself will not investigate who is actually responsible for the violation – that is to say, whether the head of the establishment is the head of the enterprise or another individual.

The prosecutor will then look at the ‘minute’ and then decide whether or not to prosecute and, if so, send it to a judge of the tribunal.<sup>61</sup> It is then for the investigation judge to decide, on the basis of calling evidence, who should be held accountable – using the principles stated above.

If there is a death, there will be a different procedure. The police are likely to be the first to attend the scene and they will call an investigating magistrate. This magistrate will then conduct an investigation with the assistance of the police and the labour inspector. This information is then sent to the prosecutor in the form of a ‘minute’ and the prosecutor will then decide whether or not to prosecute. The matter will be sent to the tribunal in the same manner.

### **Level of Enforcement**

In 2003, the Ministry of Labour reports that 132 individuals received a warning, 428 were convicted of a first offence, 13 were convicted of a second offence, and 107 received either a prison or suspended sentence. One person received a professional ban. It is however not known how many of these individuals were directors or their equivalent, or senior managers.

### **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

It has not been possible to obtain reflections on the perceived effectiveness of the French system of duties and accountabilities.

## **ITALY<sup>62</sup>**

### **FORMS OF COMPANY AND CORPORATE ORGANISATION**

There are two main forms of company - the limited liability company known as an Srl<sup>63</sup> and a public limited company known as a SpA<sup>64</sup>. Both kinds of Companies in Italy are managed either

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<sup>58</sup> *It is unusual for inspectors to initiate prosecution in this matter – however, an inspector ‘will not hesitate to do so if he sees workers at risk’.* Lautard (2005).

<sup>59</sup> *It will not contain witness statements as such.*

<sup>60</sup> *The inspector will have written to the company to obtain these details.*

<sup>61</sup> *There is no need to provide reasons for decisions not to prosecute.*

<sup>62</sup> *Interviews and correspondence with the following people have assisted with the writing of this section: Dr Raffaele Guariniello (a prosecutor, Procura della Repubblica, Tribunale di Torino) and Giulio Andrea Tozzi, (Inspector from the Occupational Health and Safety Prevention Unit in Genoa).and Professor Gisella De Simone (University of Genoa).*

<sup>63</sup> *Known as ‘società a responsabilità limitata’.*

<sup>64</sup> *Known as ‘società per azioni’.*

by a sole director<sup>65</sup> or a board of directors.<sup>66</sup> If there is a board it must appoint a chairman who is considered to be the legal representative of the company, though this person does not necessarily have executive powers for the management of the company. The board of directors may delegate some of its powers to one of its members who becomes known as a managing director<sup>67</sup> or to an executive committee<sup>68</sup> composed of some of its members. In addition the board may appoint general managers<sup>69</sup> who are employees of the companies, but can also be members of the board.

## ORGANISATION OF OHS DUTIES

In Italy, the foundation of modern occupational health and safety law is the Italian constitution. This states that “health is a fundamental individual right and a social interest”<sup>70</sup> and that private economic enterprise “shall not be exercised contrary to the social good or in such a way to cause harm to safety, freedom and human dignity.”<sup>71</sup> This sets a high standard below which legislative obligations toward the safety of workers and others should not fall: there are no qualifications to the need to ensure safety.

The Civil Code – which sets out how companies should be established and organised - imposes a more specific obligation upon the entrepreneur;<sup>72</sup>

“the entrepreneur shall, in carrying out his business, adopt the measures which, in accordance with the particular nature of the work, experience and technology, are required for protecting the physical integrity and personality of the persons employed.”<sup>73</sup>

This duty can act as the foundation for both civil claims for compensation and, though more rarely, for a criminal prosecution when there has been an employer failure which has caused a death or injury which is not covered by duties set out in legislative and presidential decrees.

The third ‘level’ of occupational health and safety protection is provided by a series of presidential and legislative decrees, passed since the 1950s, which constitute a more detailed set of regulations.

It is in these decrees – the most important one being decree 626/94 which transposed into Italian law the European Commission Framework Directive and other specific directives<sup>74</sup> – that set out the more detailed and specific obligations which are imposed upon ‘employers’. Decree 626/94 is the principle source of health and safety obligations in Italy.<sup>75</sup>

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<sup>65</sup> Known as ‘*amministratore unico*’.

<sup>66</sup> Known as ‘*consiglio di amministrazione*’.

<sup>67</sup> Known as ‘*amministratore delegato*’.

<sup>68</sup> Known as ‘*comitato esecutivo*’.

<sup>69</sup> Known as ‘*direttori generali*’.

<sup>70</sup> Article 32 of the Constitution.

<sup>71</sup> Article 41 of the Constitution.

<sup>72</sup> Known as “*L'imprenditore*”. An entrepreneur is a person who engages professionally in a business activity for the purpose of production or exchange of goods or services. This term is wider than just ‘employer’.

<sup>73</sup> Article 2087 (unofficial translation).

<sup>74</sup> Directives on work equipment, work sites, visual display units, manual handling, personal protective equipment, explosive atmospheres, carcinogens, mutagens and biological and chemical agents.

<sup>75</sup> Other decrees include: DPR 303/56 (on occupational Hygiene as modified by DLgs 626). DPR 547/55 (on accident prevention as modified by DLgs 626); DPR 164/56 (construction safety); DLgs 277/91 (on noise and asbestos) DLgs

## Legislative Decree 626/94

Though this decree does impose duties upon senior managers<sup>76</sup> supervisors<sup>77</sup> and workers<sup>78</sup>, the principal duties are imposed upon the employer.<sup>79</sup> In most jurisdictions, when a business is incorporated, it is the legal entity of the company which is the employer. However in Italy, the ‘employer’ will never be a company but rather a natural person within it. The term ‘employer’ has a very specific definition and is:

“the party who holds labour relations with the worker or, at any rate, the party who (depending on the type of company and the way in which it is organised) has responsibility for the actual company or the productive unit ..., as the party in whom powers to make decisions and expenditure are invested.”<sup>80</sup>

The term ‘productive unit’ (mentioned in the paragraph above) is defined as a:

“plant or structure, endowed with financial and technical/functional autonomy, and having for its aim the production of goods and services.”<sup>81</sup>

It is important to note that the term ‘employer’ does not describe a person within the company who holds a particular title or occupies a particular post. Instead it describes a person who has *effective decision-making powers and control over financial resources relevant to the safety of the workers*. This person could be a board director or general manager (both of which would be officers of the company) or a senior manager.

Where a company has a number of productive units, a key question is whether the person deemed to be the employer is located at the company or at the productive unit (workplace) level – since the definition allows for both circumstances. This appears to depend upon the level of financial/technical autonomy that the workplace in question has from the rest of the company: the greater the autonomy of the ‘productive unit’ the more appropriate it would be for the employer to be located at that level. However it has been held that the unit must at least have its own separate budget that it manages. In fact, it is argued by some prosecutors that in order for the employer to be a person within the productive unit rather than at company level, the units must have ‘full autonomy’ as otherwise the natural person within the unit cannot be said to be a person within the

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494/96 (mobile sites) DLgs 493/1996 (OHS signals). The old presidential decrees (DPR) and the new legislative decrees (DLgs) are both laws with penal sanctions, at the same hierarchical level.

<sup>76</sup> Known as ‘dirigente’. In a large company, a person with particular technical expertise or a person in charge of a number of departments could be a dirigente, for example.

<sup>77</sup> Known as ‘preposto’. This person would be responsible for making sure workers abide by certain company rules. For example, ensuring that workers under him are wearing their personal protective equipment (Art 4(5)(d)). A failure to do so can result in prosecution (Article 91.) Although Article 4 of the Decree – an important article – is titled ‘Obligations of the employer, manager and supervisor’, as though these duties were imposed equally upon all of them, it is clear from the article itself that these are imposed upon the employer who nevertheless can delegate them to its management. Duties are also imposed upon: designers, manufacturers, suppliers and installers of work equipment (art. 6), and upon the physician dealing with health surveillance (art.17).

<sup>78</sup> Known as ‘Lavoratori’. See Article 4 of the decree.

<sup>79</sup> Known as ‘datore di lavoro’.

<sup>80</sup> Article 2(b) of title 1 of Legislative Decree 626/94.

<sup>81</sup> Article 2, (1) (i) of title 1 of Legislative Decree 626/94.

company with full decision or expenditure making powers.<sup>82</sup> Finding the person deemed to be ‘employer’ is often difficult in large companies.<sup>83</sup>

Where a company has highly autonomous productive units, it is likely that each unit will have within it a senior manager in control of budgetary and decision-making in relation to safety, who will be deemed to be the employer of that unit. However where a company has either (a) no separate productive units or (b) where the units do not have full, or at least significant, autonomy, the employer will then be considered to be a person at the corporate level. In the latter situation the ‘employer’ is likely to be a company director or general manager.<sup>84</sup>

In small or medium sized companies it is usually very straightforward to find out which is the person considered to be the ‘employer’ – it will almost always be the director or general manager. Where it is a large company with a number of different productive units, the inspector will have to decide on the level of autonomy of each unit. When the unit is largely autonomous, the employer will be the most senior person of that productive unit. This, of course, could be a director or general manager if one of them is based in that productive unit, but would be more likely to be a senior manager.<sup>85</sup>

## Delegating Responsibility

However, even assuming that a director or a general manager is considered to be an ‘employer’, it is still possible for him or her to delegate most of his or her responsibilities to senior managers (or indeed others) lower down in the management chain. However, the delegation by the employer is subject to a number of quite stringent conditions:<sup>86</sup>

- **Necessity:** the delegation must be necessary. “The transfer of functions must be justified on the basis of the company’s organisational needs.”<sup>87</sup> Delegation must not be used “in order to effect a sliding of responsibility downwards to the medium-low cadres of the organisation.... [Delegation] must be justified by the actual need for specialisation within the division of tasks and of rationalisation of productive activity.”<sup>88</sup> In relation to this, the size of the company may be a factor, as “prevalent case law tends to limit the possibility

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<sup>82</sup> Guariniello (2005).

<sup>83</sup> Tozzi (2005).

<sup>84</sup> The situation in relation to public bodies is different. Article 2(b) of Title 1 of Legislative Decree 626/94 states that the term employer, “refers to the executive with managerial powers or an official not categorised as an executive, but purely in cases where the latter is attached to a department with autonomous management (unofficial translation). This definition does not require the employer to have financial or decision-making powers – but instead to have day to day management responsibilities for the running of the operation. It appears to have been drafted to ensure that the most senior officials of public bodies would not be deemed employers: however, in practice, the courts have only rarely considered that the ‘executive with managerial powers’ is not the person with decision-making and budgetary powers. Guariniello (2005).

<sup>85</sup> Sometimes in large companies with complex structures it can be difficult to find out who is the employer. An inspector will often obtain copies of the company registration documents or the declaration to the Camera di Commercio Industria e Artigianato (CCIA) which will identify all the Board members with their duties. An inspector may also try and find out who signed the risk assessment document – since this is a document that should be signed by the ‘employer’. The documents should always be integrated with investigations into the actual decision making structure. Interview with Mr Tozzi.

<sup>86</sup> Interview with Guariniello (2005) and caselaw.

<sup>87</sup> Capone, Ruling No 26122, 15 July 2005, Corte di Cassazione. Unofficial translation.

<sup>88</sup> Carraturo, Court of Penal Cassation, Section III – Ruling no. 28126, 23 June 2004. Unofficial translation.

- of delegation to large size or at least medium-sized companies to that the employer is always held responsible in a family owned business.”<sup>89</sup>;
- **Explicit:** the delegation must be explicit and specific and free from any possibility of equivocation. “The existence of the delegation must be judicially proved beyond doubt;”<sup>90</sup>
  - **Clarity:** the clarity must set out clearly the obligations - the tasks and powers that are attributed to the person to whom the duties are delegated. The delegate must also fully understand the implications of this delegation;
  - **Competence:** responsibility cannot be delegated other than to a person with proven competence. “The delegate must be technically adequate and professionally qualified for the execution of his tasks;”<sup>91</sup>
  - **Autonomy:** this person must have full decision-making and financial autonomy. Delegation must consist of the “actual transfer of decision-making powers onto the delegate with the attribution of complete financial and managing autonomy.”<sup>92</sup> If an employer does not give enough money to the person to spend on safety, then the delegation will not be considered valid;<sup>93</sup>
  - **No knowledge of infringement:** the employer (who has delegated) must not be aware of any infringement on the part of the person to whom delegation has taken place, and if he does he has a responsibility to intervene as otherwise the responsibility will fall back on him or her. There must be “unawareness on the part of the delegating party of any negligence or subsequent inaptitude on the part of the delegate.”<sup>94</sup> In addition, the employer must not in any way induce any infringement or violation by the person to whom delegation has taken place;
  - **Supervision:** a system of control should be in place to ensure that the employer can be confident that the person to whom powers have been delegated, is carrying out his responsibilities adequately. Delegation “does not release the employer from the obligation to exercise control and vigilance as to whether the delegate is making actual use of the delegation.”<sup>95</sup> Where an employer has validly “delegated compliance of preventive norms upon others, he or she must exercise vigilance and control as to those norms being applied, complied with and caused to be complied with by the delegate. Specifically, the employer cannot deny liability by pleading ignorance of the failed adoption of safety precautions, since that very ignorance incriminates him or her as he or she has the duty to monitor both the adoption of work instruments implicitly endowed with safety precautions or devices, and the behaviour of the delegate who must make sure safety norms are respected. Even more significantly, in this particular case, the magistrates have held to these principles, noting that, owing to his visiting of the workplace and to the fact that he did in any case exercise a certain control over production, the defendant could not possibly have been unaware of failure to adopt the due safety precautions, bearing in mind, in any case, that such precautions had never been

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<sup>89</sup> Carraturo, Court of Penal Cassation, Section III – Ruling no. 28126, 23 June 2004. Unofficial translation, However some other decisions indicate that size is not such a decisive factor.

<sup>90</sup> Capone, Ruling No 26122, 15 July 2005, Corte di Cassazione. Unofficial translation.

<sup>91</sup> Capone, Ruling No 26122, 15 July 2005, Corte di Cassazione. Unofficial translation.

<sup>92</sup> Carraturo Court of Penal Cassation, Section III – Ruling no. 28126, 23 June 2004; and Marini, Court of Penal Casation, Section III, Ruling no. 12370 of 1 April 2005. Unofficial translation.

<sup>93</sup> So if 100 pairs of gloves are required, but there is only money for 50 or only enough money to buy 100 sub-standard gloves, the person responsible may well continue to be the employer.

<sup>94</sup> Marini, Court of Penal Cassation, Section III, Ruling no. 12370 of 1 April 2005, Unofficial translation.

<sup>95</sup> Capone, Court of Penal Cassation, Section III, Ruling no. 26122 of 15 July 2005, Unofficial translation.

adopted in the first place, which would make such violations and breaches very ‘gross’ indeed.”<sup>96</sup>

The required level of supervision is not spelt out clearly in jurisprudence, but the employer should be receiving reports and other information that can enable him to make a judgment about the success of the ‘delegate’. If, for example, a violation is detected and the senior manager (to whom responsibilities have been delegated) tells the inspector this is because he or she was not provided a sufficient safety budget, it may not be enough for the employer to say that the manager had not told him or her. There is a responsibility on the employer to be aware of this.<sup>97</sup>

Since the delegation must be explicit, unequivocal and certain, the courts have generally required that the delegation must be in writing. However, there are some judgments where an oral delegation has been considered adequate, provided that there were witnesses.<sup>98</sup>

In a situation where the board of directors has formally entrusted one of its members with the safety responsibilities and given him or her full spending powers and autonomy, criminal responsibility would rest with this person. The chairman of the board and other directors would only have joint responsibility if “they have maliciously omitted to exercise vigilance or being aware of facts that could prejudice the company or of the delegate’s inaptitude, omitted to intervene.”<sup>99</sup> However, in other cases, it has been held that whether other board members can remain immune from responsibility depends on the scope of the delegation they have given to the managing director: where for example, decisions had to be made that could only be made by the whole board, the other members of the board could be held responsible.<sup>100</sup>

However, the decree states that the employer can never delegate some obligations.<sup>101</sup> These are the:

- duty to carry out risk assessment;<sup>102</sup>
- duty to write a risk assessment report;<sup>103</sup>
- duty to certify in writing that a risk evaluation has been carried out and the appropriate preventative measures adopted;<sup>104</sup>
- duty to update the risk assessment document when changes in the process takes place;<sup>105</sup>

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<sup>96</sup> Niboil, *Criminal Court of Penal Cassation, Section IV, Ruling no. 24086 of 26 May 2004, Unofficial translation.*

<sup>97</sup> Tozzi (2005)

<sup>98</sup> For example, if a senior manager has acted for a long period as a delegate on safety matters, has accepted these tasks and others recognise him or her to have that role, documents may not be necessary to prove the delegation. Tozzi (2005).

<sup>99</sup> Marini, *Court of Penal Casation, Section III, Ruling no. 12370 of 1 April 2005. (unofficial translation)*

<sup>100</sup> *Op.cit.*

<sup>101</sup> Article 1(4)-ter, Legislative Decree 626/94.

<sup>102</sup> Article 4.1, Legislative Decree 626/94: “In relation to the type of activity carried out by the company or producer unit, the employer assesses all risks to the health and safety of workers, which includes those relating to groups of workers exposed to specific risks, as well as to the choice of work equipment and substances or chemical preparations used, and the arrangement of workplaces.” (Unofficial translation)

<sup>103</sup> Article 4.2 of Legislative Decree 626/94: “At the end of the assessment as mentioned in paragraph 1, the employer draws up a document containing: (a) a report on the assessment of risks to health and safety at work, in which the criteria used for the assessment itself are specified; (b) an identification of the measures concerning prevention and protection and the individual protection devices, subsequent to the assessment in section a); (c) the programme of measures deemed opportune to ensure the improvement of security levels over time”. (Unofficial translation)

<sup>104</sup> Article 4.11 of Legislative Decree 626/94. Applies to companies with ten or less employees and to ‘family enterprises’.

<sup>105</sup> Article 4.7 of Legislative Decree 626/94.



- duty to nominate a manager of the Protection and Prevention Services (RSPP);<sup>106</sup> and
- duty to consult worker representatives.<sup>107</sup>

It is also the case that certain activities can be delegated whilst others remain in the hands of the employer. So, a director may delegate certain safety responsibilities to a senior manager, and give him or her financial and decision-making autonomy in relation to those activities, but retain responsibility for others.

## Nature of Obligations upon the employer

The duties imposed upon those natural persons deemed to be employers are much the same as those obligations imposed upon companies, as employers, in Britain. For example:

- “1. In relation to the type of activity carried out by the company or producer unit, the employer assesses all risks to the health and safety of workers, which includes those relating to groups of workers exposed to specific risks, as well as to the choice of work equipment and substances or chemical preparations used, and the arrangement of workplaces.
2. At the end of the assessment as mentioned in paragraph 1, the employer draws up a document containing:
  - (a) A report on the assessment of risks to health and safety at work, in which the criteria used for the assessment itself are specified;
  - (b) An identification of the measures concerning prevention and protection and the individual protection devices, subsequent to the assessment in section a);
  - (c) The programme of measures deemed opportune to ensure the improvement of security levels over time.
5. The employer uses the measures needed to ensure the health and safety of workers, and in particular:
  - (a) Appoints in advance workers responsible for implementing measures concerning fire prevention, firefighting, the evacuation of workers in the event of serious and immediate danger, rescue, first aid and also emergency management;
  - (b) Updates prevention measures relating to organisational and production changes that are important for the purposes of health and safety at work, or in relation to the degree of technical development, prevention and protection;
  - (c) In entrusting tasks to workers takes into account their capabilities and conditions in relation to their health and safety;
  - (d) Provides workers with the necessary and suitable individual protection devices, having heard the protection and prevention service manager’s opinion;
  - (e) Takes the appropriate measures so that only those workers that have received suitable instructions access the areas that expose them to a serious and specific risk; ...
  - (h) Adopts measures to control risk situations in the event of emergency and gives instructions so that workers will abandon their work station or dangerous area in the event of serious, immediate and inevitable danger;

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<sup>106</sup> Article 4.4a of Legislative Decree 626/94.

<sup>107</sup> Article 4.6 of Legislative Decree 626/94.

- (i) Informs as quickly as possible those workers exposed to the risk of serious and immediate danger about the risk itself and the provisions taken or to be taken in terms of protection...”

However it is important to note that these duties must be complied with to the ‘maximum level of safety as is technologically possible.’<sup>108</sup>

## OFFENCES

The employer can be prosecuted for three different categories of violations under the Decree.

- The first category concerns violations of duties that only the employer can contravene.<sup>109</sup> Some of these are the non-delegable duties mentioned above: so only the employer can be prosecuted for (a) failing to draw up a report on the assessment of risk and any prevention measures to be taken, and (b) failing to appoint a protection and prevention services manager. In addition only employers can be prosecuted for breaches of a number of different provisions<sup>110</sup>. Conviction for these offences can result in imprisonment of between three to six months or with a fine of €1,549 – 4,131 Euro.
- The second category of offences can be committed by both the employer and the senior manager – though the senior manager will only be prosecuted for these offences if the employer has properly delegated these responsibilities to him or her. Conviction for one category of these offences can result in the same level of sentence as above; in the next category conviction can result in imprisonment of between two to four months or with a fine of one to five million Lira; and in the final category, with just a fine of between €258 and €1,032.
- In addition there is a category of few violations that can result in either the employer or the manager having to pay an administrative fine to the inspector of between €516 to €3,098.

In other legislative decrees, more severe sanctions exist. For example in DLgs 277/91, failures relating to asbestos risks can result in fines of between €5,164 to €25,822 or 3-6 months imprisonment. DLgs 626 allows a person deemed to be a manufacturer to be sentenced to be fined between €7,746-€30,986 Euro or to be imprisoned for up to six months. Physicians may be sentenced to be fined up to 1-6 million lira or 2 months of imprisonment.

There are in addition a number of penal code provisions. The offence of ‘unpremeditated homicide’ states that:

“Whoever by negligence causes the death of a person shall be punished by imprisonment for a period ranging from six months to five years.

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<sup>108</sup> This standard is not articulated with specificity in the decree but is founded upon two articles in Legislative Decree 626/94 and is supported by case-law. Article 3(1)(b) states that one of the overall measures concerning the health and safety of workers are “eliminating risks relating to knowledge acquired on the basis of technical progress and where this is not possible, reducing them to a minimum”. Article 4(5)(b) requires the employer to update “prevention measures relating to organisations and production changes that are important for the purposes of health and safety at work, or in relation to the degree of technical development, prevention and protection”.

<sup>109</sup> Article 89(1) of Legislative Decree 626/94.

<sup>110</sup> Breach of the following provisions: Articles 63(1, 4, 5) 69 (5a), 78(3, 5) and 86 (2-ter)f of Legislative Decree 626/94

If the act was committed by violating the rules governing road traffic or those for the prevention of industrial accidents, the punishment shall be imprisonment for from one to five years.

In the event of the death of more than one person or of the death of one or more persons and personal injury to one or more persons, the punishment applied shall be that which should be inflicted for the most serious violation committed increased by up to one third, but this punishment may not exceed twelve years.”<sup>111</sup>

Where there has been an injury rather than a death, there is a separate offence:

“Whoever by negligence causes personal injury to another shall be punished by imprisonment for up to three months or by a fine of up to €309.

If the injury is serious the punishment shall be imprisonment for from one to six months or a fine of from €123 to €619; if it is very serious, imprisonment for from three months to two years or a fine of from €309 to €1239.

If the acts in the preceding paragraph were committed by violating the rules governing road traffic or those for the prevention of industrial accidents, the punishment for serious injury would be imprisonment for from two to six months or a fine of from €206 to €619; and the punishment for very serious injury shall be imprisonment for between six months and two years or a fine from €619 to €1,239.

In the event of injury to more than one person, the punishment applied shall be that which should be inflicted for the most serious violation committed, increased by up to one third; but this punishment of imprisonment may not exceed five years.

In the case designated in the first paragraph of this article, the offender shall be punished on complaint of the victim.”<sup>112</sup>

It also states that in case of a *severe* or *very severe* injury as a result of an occupational accident or an occupational disease, resulting from an infringement of the safety regulations the prosecutor has to act even if the victim can not or doesn't want to complain.

## ENFORCEMENT

Most enforcement of the legislative decrees is undertaken by over 320 ASLs<sup>113</sup> which are local agencies of the National Health Service and are organised at regional governmental level.<sup>114</sup> Each

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<sup>111</sup> Article 589 of the penal code.

<sup>112</sup> Article 590 of the penal code. The infringement of art. 2087 of the Civil Code can be used to prosecute without the victim complains” There is in addition Article 451 of the penal code - ‘omission of precautions or safeguards against industrial accident or disasters’. This states that: “Whoever, through negligence, fails to install, or removes or renders unserviceable the apparatus or other devices designed for extinguishing fires, or for rescue or relief in cases of industrial accident or disaster, shall be punished by imprisonment for up to one year and by a fine of from 40,000 to 200,000 lire.”

<sup>113</sup> An ASL stands for Aziende Sanitarie Locali.

<sup>114</sup> See Legislative Decree. 833/1978. There are 20 regions and 2 autonomous provinces (Bolzano and Trento).

ASL covers districts of 100-700,000 inhabitants.<sup>115</sup> Some enforcement responsibilities also remain with the Labour Inspectorate.<sup>116</sup> The ASL inspector is considered to be a judicial police officer<sup>117</sup> with special powers to investigate suspected criminal offences.

Details of any violation identified by the inspector must be sent to the prosecutor for prosecution. However, prosecution can be deferred by the inspector issuing a prescription<sup>118</sup> which is a document that sets out “specific measures” that should be adopted by the employer “to stop the danger for the health and safety of workers during work.”<sup>119</sup> The inspector should set a time by which the changes should be made, which should be a period “not exceeding the period of time technically necessary.”<sup>120</sup> The ASL must immediately inform the prosecutor that a prescription has been issued and as a result the criminal procedure will be temporarily deferred. The prosecution process only comes to an end if the measures are adopted and the employer pays one quarter of the maximum fine available for the offence.<sup>121</sup> Most prescriptions are complied with.<sup>122</sup>

The prosecutions that proceed take place in the ordinary criminal courts<sup>123</sup> and are usually undertaken by a dedicated set of prosecutors who only deal with these (and other unpremeditated) kinds of offences. There are no details published of the number of prosecutions against employers throughout Italy. In one region, however, in 1999, inspectors identified 8,239 infringements – 88% of which were rectified. A total of €4,440,000 was obtained in fines.<sup>124</sup>

## PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE

We have not been able to obtain any information on the perceived benefits of the legislative structure in Italy.

## SWEDEN<sup>125</sup>

### FORMS OF COMPANY AND CORPORATE ORGANISATION

There are a number of different types of companies in Swedish law.

- Trading or Limited Partnership companies: These are companies which exist as soon as an agreement has been made between two or more parties to carry on business in the form of a

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<sup>115</sup> *In each ASL there are medical care, prevention and rehabilitation services. The prevention department is divided into four specialized units, Public Hygiene, Veterinary, Foodstuff Hygiene, Occupational Health and Safety (OHS). OHS personnel is about 0.3 to 1.4% of the overall Health personnel at regional level.*

<sup>116</sup> *Labour Inspectorate has responsibility for enforcing construction safety, but in co-ordination with ASLs. Both, ASL and Lab inspectors, enforce construction safety, often together.*

<sup>117</sup> *Ufficiale di polizia giudiziaria (UPG).*

<sup>118</sup> *Prescrizione.*

<sup>119</sup> *The procedure is set out in detail in the decree, DLgs 758/94.*

<sup>120</sup> *This must not be more than six months.*

<sup>121</sup> *The head of the regional prevention department also has the power to prescribe measures that are not completely defined by law (Disposizione) – however the employer then can appeal this to the president of the Regional Government.*

<sup>122</sup> *Tozzi (2005).*

<sup>123</sup> *Tribunale, Procura della Repubblica presso il Tribunale.*

<sup>124</sup> *Tozzi (2005).*

<sup>125</sup> *Interviews and correspondence with the following individuals have provided some of the background research for this section. Ralph Perlman and Maria Steinberg (Work Environment Authority), Jonas Wiberg (trade union) and Philippe De Baets, an academic.*

company. These companies can have a board, but are usually managed by the partners without the constitution of a special board. Each partner is considered to represent the company.

- Cooperative associations:<sup>126</sup> There must be at least three ‘members’, and the organisation and administration of the association is undertaken by a board of directors. The board can appoint a managing director, which is usually done when the number of employees exceeds 200.
- Limited liability companies:<sup>127</sup> this is the most common form of company in Sweden. There are two types – public and private. They must have a board of at least three members who may appoint a managing director<sup>128</sup> (who may or may not be a board member) to handle the day to day administration of the company.<sup>129</sup> One of the members of the board shall be elected as chairman.<sup>130</sup>

## ORGANISATION OF OHS DUTIES

The Work Environment Act 1977,<sup>131</sup> the Work Environment Ordinance, and the ‘Provisions’<sup>132</sup> – set out the health and safety law in Sweden. This legislation imposes duties upon a number of different actors<sup>133</sup> but the principal obligations are, however, placed upon the ‘employer’ who in relation to an incorporated business, will be the legal entity of the relevant company. The Act itself for example, states:

“2. The employer shall take all the precautions necessary to prevent the employee from being exposed to ill-health or accidents.

The employer shall consider the special risk of ill-health and accidents which can be entailed by an employee working alone.

Facilities, as well as machinery, implements, safety equipment and other technical devices, shall be kept in a good state of repair.

- 2a. The employer shall systematically plan, direct and control activities in a manner which leads to the working environment meeting the requirements of this Act and of Provisions issued by authority of the same. He shall investigate work injuries, continuously investigate the hazards of the activity and take the measures thus prompted. Measures which cannot be taken immediately shall be timetabled.

To the extent which the activity requires, the employer shall document the working environment and measures to improve the same. Action plans shall be drawn up in this connection. ...

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<sup>126</sup> Known as ‘*Ekonomisk forening*’.

<sup>127</sup> Swedish Companies Act 1975.

<sup>128</sup> Known as *Verkstallanda Direktor*.

<sup>129</sup> Para 6, Swedish Companies Act 1975.

<sup>130</sup> Para 8, Swedish Companies Act 1975.

<sup>131</sup> <http://www.av.se/english/legislation/legislation.shtm>.

<sup>132</sup> Note that ‘provisions’ here means something akin to ‘regulations’ in Britain – they are created by the Work Environment Authority (WEA).

<sup>133</sup> This includes, for example, manufacturers importers, and suppliers.

3. The employer shall ensure that the employee acquires a sound knowledge of the conditions in which work is conducted and that he is informed of the hazards which the work may entail. The employer shall make sure that the employee has received the training necessary and that he knows what measures shall be taken for the avoidance of risks in the work.

The employer shall make allowance for the employee's special aptitudes for the work by modifying working conditions or taking other appropriate measures. In the planning and arrangement of work, due regard shall be paid to the fact that individual persons have differing aptitudes for the tasks involved.”

### **Duties upon ‘highest manager’**

Although these duties are formally placed upon companies as employers, this duty is in practice placed upon the most senior manager within the company. Caselaw states that:

“The employer’s responsibility for the work environment is borne primarily by the highest manager i.e. in a limited company usually by its Managing Director.”<sup>134</sup>

The term ‘managing director’ can refer to a board member – but in practice it is usually the most senior employee within the company appointed by the board.

The imposition of the duties upon the ‘managing director’ is not something apparent from the Act itself – but instead is a principle developed from the preparatory documents concerned with the enactment of the legislation and subsequently through caselaw.<sup>135</sup>

### **Delegation**

The caselaw indicates however that the responsibility of the highest manager can be delegated to others within the company – though it states that there are a number of conditions for this delegation to be valid:

- There must be a ‘need’ for the delegation:

“In accordance with expert legal practice, that responsibility can be delegated if there is a clear need for this to happen. Such a need can be that delegation aims to fulfil the employer’s work environment responsibility in a better way by transferring the decision-making responsibility and sufficient decision-making authority to someone who has a more direct responsibility for a workplace.”<sup>136</sup>

- The person to whom safety is delegated must have certain characteristics:

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<sup>134</sup> Case no B 3184-03, NJA 2004 s.126. (unofficial translation). In relation to a municipality, the top manager would be the director general, and for a school, the headteacher (Wiberg, 2005(a)).

<sup>135</sup> This principle has developed in this way since Swedish law does not allow companies to be prosecuted.

<sup>136</sup> Case no A: 93-06-03, NJA 1993 S.245 (unofficial translation). This requirement is common to the principle of delegation in France and Italy as well.

“Such a person must also have requisite training and competence for the assignments and have a relatively independent position.”<sup>137</sup>

- There must be clarity of delegation:

“A condition for a valid delegation to exist, however, is also that the delegation clearly shows the scope of the responsibility delegated and to whom that responsibility is delegated. The requirement that a delegation must be clear does not, however, mean that a particular legal form has to be established as to how a delegation must be worded to be valid.”<sup>138</sup>

The lower down in the organisation that delegation takes place, the greater the clarity required.

“It is the nature of the case that this clarification requirement is invoked with the greatest of emphasis the further down the decision chain the delegation takes place.”<sup>139</sup>

However at the same time “subordinate post holders may however have a certain responsibility for safety at the workplace even if it is without being expressly delegated if it goes with their work assignments or position”.<sup>140</sup>

These conditions appear to have been systematised in a recent amendment to the Provision on Systematic Work Environment Management.

“The employer shall allocate the tasks in the activity in such a way that one or more managers, supervisors or other employees are tasked with working for the prevention of risks at work and the achievement of a satisfactory working environment. The employer shall see to it that the persons allotted these tasks are sufficient in number and have the authority and the resources that are needed. The employer shall also see to it that they have sufficient knowledge of;

- rules material to the working environment
- physical, psychological and social conditions implying risks of accidents and ill health
- measures to prevent ill health and accidents, and
- working conditions conducive to a satisfactory working environment

The employer shall see to it that those allotted the tasks have sufficient competence for the conduct of a well functioning systematic work environment management”.<sup>141</sup>

Guidance on this states:

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<sup>137</sup> *Op. Cit.*

<sup>138</sup> *Op. Cit.*

<sup>139</sup> *Case no B4771, NJA 2004 s.34 (unofficial translation).*

<sup>140</sup> *Op. Cit.*

<sup>141</sup> *Section 6. Statute Book of the Swedish Work Environment Authority, AFS 2003:4.*

“It is incumbent on the employer’s top management to commence the allocation of tasks. Usually the management entrusts tasks to senior executives within the organisation. They in turn can allocate the tasks further if empowered to do so by their respective superiors.”<sup>142</sup>

If delegation has taken place to a person without sufficient resources, authority, competence or without sufficient knowledge of the issues mentioned above, responsibility will remain with the highest manager. The guidance to the provisions states that:

“The allocation of tasks does not mean that the person incurring tasks will be automatically punished in the event of a work accident or a work-related illness. ... If an accident leads to prosecution and court proceedings, the court’s assessment can to a great extent hinge on whether the accused has sufficient knowledge, powers and resources for his or her tasks.”<sup>143</sup>

In addition, the senior manager continues to have supervisory duties:

“However, it always remains the duty of the employer’s top management to continuously verify that the allocation of tasks is working in practice and if necessary to revise it. The existing allocation of tasks may need to be revised, for example, if new hazards appear in the work environment or the operation is reorganised or substantially changed.”

A recent case, which focuses on the need for clarity in delegation, is useful in understanding how the courts assess whether or not delegation has taken place in an appropriate manner.<sup>144</sup> It concerned an employee at a parquet factory who in December 1999 trapped and injured her hand whilst cleaning a gluing machine. Another incident, with less serious consequences, had happened six months previously at the same machine in similar circumstances. A person referred to as HN was site manager at the factory, and he had been found guilty in a lower court. The question before the Supreme Court was whether he could appeal.

The court decided that the managing director of the company had in effect delegated responsibility to HN, even though there was no document in writing to that effect, on the basis that he was the most senior manager of the factory with day to day management responsibility.

“The first issue of the case is who will be considered to have primarily borne the employer’s work environment responsibility at the parquet factory in Tibro. HN has at the Supreme Court contested that this responsibility was delegated to him by the company management. The report in the case showed that no express delegation order, verbal or written, existed in the company. HN was thus the manager of the factory

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<sup>142</sup> WEA (2005), ‘Work Environment Responsibility and penal liability - two quite different things’ (draft translation by the WEA).

<sup>143</sup> Also see other guidance given by WEA: “If, on the other hand, the question of penal liability arises, this is apportioned after the event by the courts. .... In such cases the courts often consult the internal division of labour, but if that division has been wrongly affected they can disregard it. Wrongful allocation occurs, for example, if tasks are allocated unaccompanied by the powers and resources that are needed, or again if a task is given to someone who is not competent to perform it or if sufficient information and instruction are not provided.” Official commentary on Chapter 3 of the Act, p.36.

<sup>144</sup> B-3184-03, NJA 2004 s.126, (Unofficial translation). The case did not deal with the questions of authority, independence and, competence.



directly subordinate to Forbo Forshaga's Managing Director. The latter was, together with the company's management, stationed at the company's main office in Gothenburg. Regarding the fact that HN was evidently responsible for the day-to-day management at the parquet factory in Tibro, and that he was the highest salaried manager at the factory, the work environment responsibility at the factory may be considered to have been delegated by the company management to HN on the basis of the latter's position."

HN further argued that he had in any case delegated safety responsibilities to LD – a technical manager at the factory – though there had been no written or verbal delegation to this effect. LD himself did accept that he had some safety responsibilities but it was limited to issues relating to the purchasing, installation and maintenance of the machines, and that it was not he but a more junior manager who was responsible for the safety of the machines regarding their use and the instructions. The court ruled that:

"With the lack of any expressly written or verbal delegation order in the company, it must be maintained that uncertainty prevailed as to whether LD had further responsibility for the employer's work environment assignments than he himself confirmed. Of decisive significance to the issue of whether delegation with the effect of discharging HN had taken place is then whether it has been clarified in the case that there were shortcomings in the work environment that cannot be attributed to such considerations and measures with regard to the purchasing, installation and maintenance of the work machines for which it may be considered to be apparent that LD was responsible".

Having found that lack of proper instruction to employees was the cause of the incident, the court ruled that HN had not delegated this part of his safety responsibility. It went on to conclude:

"The case shows that after a holiday, HN found out about the accident on 29 July 1999 and that he without further investigation relied on the fact that LD or someone else would take the required measures. Since HN failed to ensure that suitable safety measures were taken to prevent new accidents, he may be considered to have been negligent. This negligence has caused MP's bodily harm which is why HN will be found guilty of work environment crime."

## **Employees**

Employees also have duties under the Act and the guidance to the Act makes clear that this applies to employed directors (as well as to other employees). The duty on employees is as follows:

"The employee shall assist in work relating to the working environment and shall take part in the implementation of the measures needed in order to achieve a good working environment. He shall comply with Provisions issued and use the safety devices and exercise such other precautions as are needed for the prevention of ill-health and accidents.

An employee finding that work entails an immediate and serious danger to life or health shall immediately notify the employer or a safety delegate. The employee cannot be held

liable for any damage resulting from his non-performance of work pending instructions regarding its resumption.”<sup>145</sup>

The official commentary, however, explicitly states that the section imposing duties upon employees applies to managing directors of companies:

“If the employer is a juristic person, all workers are deemed to be employees. This also applies to managers and supervisory staff, such as the managing director of a limited company or the chief executive officer in a municipality. Persons employed in their own limited companies also count as employees.”

Managing directors can be prosecuted for breaching this section<sup>146</sup> but it appears that no managing director has been prosecuted in this way.<sup>147</sup>

## **OFFENCES**

### **Work Environment Act**

A violation of the general duties under the Act are not offences in themselves. It is only when there has been ‘intentional’ or ‘negligent’ non-compliance with an ‘injunction’ or ‘prohibition’ imposed by an inspector from the Work Environment Authority that a prosecution can take place.

There are certain violations that can result in a prosecution without an injunction or prohibition being imposed – employing a minor, providing the WEA with incorrect information, removing a safety device or rendering it inoperative.<sup>148</sup>

### **Penal code offences**

The Penal Code also contains a number of offences concerned with the causing of death and injury, or exposing people to the risk of death. Section 7 of chapter 3 of the Penal Code states that:

“A person who through carelessness causes the death of another shall be sentenced for causing another's death to imprisonment for at most two years or, if the crime is petty, to a fine. If the crime is gross, imprisonment shall be imposed for at least six months and at most six years. ...”

If there has only been an injury, section 8 of the chapter applies:

“A person who through carelessness causes another to suffer bodily injury or illness not of a petty nature, shall be sentenced for causing bodily injury or illness to a fine or imprisonment for at most six months.

If the crime is gross, imprisonment for at most four years shall be imposed. ...”<sup>149</sup>

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<sup>145</sup> Section 4 of the Act.

<sup>146</sup> Perlman (2005).

<sup>147</sup> Steinberg (2005). The section was not intended for managing directors but for ordinary employees.

<sup>148</sup> Chapter 8, section 2 of the penal code.

And when the person has neither died nor been injured but exposed to a risk of death, section 9 of the chapter applies:

“A person who through gross carelessness exposes another to mortal danger or danger of severe bodily injury or serious illness, shall be sentenced for creating danger to another to a fine or imprisonment for at most two years.”

What is particularly interesting about these offences is that the Penal Code specifically indicates that these offences may be applied [committed?] in a work-related situation. Section 10 of the chapter states:

“Where a crime referred to in Sections 7 - 9 has been committed by a person with intent or by carelessly neglecting his duty under the Work Environment Act (1977:1160) to prevent sickness or accidents, the punishment shall be for an environmental offence and as provided for in the said provisions”.

This simply appears to mean that when one of these penal law offences are committed following a workplace death or injury, it will be called an “environmental offence”.

## ENFORCEMENT

Responsibility for the enforcement of this legislation lies with the Work Environment Inspectorate of the Work Environment Authority (WEA).<sup>150</sup> If in the course of an inspection or investigation, a WEA identifies breaches of the Act or Provisions (issued under the Act's authority), the WEA can issue a notice requiring the employer to take certain action within a specified period of time, and to inform it about what improvements have been made.<sup>151</sup> If the employer does not comply with the notice, the WEA can issue an order to the company containing binding requirements. This order might be an ‘injunction’ (requiring further measures to be taken) or a ‘prohibition’ (preventing the use of machine or facility unless particular action is taken).<sup>152</sup> When imposing one of these orders, the WEA can set a ‘contingent fine’ – a maximum of 10 million Swedish Crowns - which can be exacted if the injunction/prohibition has not been complied with.<sup>153</sup>

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<sup>149</sup> If the crime is not of a serious nature, prosecution will only take place if the injured party reports the crime for prosecution and a prosecution is called for in the public interest (section 12). This is similar to the situation in Germany.

<sup>150</sup> The Work Environment Authority was formed in 2001 by merging of the National Board of Occupational Safety and Health, and the Labour Inspectorate.

<sup>151</sup> The requirements contained in an inspection notice are not formally binding, but they do express the supervisory authority's assessment of what needs to be done to improve the work environment.

<sup>152</sup> Section 7 of Chapter 7. To read the process, see p.2 of the document “Work Environment responsibility and penal liability - two quite different things”. This decision can be appealed.

<sup>153</sup> This would be instead of a prosecution. The level of the contingent fine is gauged according to the cost of carrying out the measures concerned and the amount judged necessary to prevail upon the employer to take them. A County administrative court can, at the request of the WEA, order the employer to pay all or part of the fine. No evidence of negligence is required. This is usually imposed upon companies and are larger than any penalty that might be imposed against an individual (see commentary). In 2001, there were 11,519 inspection reports with warning notices, 13 injunctions (with penalties), 274 injunctions with penalty, 111 prohibitions without penalty, 122 prohibitions with penalty. In 2002, contingent fines were actually imposed on 30 occasions.

It is only when there has been ‘intentional’ or ‘negligent’<sup>154</sup> non-compliance with an injunction or prohibition that a prosecution against one or more of the employer’s representatives can take place.<sup>155</sup> Companies cannot be prosecuted under Swedish law – and as a result prosecution of a legal representative (a natural person), or a person to whom powers have been delegated, will be prosecuted. Conviction can result in an unlimited fine (linked to the income of the person) or a sentence of imprisonment for not more than one year.<sup>156</sup>

### **Who to prosecute?**

Because of the delegation conditions, the person allocated tasks will not automatically be the person prosecuted. The WEA sums the position up in the following manner:

“If the accident leads to prosecution and court proceedings, it can make a big difference to the court’s assessment whether the accused had sufficient competence and sufficient knowledge, powers and resources for his duties. The court must decide whether the tasks of the accused are matched by sufficient powers, resources and knowledge. In order for punishment to be possible, the accused must also have a position of independence in relation to the employer, there must be a need for allocation of tasks within the organisation and the allocation must be clear. If, on the other hand, only one person is prosecuted and the court finds that person not to have had sufficient knowledge for the duties, an acquittal will follow.”<sup>157</sup>

### **Levels of Enforcement**

In 2002, the WEA report that a total of 44 people were convicted and received either a fine or suspended sentence. These people were in one of the following positions: supervisor, assistant director of training, head of loading staff, head of production department, factory manager, removal worker, group leader, head of high school, proprietor of a firm, machine supervisor, site manager, production supervisor, production manager, safety manager, proxy for a limited company, issuer of testimonial and a managing director.<sup>158</sup>

In 2001 the WEA reported 167 incidents to the police.<sup>159</sup>

### **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

We were unable to obtain any information about this.

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<sup>154</sup> Negligence usually means that one or more persons “have omitted to take the measures which could have prevented the injury”

<sup>155</sup> Section 1, chapter 8. Therefore a failure to comply with the employer’s general obligation in Chapter 3, section 2 and 2a of the Work Environment Act and the provision on Systematic Work Environment Management – both set out above - do not have any direct penal criminal consequences.

<sup>156</sup> No one has ever been imprisoned for this offence. Steinberg (2005). In 2002 44 people were convicted of offences. WEA offences are prosecuted in either an administrative court or, if it is a state employer, a public court.

<sup>157</sup> WEA (2005), ‘Work Environment Responsibility and penal liability - two quite different things’ (draft translation by the WEA). P.7.

<sup>158</sup> Op. Cit

<sup>159</sup> WEA report to Senior Labour Inspectors Committee, 2001

## JAPAN<sup>160</sup>

### FORMS OF COMPANY AND COMPANY MANAGEMENT

There are two main kinds of companies in Japan; the limited liability corporation<sup>161</sup> and the general corporation<sup>162</sup> - the latter can sell shares on the open market. They must have at least three directors who are responsible for the management of the company.

### FRAMEWORK OF OHS DUTIES

The Industrial Safety and Health Law 1972 (the 1972 Law) sets out the main health and safety responsibilities. It imposes duties upon employers, manufacturers and those who commission work, amongst others. Article 3, for example, states:

1. “The employer shall not only comply with the minimum standards for preventing industrial accidents provided for in this Law, but also endeavor to ensure the safety and health of workers in workplaces through the materialization of a comfortable working environment and the improvement of working conditions. He shall, furthermore, endeavor to cooperate in the measures for the prevention of industrial accidents to be taken by the Government.
2. A person who designs, manufactures or imports machines, instruments and other equipment, or one who manufactures or imports raw materials, or one who constructs or designs buildings, shall endeavor, in designing, manufacturing, importing or constructing these, to contribute to the prevention of the occurrence of industrial accidents caused by their utilization.
3. A person who commissions work such as construction work to others or one who places an order for the execution of such work by others shall not impose on the commissionee conditions which could impede the safe and health execution of the work, in determining the commissioning conditions, such as the work execution procedure or the period of the work.”

When the employer, manufacturer etc are incorporated businesses, these duties will be placed upon the company.

#### Duty on General Manager

In addition to these duties, Article 10 of the 1972 Act requires employers involved in businesses of certain sizes to appoint a General Safety and Health Manager<sup>163</sup> (GSHM) for each workplace. A GSHM must be appointed for the following workplaces:

- those employing 100 or more workers in the following industries: forestry, mining, construction, transportation and cleaning industries;

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<sup>160</sup> Correspondence and interviews with Mr. H. Goto, Senior Director for International Affairs, Japan Industrial Safety and Health Association (JISHA) has provided some of the background research for this section final report

<sup>161</sup> Known as ‘Yugen Gaisha’. This is established by the Yugen Gaisha law.

<sup>162</sup> Known as ‘Kabushiki Kaisha’. This is established by the Commercial Code

<sup>163</sup> Known as ‘soukatsu-anzen-eisei-kanrisha’.

- those employing 300 or more workers in the industries that include Manufacturing, electricity gas, heat supply, waterworks, communications, wholesaling and retailing;
- all those with 1000 or more workers.<sup>164</sup>

The person appointed should be the “person who exercises overall management over the execution of the undertaking at the workplace concerned”. In a small company this could be the company director, but alternatively will be the senior most manager of the relevant workplace - “the person in charge of the factory.”<sup>165</sup> the plant manager or branch manager, depending on the workplace.

The GSHM has the responsibility for directing the work of “safety officers, health officers or persons in charge of management of technical matters,”<sup>166</sup> and also have “overall management of the following matters

- (1) matters pertaining to measures for the prevention of the hazards or health impairment of workers;
- (2) matters pertaining to the provision of education on the safety and health of workers;
- (3) matters pertaining to the medical examination, the maintenance and the promotion of the health of workers;
- (4) matters pertaining to the investigation of the causes of industrial accidents and the measures for preventing the recurrence of such accidents; and
- (5) apart from the above-stated, such services necessary for preventing industrial accidents as may be provided by Ministry of Health, Labour and Welfare Ordinance.

The GSHM shall be the chair of the company’s Safety Committee<sup>167</sup> and a Health Committee<sup>168</sup> and in effect is responsible for ensuring that the duties imposed upon the employer are complied with.

## THE OFFENCE

If the GSHM “violates” the duties set out in article 10 he or she can be prosecuted with a fine not exceeding 300,000 yen.<sup>169</sup> It is not necessary to show negligence.

The penal code also contains the offences of manslaughter and grievous bodily harm

## ENFORCEMENT

The Labour Standards Inspection Agency is responsible for the enforcement of the Occupational Safety and Health law. Prosecution of GSHMs are not common, and the “emphasis in Japan is on preventative inspection and fixing the problem.” Prosecutions of GSHMs are more likely to take

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<sup>164</sup> As set out in article 2 and 3 of the Enforcement Order of the Industrial Safety and Health Law.

<sup>165</sup> Goto (2005).

<sup>166</sup> The Act requires the appointment, depending on the circumstances, of a number of other individuals to positions; a safety officers, a health officer, a Safety and Health promoter, an industrial physician, an Operations Chief (where there is a particular dangerous hazard) an Overall Safety and Health Controller (where there is a contractor on site), a Master Safety and Health Supervisor, a Site Safety and Health Supervisor, and a Safety and Health controller.(see section 11-16 of the Act.).

<sup>167</sup> Article 17 of the Act.

<sup>168</sup> Article 18 of the Act.

<sup>169</sup> Equivalent to 22,000 Euro.

place if he or she has failed to rectify the situation or after a death has taken place. However, it is more likely in Japan for the deceased's immediate supervisor to be prosecuted than the GHSM.

## **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

The regulator spoken to said that he thought it was a good thing to have a person high up in the company with specific responsibilities.<sup>170</sup>

## **SOUTH AUSTRALIA, AUSTRALIA**

### **LEGAL FRAMEWORK OF OHS DUTIES**

The Occupational Health, Safety and Welfare Act 1986 (1986 Act) imposes duties upon a number of different actors – though primarily upon employers. Section 19(1) for example states that:

“An employer shall, in respect of each employee employed or engaged by the employer, ensure so far as is reasonably practicable that the employee is, while at work, safe from injury and risks to health and, in particular÷

- (a) shall provide and maintain so far as is reasonably practicable÷
  - (i) a safe working environment;
  - (ii) safe systems of work;
  - (iii) plant and substances in a safe condition; and
- (b) shall provide adequate facilities of a prescribed kind for the welfare of employees at any workplace that is under the control and management of the employer; and
- (c) shall provide such information, instruction, training and supervision as are reasonably necessary to ensure that each employee is safe from injury and risks to health.”

### **Appointment of ‘responsible officers’**

Section 61 of the Act however requires that companies must appoint a ‘responsible officer’ who must “take reasonable steps to ensure compliance by the body corporate of its obligations under this Act”. The responsible officer must be the chief executive officer or a member of the governing body of the body corporate if these persons reside in South Australia or if this is not the case, a senior executive who resides in the State. It states in full:

- (1) Each body corporate carrying on business in the State must appoint one or more responsible officers for the purposes of this section.
- (2) A person appointed as a responsible officer under this section must be -
  - (a) a member of the governing body of the body corporate who resides in the State; or
  - (b) the chief executive officer of the body corporate, if he or she resides in the State; or
  - (c) if no one is eligible for appointment under a preceding paragraph - a senior executive officer of the body corporate who resides in the State; or
  - (d) if no one is eligible for appointment under a preceding paragraph - an officer of the body corporate.

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<sup>170</sup> Goto (2005).

- (3) A responsible officer must take reasonable steps to ensure compliance by the body corporate of its obligations under this Act.
- (4) If a body corporate fails to appoint one or more responsible officers under this section, each officer of the body corporate will be taken to be a responsible officer for the purposes of subsection (3).
- (5) This section does not derogate from any other rule of law relating to the duties of officers of bodies corporate.

This section was recently amended to require training of responsible officers. Clause 25 of the Occupational Health Safety and Welfare (SafeWork SA) Amendment Act 2003 states that:

“A person who is appointed as a responsible officer under this section and who has not previously attended a course of training recognised or approved by the Advisory Committee for the purposes of this section must attend such a course of training within 3 months after his or her appointment.”

In the public sector, section 62 of the 1986 Act requires the appointment of the Chief Executive Officer to be responsible for the implementation of the requirements of the Act in each administrative unit. The section states:

*“Health and safety in the public sector*

The chief executive officer of each administrative unit under the *Government Management and Employment Act 1985* must appoint a person to be responsible for the implementation of the requirements of this Act in that administrative unit.”

The Amendment Act clarifies this by stating:

“For the purposes of this Act, an administrative unit will be taken to be the employer of any Public Sector employees assigned to work in the administrative unit (and may be held to be liable for any offence for which an employer may be liable).”

The Handbook of WorkCover – the regulatory body – sets out what should be in a health and safety policy and in so doing sets out the kinds of duties that should be carried out by the responsible officers:

“The [title of responsible officer] as the Responsible Officer has the overall responsibility to provide a healthy and safe workplace for employees and will ensure adequate resources are provided to meet the health and safety objectives and implement strategies.

In particular the [title of responsible officer] will ensure:

- appropriate health and safety policies and procedures are developed and implemented to enable the effective management of health and safety and control of risks to health and safety
- mechanisms are provided to enable the identification, development, implementation and review of appropriate health, safety and welfare related policies and procedures
- mechanisms are provided to enable employees and their representatives to be consulted on any proposals for, or changes to the workplace, work practices, policies or procedures which may affect the occupational health, safety and welfare of



- employees
- managers are provided with the necessary knowledge and skills to effectively enable them to carry out their health and safety responsibilities
- mechanisms are provided to enable the assessment of managers' and supervisors' health and safety performance
- occupational health and safety performance is an integral component of the [organisation's name] business and financial plans
- mechanisms are provided to regularly monitor and report on health and safety performance
- annual health and safety strategic plans are developed and implemented to meet health and safety objectives.”

## OFFENCES

It is an offence on the part of the responsible officer to fail to take reasonable steps to obtain compliance on the part of the company.<sup>171</sup> The level of fine is the same as the fine that would be imposed upon the company.

## ENFORCEMENT

Enforcement need not only be via prosecution; enforcement notices can be issued against a responsible officer – though it is not known how often these are used. The Enforcement Policy<sup>172</sup> does not mention ‘responsible officers’ and in the last two years there does not appear to have been a conviction of such a person.<sup>173</sup>

## PROVINCE OF ALBERTA, CANADA<sup>174</sup>

### LEGAL FRAMEWORK OF OHS DUTIES

Alberta’s Occupational Health and Safety Act 2000 (the 2000 Act) places duties upon a number of actors including employers. Section 2(1) states that:

- “Every employer shall ensure, as far as it is reasonably practicable for the employer to do so,
- (a) the health and safety of
    - (i) workers engaged in the work of that employer, and
    - (ii) those workers not engaged in the work of that employer but present at the work site at which that work is being carried out, and
  - (b) that the workers engaged in the work of that employer are aware of their responsibilities and duties under this Act, the regulations and the adopted code.”

<sup>171</sup> Section 58 of the *Occupational, Safety, Health and Welfare Act 1986*.

<sup>172</sup> [http://www.eric.sa.gov.au/uploaded\\_files/enforcement\\_policy.pdf](http://www.eric.sa.gov.au/uploaded_files/enforcement_policy.pdf).

<sup>173</sup> [http://www.eric.sa.gov.au/show\\_page.jsp?id=2463](http://www.eric.sa.gov.au/show_page.jsp?id=2463).

<sup>174</sup> Correspondence and interview with Yan Lau from the Legislation Policy and Technical Services Department of Alberta Human Resources and Employment have provided some of the background research for this section.

The definition of ‘employer’ is defined in the 2000 Act as:

- “ (i) a person who is self-employed in an occupation,
- (ii) a person who employs one or more workers,
- (iii) a person designated by an employer as the employer’s representative, or
- (iv) a director or officer of a corporation who oversees the occupational health and safety of the workers employed by the corporation;”<sup>175</sup>

In the context of incorporated businesses, subsection (ii) refers to the ‘company’. It should be noted that sub-section (iv) does not apply to all directors or officers but only to one who “oversees the occupational health and safety of the workers employed by the corporation”. This is interpreted by the regulatory body to mean only those “directly linked to the setting of OHS policy for the company and directing how it runs.”<sup>176</sup>

Moreover it need not impose a duty upon a director since it also refers in the alternative to an ‘officer of a corporation’ and this is defined<sup>177</sup> more widely than directors to include company lawyers or general managers. In addition, if a company does not have such a director or officer with that responsibility – and there is nothing in the legislation requiring companies to appoint such a person – no duties will arise.

## OFFENCE

It is an offence for an employer – which includes the director with safety responsibilities – to breach the duties imposed under the Act and conviction can result in a fine of up to \$500,000 or/and imprisonment of up to six months.

## ENFORCEMENT

Alberta Human Resources and Employment is the body responsible for enforcement of this legislation. Prosecutions are considered only if there is evidence that (a) an employer knowingly and seriously contravened the Act and regulations (b) an employer intentionally did not follow through on the voluntary compliance commitments made with Alberta Human Resources and Employment or (c) the regulatory body believes that prosecution is the best approach to encourage present or future compliance. If any of these criteria exist then Alberta Human Resources and Employment refers the case to Alberta Justice.<sup>178</sup>

Prosecutions are generally ‘rare’ in Alberta, although ‘their number is increasing’.

Senior company officers have been prosecuted as employers under this section – but it has only been used against small companies<sup>179</sup>. No director has ever received a jail sentence.<sup>180</sup> Prosecutions are generally ‘rare’ in Alberta, although ‘their number is increasing.’<sup>181</sup>

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<sup>175</sup> Section 1(k) of the Occupational Health and Safety Act.

<sup>176</sup> Lau (2005).

<sup>177</sup> See Canadian Business Corporations Act 1985 set out on page 20 of this report

<sup>178</sup> see: <http://www3.gov.ab.ca/hre/whs/prosecutions/index.asp> and prosecution policy downloadable from this page.

<sup>179</sup> Lau (2005). A list of completed prosecutions between January 1996 and May 2005 on the Alberta Worksafe website suggests that no director has been prosecuted in this period. See document available from this webpage: <http://www3.gov.ab.ca/hre/whs/prosecutions/index.asp>.

<sup>180</sup> Lau (2005).

The regulatory body only prosecutes in a small number of cases – around 10 in a year. The policy is to “try and get compliance in a more speedy way ... through co-operative means.”

### **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

There is no information available on the background to the duty or whether it is perceived as beneficial.

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<sup>181</sup> See <http://www3.gov.ab.ca/hre/whs/prosecutions/index.asp>.

## **CHAPTER FOUR**

### **SIGNIFICANT DUTIES PLACED UPON DIRECTORS THROUGH THE CREATION OF PARTICULAR OFFENCES**

Some jurisdictions do not impose duties on directors on the face of the legislation – but do it indirectly through the creation of the offences. By defining particular conduct on the part of a director as criminal, the offences indirectly impose a duty upon the director either not to conduct themselves in a particular way, or to do something positive in order to prevent the commission of the offence. However the duties only exist in the context of a decision by the regulatory body to prosecute – they do not exist independent of that, and they do not create duties that allow ‘enforcement notices’ to be imposed.

The jurisdictions in this section – the four Australian states of Victoria, Tasmania, New South Wales and Australian Capital Territory and the Federal criminal law in Canada – are placed in a separate chapter to those jurisdictions which contain offences similar to section 37 of the Health and Safety at Work Act 1974 in Britain. This is because the nature of the duty created by the offences in this chapter is much wider.

It should be noted that the duties contained in the Australian Capital Territory and in the Federal criminal law of Canada only engage in the context of an offence of manslaughter and not an occupational safety offence unlike with the other three Australian states.

#### **STATE OF VICTORIA, AUSTRALIA<sup>1</sup>**

##### **LEGAL FRAMEWORK OF OHS DUTIES**

The Occupational and Safety and Health Act 2004 (2004 Act) imposes duties on a number of actors - including employers, those who manage or control workplaces, designers of plant, buildings or structures, and manufacturers/suppliers.<sup>2</sup> An employer, for example,

”must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.”<sup>3</sup>

When these businesses are incorporated, the duties will be imposed upon the legal entity of the company. An offence is committed when these legal persons breach their various duties.

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<sup>1</sup> Correspondence with Craig Newton from Victoria Worksafe have provided some of the background research for this section.

<sup>2</sup> Sections 21-31 of the Act.

<sup>3</sup> Section 21 of the Act.

## THE OFFENCE

Section 144 of the 2004 Act states that, if a company commits an offence and the contravention is "attributable to an officer of the body corporate *failing to take reasonable care*, the officer is guilty of an offence."<sup>4</sup> The officer will be liable to a fine not exceeding the maximum that a natural person would receive for the breach committed by the corporation.

The section goes on to say that in determining whether an officer of a body corporate is guilty of an offence, regard must be had to -

- what the officer knew about the matter concerned; and
- the extent of the officer's ability to make, or participate in the making of, decisions that effect the body corporate in relation to the matter concerned; and
- whether the contravention by the body corporate is also attributable to an act or omission of any other person; and
- any other relevant matter.

### Who is an officer

The definition of an officer is set out in the Corporation Act and includes a director or secretary of a corporation.<sup>5</sup> A note in the 2004 Act itself states that an officer of a body corporate:

"includes a person who makes or participates in the making of decisions that affect the whole or a substantial part of the body corporate's business and a person who has the capacity to affect significantly the body corporate's financial standing."<sup>6</sup>

Guidance produced by Worksafe, the enforcement body, explains who comes within the definition of officer:

"This means that only persons who have the capacity to make decisions — or to participate in making decisions — that have a real or direct influence on an organisation's policy and planning or financial standing will be considered 'officers'. A person who only has responsibility for implementing those decisions is not an officer. Under this definition, 'officer' includes all:

- directors of a corporation;
- members of boards of management of public authorities;
- partners in a partnership; and
- office holders of unincorporated bodies and associations.
- Chief Executive Officers are also officers.

The following classes of people are also considered officers for the purposes of the Act:

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<sup>4</sup> *Emphasis added. Unlike the situation in Tasmania, the offence applies to officers, not just directors, and does not impose any reverse burden of proof.*

<sup>5</sup> Section 9 of the Act.

<sup>6</sup> Section 144(4), note 1.

- those who operate divisions of a corporation who, with the CEO, are part of the executive management committee that makes decisions that directly influence the organisation's policy and planning or financial standing;
- those who operate a division of a corporation that represents a substantial part of the corporation and who have the authority to make decisions about policy and planning or financial standing of that;
- those who significantly affect the corporation's financial or business standing but are not directly appointed (e.g. members of a holding corporation who help shape the operation of a subsidiary); and
- shadow directors or de facto directors (in some circumstances, a person may be a "shadow director" who effectively acts as an officer, even though they are not a named office holder. A corporation cannot be appointed a director but may come within the scope of the provision as a shadow director)."

The guidance then goes onto explain who is not an 'officer':

"Only persons who can affect a substantial part of a business or significantly affect its financial standing will be considered to be 'officers'. This means that only persons at the most senior levels of organisations that are genuinely in a position to prevent breaches of Victoria's OHS laws will be liable for prosecution as an 'officer'.

The following classes of people are not considered 'officers' for the purposes of the Act:

- those who manage branch offices but do not make, or participate in making, decisions that directly influence the organisation's policy and planning or financial standing (i.e. persons who only implement the decisions of others are not 'officers');
- school principals, in either their role as managers of schools or as the executive officers of school councils;
- middle level managers who report to, and implement decisions of, officers (e.g. area managers of retailers);
- forepersons or managers in small businesses who implement decisions made by directors of the organisation."

## ENFORCEMENT

The indirect effect of this offence appears to be to impose a duty upon 'officers' to "take reasonable care" in preventing a company from committing an offence. However the extent of this duty depends upon the circumstances in which prosecution will take place.<sup>7</sup> These are set out in Worksafe guidance.<sup>8</sup> One of the factors that will be taken into account is:

"Did the measures which might reasonably have been taken to avoid the incident fall properly and reasonably within the duties, responsibilities, and scope of the officer's functions, for example:

- making arrangements for facilitating ongoing training and supervision; and

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<sup>7</sup> See introduction to this report.

<sup>8</sup> 'Liability of organisations, officers, employees, and other duty-holders.'  
[http://www.workcover.vic.gov.au/vwal/home.nsf/pages/prosecutions\\_enforce](http://www.workcover.vic.gov.au/vwal/home.nsf/pages/prosecutions_enforce).

- creating, monitoring, and maintaining systems for identifying, assessing, and controlling hazards and risks to health and safety?”

Other factors that the regulator will take into account are:

- “• Did the officer fail to take obvious steps to prevent the incident?
- What was the degree of culpability involved in the officer’s behaviour?
- Has the officer had previous advice or warnings regarding matters leading to the incident, or should the officer have reasonably known about the advice or warnings?
- Did the officer knowingly compromise safety for personal gain, or for commercial gain of the organisation, without undue pressure from the organisation to do so?
- Was the contravention attributable to another person, and if so, to what extent?
- What could reasonably be expected of the officer, bearing in mind all the relevant circumstances including:
  - the officer’s role and knowledge; and
  - the nature and context of the relevant activity being conducted by the organisation?”

Other guidance produced by Worksafe sets out what is required of company officers:

”Officers must use the level of sound judgment, prudent decision-making and taking of action that any reasonable person would use to prevent and reduce hazards and risks to health and safety.

Officers should know what their own and their organisation’s OHS obligations are and how they are managed, including:

- appointing a member of the executive with overall responsibility for health and safety;
- defining, documenting and communicating to all levels in the organisation their specific health and safety responsibilities, authority to act and reporting requirements;
- holding managers accountable for their health and safety responsibilities;
- allocating financial and physical resources so that their organisation’s health and safety actions comply with the Act;
- employing or engaging sufficient numbers of qualified and competent people to advise on and to implement OHS requirements;
- ensuring that there are procedures in place for the systematic identification of workplace hazards, evaluation of their risk and implementation of controls to manage the risk;
- providing induction programs and training on OHS for all employees including management;
- ensuring there is a system in place for the reporting of hazards and incidents and for a prompt response to investigate and rectify them; and
- understanding their organisation’s OHS performance and monitoring it over time.”

The guidance gives an example of a situation where a director/senior officer could be held responsible:

”An employee identifies a rusty steam pipe in a production area and lodges a hazard report which is forwarded to senior management of the company. No action is taken to

have the pipe repaired or replaced even though funds have been requested for the work by line managers. If the pipe bursts and an employee is injured, a senior manager from that organisation may be held responsible for failing to take reasonable care to prevent this incident.”

We were unable to find any information on levels of enforcement.

## **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

We have not been able to obtain any information on this.

## **STATE OF TASMANIA, AUSTRALIA<sup>9</sup>**

### **LEGAL FRAMEWORK OF OHS DUTIES**

The Workplace Health and Safety Act 1995 (1995 Act) imposes duties on a number of parties, including designers, manufacturers, importers, suppliers and installers. The principal duties are those imposed upon employers, which include for example:

- “(1) An employer must, in respect of each employee employed by the employer, ensure so far as is reasonably practicable that the employee is, while at work, safe from injury and risks to health and, in particular, must
  - (a) provide and maintain so far as is reasonably practicable
    - (i) a safe working environment; and
    - (ii) safe systems of work; and
    - (iii) plant and substances in a safe condition; and
  - (b) provide facilities of a prescribed kind for the welfare of employees at any workplace that is under the control or management of the employer; and
  - (c) provide any information, instruction, training and supervision reasonably necessary to ensure that each employee is safe from injury and risks to health”.<sup>10</sup>

When these businesses are incorporated, the duties will be imposed upon the legal entity of the company. An offence is committed when these legal persons breach their various duties.

## **OFFENCES**

### **Workplace Health and Safety Act 1995**

The 1995 Act contains the provision that if the:

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<sup>9</sup> An interview Graeme Williams. Manager of Advocacy and Prosecutions, Workplace Standards Tasmania.

<sup>10</sup> Section 9 of the Workplace Health and Safety Act 1995, has assisted with this section.



“body corporate contravenes or fails to comply with any provision of this Act, each director of the body corporate is taken to have contravened or failed to comply with the same provision ... .”<sup>11</sup>

However, the director will not be considered to have committed the offence if:

- “(a) the body corporate contravened or failed to comply with that provision without the director's knowledge and that the director was not reasonably able to have acquired that knowledge; or
- (b) the director used all due diligence to prevent the contravention or failure to comply by the body corporate.”

In effect, this imposes a duty upon directors to either take reasonable steps to determine whether the company is complying with its obligations and to stop any violation taking place, or to use all due diligence in preventing the company committing the offence. This duty is much wider than the section 37 duty in the Health and Safety at Work Act in Britain, which does not impose any obligation upon a director to take steps to find out if the company is committing an offence. Moreover, the offence created here assumes that a director is responsible for the offence, unless he or she can prove otherwise.

No director has ever appealed a conviction, so there is no case law that may assist further with understanding the offence.

## Penal Offences

The Criminal Code contains the offences of manslaughter and grievous bodily harm. Manslaughter is defined as ‘the killing of human being by another.’ The following three elements must be proven: the defendant caused the death of a person, that there was a breach of a ‘duty tending to the preservation of human life’ and the breach of duty amounted to culpable negligence.<sup>12</sup>

Chapter 16 of the Code sets out the duties ‘tending to the preservation of human life, and the most likely duties to apply in a workplace death or injury are:

“Duty of Persons doing Dangerous Acts:

149 ... it is the duty of a person who undertakes to administer surgical or medical treatment to another, or to so any other lawful act of a dangerous character which requires special knowledge, skill, attention or caution, to employ in so doing a reasonable amount of such knowledge skill, attention, and caution.”

Duty of persons in charge of dangerous things:

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<sup>11</sup> Section 53 of the Workplace Health and Safety Act 1995. It is not necessary to actually prosecute a company. A similar provision exists in section 93 of the Industrial Relations Act 1984 which states that: “Where an offence against this Act is committed by a body corporate, every person concerned in the management of that body corporate shall be deemed also to have committed the offence and may be convicted of the offence, unless he proves that the act or omission constituting the offence took place without his knowledge.”

<sup>12</sup> Section 153 and 154 of the Criminal Code.

150 It is the duty of every person who has anything in his charge or under his control, or who erects, makes or maintains anything which, in the absence of precaution or care, in its use or management may endanger human life, to take reasonable precautions against, and to use reasonable care to avoid, such danger.”

The code defines offence of grievous bodily harm as:

“Any bodily injury of such a nature as to endanger or be likely to endanger life or to cause or be likely to cause serious injury to health”

In addition it must be proved that the harm was required with the required mental element. It is clear that evidence of intention or subjective recklessness is sufficient, but there have in addition been a number of cases where the courts have “accepted that a person could be guilty of grievous bodily harm on the basis of criminal negligence.”<sup>13</sup>

## ENFORCEMENT

Since 1996, three directors and one managing director are reported to have been convicted under this provision.<sup>14</sup> In practice this provision is not used as frequently as it might be. Most companies in Tasmania are small and it is considered appropriate in such a situation to prosecute the company. There are no guidelines for prosecutors on when to prosecute directors or not - so it is difficult to assess what the extent of the duty on directors is in practice.<sup>15</sup>

## PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE

In a recent study on criminal liability of corporations the Tasmania Law Reform Institute stated that:

“Of course it is important for senior officers, like all other people, to be able to be held criminally liable for their actions or negligence. Where a particular senior officer is responsible for a death or injury it may be appropriate that they be personally charged with manslaughter or grievous bodily harm. In other instances they may simply have contributed towards their employer committing the crime. The potential to find senior officers criminally liable in such cases may motivate senior officers to work towards compliance by their organisation.”<sup>16</sup>

Workplace Standards Tasmania is also of the view the threat of prosecution and having to appear in court is a “significant deterrent” for directors. Imposing duties “also stops any person trying to hide behind the corporate structure.” It also assists, in their view, holding directors of large companies to account. The regulatory body also believes that imposition of the duty on directors

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<sup>13</sup> Tasmania Law Reform Institute, “Criminal Liability of Organisations” (2005) para 1.1.7 and footnote 16.

<sup>14</sup> This is according to a document provided to the authors by Workplace Standards Tasmania – which indicated that 43 companies had been convicted in the same period. It should however be noted that a recent paper by the Tasmania Law Reform Institute “The Criminal Liability of Organisation” Issue Paper 9, June 2005, para 5.2.22 states that “It appears that no-one has ever been prosecuted under this section, let alone found guilty.”□

<sup>15</sup> Williams (2005). Compare this to State of Victoria, which has detailed guidance. Also Tasmania’s Prosecution policy does not mention the issue of directors.

<sup>16</sup> “The Criminal Liability of Organisation” Issue Paper 9, June 2005, para 5.2.20.

– which allows inspectors to tell directors their responsibilities - does make directors take safety more seriously. There have however been no studies in Tasmania on this issue.<sup>17</sup>

## **NEW SOUTH WALES, AUSTRALIA<sup>18</sup>**

### **LEGAL FRAMEWORK OF OHS DUTIES**

The Occupational Health and Safety Act 2001 (2001 Act) imposes duties on a number of actors, including employers, designers, manufacturers, suppliers and controllers of work premises, plant or substances. When these businesses are incorporated, the duty holder will be the legal entity of the company.

### **OFFENCE**

It is an offence on the part of the company to contravene these duties. The 2001 Act also, however, states that “each director of the corporation and each person concerned in the management of the corporation” is taken to have committed the corporate offence unless he can show that;

- (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.<sup>19</sup>

A company director can be prosecuted even when a company is not being prosecuted as long as the prosecution can establish the original offence.

### **Meaning of ‘concerned in the corporation’s management’:**

A case, which is on appeal, has recently considered the meaning of similar words. The judge held the following:

“What would appear to be a common and understandable factor in all the authorities to which I was taken was the person's decision-making powers and/or authority going directly to the management of the corporation. That decision-making role or authority on behalf of the corporation may involve advice given to management encompassing a participation in its decision-making processes and the execution of those decisions going beyond the mere carrying out of directions as an employee. That decision-making role or authority and the responsibilities inherent in them must be such as to affect the corporation as a whole or a substantial part of the corporation. In saying that, it does not mean that the person must be at the highest levels of management. The structure and size of the corporation is relevant as is the role of the person within the corporation relevant to his/her decision-making powers on behalf of the corporation. Critically, in relation to s. 50(1), the person's decision-making powers must be such as to directly influence the

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<sup>17</sup> Williams (2005).

<sup>18</sup> Correspondence with Catherine Morgan, Worksafe, New South Wales has provided some of the background research for this section.

<sup>19</sup> Section 26 of the Occupational Health and Safety Act 2001. This section is similarly worded to section 50 of the previous Occupational Health and Safety Act 1983.

corporation in relation to the act or omission that constituted the offence of the corporation. That much, I believe, is self evident given the nature of the defences available in s. 50(1)(a) and (b). In other words, the determination of a person concerned in the management of the corporation in s. 50(1) must be a person who was in a position to influence, by advice or decision making, the conduct of the corporation in relation to its contravention or whose decision making powers within the corporation comprehends activities the consequences of which have a significant bearing on the conduct of the corporation relevant to its contravention.”<sup>20</sup>

Workcover summarised the position in June 2005, as follows:

“Where section 26 applies, the courts have found that a person who is ‘concerned in the management of a corporation’ is not limited to persons at the highest levels of management, although, the person's decision-making powers must affect the corporation as a whole, or some substantial part of it. The size and structure of the corporation will be relevant in determining the extent of the person's decision-making powers.

Consideration of whether someone is ‘concerned in the management of a corporation’ will include consideration of whether the person was in a position to influence, by advice or decision-making, the conduct of the corporation in relation to the contravention. Allowing the courts to determine whether a person is concerned in the management of a corporation’ provides the flexibility to take into account the particular circumstances of each case.”

## Extent of Duty

This offence imposes a duty on every company director (as well as others involved in the management of the company) to use all due diligence to prevent the company committing an offence unless he was not in a position to influence the conduct of the company. What does 'due diligence' mean? This was discussed in a the case, referred to above, of *Stephen Finlay Martin v Newcastle Wallsend Company Pty Ltd and Others*,<sup>21</sup> which stated:

“166 There is no definitive interpretation or construction of the phrase “all due diligence” in the section. ... Our instructing solicitors have drawn attention to the decision in *Universal Telecasters (Qld) Limited v Guthrie* that speaks in terms of “due diligence” as requiring “a proper system to provide against the contravention of the Act” and emphasising “adequate supervision to ensure the system was properly carried out”.

167 The decision in *State Pollution Control Commission v Kelly* refers to “due diligence” as contemplating “a mind concentrated on the likely risks. The requirements are not satisfied by precautions merely as a general matter in the business of the corporation, unless designed to prevent the contravention.

168 It is apparent that the scope of “due diligence” depends upon the circumstances of

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<sup>20</sup> *Stephen Finlay Martin v Newcastle Wallsend Company Pty Ltd and Others*, 2004 NSWIR Comm 202 (9 August 2004), para 885.

<sup>21</sup> 2004 NSWIR Comm 202 (9 August 2004).

each case. It requires a defendant to prove that an adequate system was designed, implemented and supervised: *WorkCover Authority of NSW (Insp. Dowling) v Costa*.

- 169 The concept of “due diligence” is accordingly qualified by the circumstances of a particular matter. It does not, we believe, assist greatly in establishing discernible standards that are readily identifiable and that encourages and obliges managers and directors to attain.”

## ENFORCEMENT

There are no clear criteria concerning when directors or managers will be prosecuted in practice. The prosecution guidance simply says:

“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.”<sup>22</sup>

The guidance sets out general considerations that will be taken into account, “in choosing the appropriate defendant in a particular case”. These are:

- a) who is primarily responsible for the alleged offence, that is, who was primarily responsible for the acts or omissions giving rise to the alleged offence or the material circumstances leading to the alleged offence or who formed any relevant intention;
- b) in relation to (a) above, what was the culpability of the proposed defendant;
- c) the effectiveness of any court order that might be made against the proposed defendant.<sup>23</sup>

### Level of Enforcement

No official statistics concerning numbers of convictions under section 26 of the 2001 Act are available; however it is known that there have been at least 35 prosecutions between 1983 (when similarly worded offence existed in the previous legislation) and 2004.<sup>24</sup> Most of these identified prosecutions (27 out of 35) were against directors rather than individuals ‘concerned in the management’ of the company.

In most of the cases the directors were directly involved in the incident that was the subject of the prosecution – even though this is not a requirement of the offence. However in 2002/3 there were three cases involving non-hands-on directors and they appear to be ‘an indication that WorkCover seems to be increasingly prepared to prosecute directors ... in situations whether they may not have a direct involvement in the particular incident.’<sup>25</sup> Almost all the prosecutions involved small companies – there were no 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.

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<sup>22</sup> Para. 5.19 of *Compliance Policy and Prosecution Guidelines*

<sup>23</sup> Para 5.18

<sup>24</sup> See Foster, N, ‘Personal liability of Company Officer for corporate Occupational Health and Safety Breaches: section 26 of the Occupational Health and Safety Act 2000 (NSW)’, (2005) *Australian Journal of Labour Law* 107

<sup>25</sup> Foster, N *op cit.*, p.116

## PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE

In January 2004, the Workcover Authority of New South Wales sought advice from four lawyers and academics on various occupational health and safety law matters including “whether the law relating to the liability of directors and managers in occupational health and safety matters should be strengthened.” The Advice published in July 2004 stated:

“It has been observed that the purpose of section 26 is to ensure that directors or managers who are involved in a corporation’s illegal acts or omissions are not shielded from responsibility by the corporate legal structure.

“However directors or managers can in fact be shielded from liability by relying upon the complexity of the hierarchy in an organisation or the multiplicity of operations and responsibilities to be able to satisfy the above grounds of defence (i) that is they were not in a position to influence or alternatively under (ii) that, at their level of seniority, they used all due diligence to prevent a contravention (eg. by promulgating a policy or issuing a directive) and then relying upon a breach or breaches further down the chain by one or more persons in order to isolate or insulate themselves from causative acts or omissions.

“In principle the greater the transparency and accountability there is in management processes and the integration of management in operational issues the more difficult it would become for directors and managers further up the seniority ladder to insulate themselves from potential exposure to liability.

“Generally speaking the greater level of involvement in management in issues affecting safety (such as in relation to integrated safety systems) the safer will be the organisation. However, the greater the integration the greater the potential exposure of directors and managers to liability. On this basis it would be safer for directors and managers to take refuge in a non-integrated system that does not expose them as referred to above.”<sup>26</sup>

The advice considered the *Coal Mines Regulation Act* 1982 which, compared to the Occupational Health and Safety Act, has a more rigorous regime concerning individual accountability. In this Act:

“a manager could only escape liability if it is established that he or she took all reasonable means to prevent the commission of the offence by positively taking certain action (eg. Enforcing the observance of regulations, etc) or by proving that it was not reasonably practicable to comply or that the offence was due to causes over which he or she had no control and against the happening of which it was impractical for the person to make provision.”

The Advice backed an “entirely new provision based on first principles of safety management and legal liability”. It stated that:

“This approach would seek to establish and then link a fairly prescriptive Code of Practice binding on managers and directors to defence provisions (namely, “*events beyond control*” defence or the “*not in a position to influence*” defence provisions).

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<sup>26</sup> *op. cit.* para 181-184.

“What is envisaged on such a new approach would be three elements involving:

1. A Code of Practice which has statutory force;
2. A deeming provision creating liability much like the present provisions of section 26; and
3. Provisions containing defence grounds the scope and availability of which would be limited and circumscribed by the Code of Practice, and demonstrated compliance by directors and managers with their obligations under the Code.”

In relation to the Code of Practice, the report states:

“The Code of Practice would be incorporated as part of the OH&S statutory scheme. It may need to be supplemented by further obligations that are particularly relevant to an individual enterprise or undertaking. Its purpose would be to both define and impose obligations on senior management personnel thereby encouraging and indeed mandating a proactive approach to safety and which would have the effect of limiting avenues of escape from liability. The Code of Practice would address matters such as the following:

1. The definition of directors’ and managers’ functions and responsibilities;
2. Particularisation of the steps required by directors and managers to discharge safety obligations attaching to managerial roles (eg. The issue of directions, the carrying out of inspections, the mandatory supply of supervisor’s periodic reports and discussion of the implementation of safety measures in quarterly board meetings);
3. The formulation of obligations of members of senior management to integrate themselves into safety systems effecting operations including, but not limited to, the receipt of quarterly reports on the integrity of identified safety management systems themselves and as to any identified risks based on predictive methodologies.”<sup>27</sup>

The Advice also makes some general comments about the need for imposing clear duties on directors and other senior managers:

“There is an increasing requirement for senior management to be integrated into safety management systems.

“The process of integration reduces the scope of senior managers to distance themselves from operational events by relying upon the hierarchy concept.

“Law reform in this area should be directed towards encouraging and promoting positive constructive safety conduct.

“Constructive or positive conduct can be encouraged by raising the potential bar on the liability of individuals. The prospect of personal liability increases vigilance and a proactive culture.

“... a Code of Practice would be the means of positively creating benchmarks against which liability issues can then be evaluated in terms of culpability and the scope for escaping liability but only in circumstances where it can be demonstrated that a manager/director has been relevantly proactive.”

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<sup>27</sup> *Op. cit. Para 192.*

It goes onto say:

“Organisational complexity should not shield individual corporate personnel from responsibility.

“Organisational blameworthiness and individual blameworthiness are interrelated in almost all cases.

“Corporate blameworthiness often arises from a *failure* to take reasonable precautions and to exercise due diligence. Where a senior corporate manager is relevantly connected to it, there is an acceptable societal basis for personal liability.

“Senior managers should have direct responsibility for safety management systems. They rarely by their own actions physically contribute to an accident (they are typically far removed from the scene of the particular cause of death).

“However, an effective integrated safety management regime has the capacity of preventing the external elements that constitute an accident from aligning themselves into a causative chain.”<sup>28</sup>

The Advice concludes

“The above approach seeks to negate what is common place in large or medium size organisations, namely, management by exception, whereby compliance is treated as a routine matter to be delegated to inferiors and handled by them, unless specifically brought back to the attention of senior management. A proactive approach mandates internal discipline and preventative reform. A genuine well-run compliance system in accordance with the proposed Code of Practice should give directors and managers little to fear and also enhance safety. Compliance would permit directors/managers to rely upon statutory grounds of defence.”<sup>29</sup>

In June 2005, Workcover itself published a discussion paper on whether changes were required to the 2001 Act.<sup>30</sup> This stated that “there is growing interest in the liability of directors and managers in relation to actions by corporations and other entities.”

It quotes the Legal Advice (summarised above) which had suggested the following three principles should inform any new approach to the liability of directors and managers.<sup>31</sup>

- “1. The conviction of directors and managers without fault is unacceptable.
2. Corporate personnel have and should be accountable for individual responsibilities where personal fault exists.
3. Principles of individual responsibility however, must also allow for:

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<sup>28</sup> *Op. cit.* para 205 to 208.

<sup>29</sup> *Op. cit.* para 214.

<sup>30</sup> This is required by the Act every five years.

<sup>31</sup> In 2003 the New South Wales Government commissioned a panel of eminent legal experts to advise on enhancements to the legislation as they relate to workplace fatalities. Following an extensive public consultation process, the Occupational Health and Safety Amendment (Workplace Deaths) Act 2005 introduced a new offence and increased penalties for reckless conduct causing death in a workplace.



- excuse where relevant events occur without an individual's actual or constructive knowledge of material facts;
- excuse where relevant events are beyond that individual's control.”<sup>32</sup>

The Workcover discussion paper goes onto say:

“The principles need to be flexible enough to address different and sometimes complex circumstances and yet balanced by the need of managers to know what their responsibilities are.

“The Panel also recommended the development of a code of practice that identifies the following individual responsibilities of management personnel:

1. the obligations and requirements for an adequate safety management system;
2. the development of a relevant risk assessment plan; and
3. the methodology and strategies required and that should be followed for implementing, overseeing and enforcing compliance with relevant safety management systems.

It was unclear from the consultation following the Panel's report whether stakeholders supported any such Code operating:

- a) in the same way as other Codes of Practice – as a guidance document whereby evidence of failure to comply with the Code can be used as evidence in a prosecution;
- b) as a defence additional to those in section 26; or
- c) as a threshold to satisfy before being able to rely on the defences provided in section 26.

A working group of employer and union representatives was formed and met to consider the development of a code of practice. However, the working group resolved not to progress the code until the review of the OHS Act 2000 is finalised, as any changes to the OHS Act 2000 may affect the code.”

The regulator told us that the reform was:

“Essentially to ensure that directors and managers who run corporations will not be shielded from responsibility by the corporate legal structure.”<sup>33</sup>

## AUSTRALIAN CAPITAL TERRITORY<sup>34</sup>

### LEGAL FRAMEWORK OF OHS DUTIES

The Occupational Health and Safety Act 1989 (the 1989 Act) imposes duties upon a number of

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<sup>32</sup> Panel Report, June 2004, p. 57.

<sup>33</sup> This is the same use of words as cited in the report to Workcover Authority of New South Wales on “Advice in relation to Workplace Death, Occupational Health and Safety Legislation and other matters” (June 2004) Professor Ron McCallum; Mr Peter Hall QC; Mr Adam Hatcher, Barrister at law, Mr Adam Searle, Barrister at Law. see para 181.

<sup>34</sup> Correspondence with Susan Mcleod, Worksafe, ACT has provided some of the background research for this section

different actors – but principally upon employers. For example section 37(1) states that, “an employer shall take all reasonably practicable steps to protect the health, safety and welfare at work of the employer’s employees.”

The 1989 Act does not however impose any duties upon directors, and does not create a provision that would allow a director to be prosecuted in any circumstance.

However, in the context of creating new manslaughter offences, the Crimes (Industrial Manslaughter) Amendment Act 2004 imposes a duty upon ‘senior officers’:

- “(2) An omission of a senior officer of an employer to act can be conduct for this part if it is an omission to perform the duty to avoid or prevent danger to the life, safety or health of a worker of the employer if the danger arises from—
- (a) an act of the senior officer; or
  - (b) anything in the senior officer’s possession or control; or
  - (c) any undertaking of the senior officer.”

A senior officer, of an employer is defined as:

- “a) for an employer that is a government, or an entity so far as it is a government entity—any of the following:
- (i) a Minister in relation to the government or government entity;
  - (ii) a person occupying a chief executive officer position (however described) in relation to the government or government entity;
  - (iii) a person occupying an executive position (however described) in relation to the government or government entity who makes, or takes part in making, decisions affecting all, or a substantial part, of the functions of the government or government entity; or
- (b) for an employer that is another corporation (including a corporation so far as it is not a government entity)—an officer of the corporation; or
- (c) for an employer that is another entity—any of the following:
- (i) a person occupying an executive position (however described) in relation to the entity who makes, or takes part in making, decisions affecting all, or a substantial part, of the functions of the entity;
  - (ii) a person who would be an officer of the entity if the entity were a corporation.”

An officer of the corporation has the same definition as contained in section 9 of the Corporations Act.

## **OFFENCE**

The ‘Industrial Manslaughter – senior officer offence’ is as follows:

- “A senior officer of an employer commits an offence if—
- (a) a worker of the employer—
    - (i) dies in the course of employment by, or providing<sup>8</sup> services to, or in relation to, the employer; or
    - (ii) is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and

- (b) the senior officer's conduct causes the death of the worker; and
- (c) the senior officer is—
  - (i) reckless about causing serious harm to the worker, or any other worker of the employer, by the conduct; or
  - (ii) negligent about causing the death of the worker, or any other worker of the employer, by the conduct.”

In effect the offence imposes a duty upon directors and other similarly positioned people within an organisation to take action to prevent their conduct, or something in their control or possession from creating a ‘danger to the life, safety or health of a worker of the employer’. If a death takes place, the director can be prosecuted for the manslaughter offence if this duty is not complied with in a negligent manner.

## **ENFORCEMENT**

The Act only came into effect on 1 March 2004. No prosecutions of directors or senior company officers have occurred since the legislation was introduced.

## **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

It is clear from the material produced around the enactment of the Act that the intention was to increase the deterrence, be able to hold more directors accountable and to make workplaces safer. In a press briefing published after the enactment of the bill, the Industrial Relations Minister, Ms Katy Gallagher, is quoted as saying:

"The challenge for those who oppose this legislation is to convince me that any employer who significantly contributes to the death of a worker through a reckless or negligent act should not be charged with a criminal offence.”

"The legislation is a key component of the Government's occupational health and safety reform agenda aimed at ensuring that workplaces are as safe as possible for ACT workers."

"Under the current Crimes Act, individuals can already be charged with manslaughter when they contribute to the death of another person. This legislation simply ensures that companies can be held responsible where their criminally reckless or negligent conduct causes the death of a worker."<sup>35</sup>

## **CANADIAN FEDERAL LAW**

### **FRAMEWORK OF OHS DUTIES**

#### **Canada Labour Code**

Canada is a Federal state and each of the ten provincial and three territorial jurisdictions have their own safety legislation. The Canada Labour Code only covers employees of the federal

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<sup>35</sup> <http://www.cmd.act.gov.au/mediareleases/fileread.cfm?file=deleted/MR29IIM1.txt>.

government and Crown agencies and employees of companies or sectors that operate across provincial or international borders.

The Canadian Labour code imposes duties upon employers – which in most cases will be public bodies rather than private companies. The Labour codes does not impose any duties on directors or senior managers.

### **Canada Criminal Code**

The Canadian criminal code applies across all of Canada applying at a federal and state level. A recent bill, known as C-45 (which amends the criminal code) creates the following duty:

“Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.”<sup>36</sup>

A breach of this duty is not in itself a criminal offence – it is a duty that applies only in the context of certain criminal offences in the criminal code: Section 219 of the Code creates an offence of Criminal Negligence

- (1) Every one is criminally negligent who
  - (a) in doing anything, or
  - (b) in omitting to do anything that it is his duty to do,shows wanton or reckless disregard for the lives or safety of other persons.

- (2) For the purposes of this section, "duty" means a duty imposed by law.

Section 220 creates an offence of ‘causing death by criminal negligence’

“Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable

- (a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
- (b) in any other case, to imprisonment for life.”

Section 221 creates an offence of Causing bodily harm by criminal negligence

“Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.”

Therefore whenever a death or bodily harm occurs within Canada, or there is evidence of “wanton or reckless disregard of the lives and safety” the duty set out above is potentially engaged.<sup>37</sup>

### **Application to directors and senior managers**

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<sup>36</sup> Article 217.1 of the amended criminal code.

<sup>37</sup> What is meant by ‘negligence’ has not been decided conclusively by the Canadian courts – and whether or not it is necessary to have evidence of awareness on the part of the defendant.

This duty is imposed upon any person who “undertakes, or has the authority, to direct how another person does work or performs a task.” Although there is no caselaw on the meaning of these words, it is assumed by regulators and lawyers that, along with others, it will apply to company directors. However whether it applies to all board directors or whether it only applies to those with day to day management responsibilities is unclear.<sup>38</sup> One commentator on the bill states:

“The application of this duty to every one who has the authority to direct how another persons does work or performs a task extends it beyond the individual who directed the work or a task. The phrase, “or has the authority”, is problematic because it does not provide a particular title or level of responsibility within the organisation.”<sup>39</sup>

He goes onto say

“What is clear from the phrase “or has the authority”, in section 217.1 , is that a court would have to specifically and carefully review who has the authority to direct how another person does work or performs tasks in order to establish the application of the new legal duty. Therefore, although this phrase gives some uncertainty as to how high in the organizational hierarchy a person may be who has the authority to direct how another person does work or performs tasks, it nevertheless gives trial courts a degree of flexibility to look at the specific organizational structure, and reporting authority, of each organization that is brought before the courts.”<sup>40</sup>

The duty appears to extend from the most senior organisational decision makers all the way to foreman, lead hands and potentially even co-workers.

### **Extent of duty**

The duty is to take “reasonable steps” to prevent bodily harm to the person to whom direction is given as to how to do the work or perform the task.

“the term “reasonable steps” is not defined. .... [R]easonable steps, at a minimum, would refer to compliance with applicable OHS statutes and regulations. Reasonable steps may also to refer to industry standards, codes of practice and in some cases best practices.”<sup>41</sup>

## **ENFORCEMENT**

The criminal code is enforced by courts at a state level. It is necessary for safety inspectors working for the different regulatory bodies in the different states to inform the police who will then investigate the offence.

The Bill only comes into effect on 31 March 2004 – and as yet no director or senior manager is known to have been prosecuted for breach of this duty.

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<sup>38</sup> Interview with Yan Lau, Alberta Human Resources and Employment.

<sup>39</sup> Keith N, (2004) *Workplace Health and Safety Crimes*, LexisNexis Butterworths, p.69.

<sup>40</sup> Keith N, *op cit*.

<sup>41</sup> Keith N, *op cit*.

## **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

The Government has said the following about this section:

“The Criminal Code imposes various legal duties including the duty to provide the necessities of life for one's child (s. 215) and to use reasonable care and skill when doing any act that may endanger the life of another (s. 216). Moreover, if a person undertakes to do an act, that person is under a duty to perform the act if failing to do so would endanger life (s. 217). Wanton or reckless disregard of a duty which leads to death or injury is grounds for a charge of criminal negligence causing death (s. 220) or criminal negligence causing bodily harm (s. 221). However, the Code makes no explicit provision regarding a duty of a person directing work to ensure safety for the workers carrying out the work or to take reasonable steps to ensure the safety of the public.

In the Government's view, everyone who employs others to perform work or has the power to direct how work should be done should be under a duty to take reasonable steps to ensure safety of the workers and the public. The Government proposes to enshrine that duty in a new section 217.1 of the Code. What is "reasonable" will vary with the nature of the work and the experience of the workers. The courts are well-equipped to consider the evidence and decide on the proven facts whether a person has shown reckless disregard of the duty that led to death or injury.”



## CHAPTER FIVE

### JURISDICTIONS WITH IMPLICIT DUTIES UPON DIRECTORS THROUGH OFFENCES SIMILAR TO SECTION 37 OF THE HEALTH AND SAFETY AT WORK ACT 1974

There are a number of Australian States and Canadian provinces which includes a provision – very similar to that of section 37 of the Health and Safety at Work Act 1974<sup>1</sup> - which allows a director to be prosecuted in certain circumstances.

As a result these provisions impose an implicit obligation upon directors not to conduct themselves in such a way as to commit the offence. These implicit obligations only engage (or indeed exist) through a decision to prosecute. They are not ‘free-standing’. The duties cannot result for example in the imposition of a notice. The extent of any duty is further restricted by the conditions set by the policy of the prosecuting body concerning when prosecutions will actually take place.

The nature of the offence is much narrower than the offences created in the previous chapter.

#### **WESTERN AUSTRALIA, AUSTRALIA<sup>2</sup>**

Section 55 (1) of the Occupational Safety and Health Act 1984 states that

“Where a body corporate is guilty of an offence under this Act and it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of, any director, manager, secretary or other officer of the body, or any person who was purporting to act in any such capacity he or she, as well as the body corporate, is guilty of that offence”.

In 2002, the statutory-required five yearly review of the 1984 Act was undertaken into the adequacy of the legislation.<sup>3</sup> In relation to the position of directors, this stated that there:

“has been some confusion over the circumstances under which section 55 applies and the relevant penalties. WorkSafe has submitted that changes are required to s.55 to clarify the applicable penalties. Another important consideration is the extent of the personal liability of directors, officers and members of a body corporate in circumstances where systems of work have lead to death or serious injury. The section presently makes such persons liable only in respect of actual acts or omissions leading to the breach. It does not cover situations where persons are not directly involved in the breach but fail to perform their organisational responsibilities.

“As noted earlier, a literature review undertaken by WorkSafe concluded that offences that provided for personal liability reinforced by credible enforcement are the most

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<sup>1</sup> See Introduction for a discussion of section 37.

<sup>2</sup> Correspondence with A Rudeforth, Senior Policy Officer, WorkSafe Division, Department of Consumer and Employment Protection, Western Australia has assisted with this section.

<sup>3</sup> Laing (2002), Section 61. Review of the Occupational Safety and Health Act 1984.



significant motivators of senior staff. Loss of corporate image and credibility were also significant. Interestingly, the review noted the importance that was placed on “safety pays” as a motivation but that there was a range of circumstances where safety did not pay. As a result it was a limited strategy in some circumstances. Other important motivators, however, included safety and health management systems in larger businesses, the perceived legitimacy of the legislation as a moral guideline, supply chain pressure, information strategies and leverage for small and medium sized business.

“It is clear from this that any offence that has direct application to individuals would carry a greatest impact. Certainly the possibility of a director or Chief Executive Officer personally facing charges appears the most significant and effective penalty. The willingness in some jurisdictions to establish a “systems approach” to penalties also increases the accountability of senior executives. It opens up that possibility as the need to have evidence of the direct involvement of senior personnel in events involving fatalities or serious injury may not be required. Instead it requires only that the responsible executives permitted the unsafe circumstances to develop without taking reasonable steps to ensure safety and prevent failures. That style of legislation, if implemented, could make prosecutions more effective and the Act more enforceable.

The Victorian and Queensland Governments have recently considered new offences and penalties to address circumstances of a serious breach of the occupational safety and health laws with the objective of ensuring a director or other senior corporate officer can be held liable if he or she was in a position to influence the circumstances of the corporation’s offence and did not exercise due diligence to prevent the offence. While these proposals ultimately did not proceed, they are indicative of strong community concern over the apparent lack of accountability of directors and senior officers.”

In conclusion the report recommended that:

“the Act be amended to more clearly establish the accountability of corporations, their directors and senior officers for the occupational safety and health of employees.”<sup>4</sup>

## **NORTHERN TERRITORY, AUSTRALIA**

Section 180(1) of the Work Health Act states that:

“Where an offence against this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to a wilful neglect on the part of, an officer of the body corporate or person purporting to act as such an officer, that officer or person is also guilty of that offence and liable to the penalty for that offence.”

## **BRITISH COLUMBIA, CANADA**

Section 213(2) of the Workers Compensation Act of British Columbia states that: “an officer, director or agent of the corporation who authorizes, permits or acquiesces in the commission of the offence also commits an offence.”

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<sup>4</sup> Laing (2002), recommendation 23.

## **NEW BRUNSWICK, CANADA**

Section 49 of the Occupational Health and Safety Act of New Brunswick allows directors to be prosecuted if they “knowingly directed, authorized, assented to, acquiesced or participated in the commission of” an offence by the company.

## **MANITOBA, CANADA**

Section 56 of the Occupational Safety and Health Act of Manitoba allows directors to be prosecuted if they “directed, authorized, assented to, acquiesced in or participated in the commission of an offence” by a corporation.

## **SASKATCHEWAN, CANADA**

Section 60 of the Occupational Safety and Health Act of Saskatchewan allows directors, officers, managers and agents of a corporation to be prosecuted if they “directed, authorized, or participated in the commission of an offence” by a corporation.

In effect, this imposes a duty upon directors not to ‘direct, authorize or participate’ in an offence by a company. There has been no case law concerning the meaning of the words in the section; and no directors have been prosecuted under this section in Saskatchewan. A review of legislation is currently taking place.<sup>5</sup>

## **PRINCE EDWARD ISLAND, CANADA**

Section 43 of the Occupational Safety and Health Act of PEI allows directors, officers, managers and agents of a corporation to be prosecuted if they “directed, authorized, assented to, acquiesced in or participated” in the commission of an offence by the corporation.

No directors have ever been prosecuted under this section.<sup>6</sup>

## **NEWFOUNDLAND AND LABRADOR, CANADA**

Section 68 of the Occupational Safety and Health Act of Newfoundland and Labrador allows directors, officers, and agents of a corporation to be prosecuted if they “directed, authorized, assented to, acquiesced or participated” in the commission of an offence by the corporation.

## **NOVA SCOTIA, CANADA**

Section 77 of the Occupational Safety and Health Act of Nova Scotia allows directors, managers, and agents of a corporation to be prosecuted if they “directed, authorized, assented to, acquiesced or participated” in the commission of an offence by the corporation.

Five directors/managers have been charged under this section; but only one has resulted in a conviction. In 1996, a review of legislation did decide against changing the law to impose duties on company directors.<sup>7</sup>

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<sup>5</sup> Sabat (2005) *Some directors have however been prosecuted as ‘supervisor’*.

<sup>6</sup> Stewart, (2005).

## **QUEBEC, CANADA**

Section 241 of the Occupational Health and Safety Act of Quebec states: “Where a legal person has committed an offence, every director, officer, employee or agent of that legal person who has prescribed or authorized the action or the omission that constitutes the offence or who has consented thereto is deemed to have participated in the offence and is liable to the same penalty as a natural person, whether or not the legal person has been prosecuted or found guilty.”

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<sup>7</sup> *Private Communication, Le Blanc (2005)*

## CHAPTER SIX

### IMPOSITION OF DUTIES UPON EMPLOYERS OR SUPERVISORS WHICH COULD APPLY TO DIRECTORS BUT DO NOT IN PRACTICE

This chapter contains a number of jurisdictions in Canada whose legislation imposes duties upon ‘employers’ or ‘supervisors’ but these terms are defined in such a way that they could include directors. However, in practice the law is rarely applied in this manner, and, when it is, only directors of small companies are involved. Only in the jurisdiction of Saskatchewan have companies directors actually been prosecuted for breaching duties as a ‘supervisor’. In effect these jurisdictions do not impose duties on directors – and so could have been included instead in the final chapter. However because some of the regulators do think it is technically possible that the terms impose duties on directors, they are placed in this separate chapter. The jurisdictions are:

- New Brunswick, Canada
- Northwest Territories, Canada (Safety Act)
- Yukon, Canada
- Manitoba, Canada
- Saskatchewan, Canada

Some of these jurisdictions also have additional offence provisions that places them in the previous chapter as well

#### NEW BRUNSWICK, CANADA<sup>1</sup>

The Occupational Health and Safety Act imposes its principal duties upon the employer. So for example it states:

“Every employer shall

- (a) take every reasonable precaution to ensure the health and safety of his employees;
- (b) comply with this Act, the regulations and any order made in accordance with this Act or the regulations; and
- (c) ensure that his employees comply with this Act, the regulations and any order made in accordance with this Act or the regulations.”<sup>2</sup>

In relation to an incorporated business, an ‘employer’ does not mean just the company. It is defined as:

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<sup>1</sup> Correspondence with M. McGovern, Associate legal Counsel, Workplace Health, Safety and Compensation Commission of New Brunswick has assisted with this section

<sup>2</sup> Section 9(1) of the Act.

“(a) a person who employs one or more employees, (b) a manager, superintendent, supervisor, overseer or any person having authority over an employee, or (c) an agent of any person referred to in paragraph (a) or (b);”

It appears that the phrase, “a manager, superintendent, supervisor, overseer or any person having authority over an employee” could apply to a director. It has never been tested in court whether or not it does. If it does apply, it is only likely to apply to a director involved in the day to day running of the company.<sup>3</sup> There has in New Brunswick never been a prosecution against a person above ‘front-line management.’<sup>4</sup>

## **NORTHWEST TERRITORIES, CANADA<sup>5</sup>**

The Safety Act of 1988 imposes principal duties upon the employer. So for example it requires every employer to:

- “(a) maintain his or her establishment in such a manner that the health and safety of persons in the establishment are not likely to be endangered;
- (b) take all reasonable precautions and adopt and carry out all reasonable techniques and procedures to ensure the health and safety of every person in his or her establishment; and
- (c) provide the first aid service requirements set out in the regulations pertaining to his or her class of establishment.”<sup>6</sup>

The term ‘employer’ is defined to mean:

“every partnership, group of persons, corporation, owner, agent, principal contractor, subcontractor, manager or other authorized person having charge of an establishment in which one or more workers are engaged in work.”

It is arguable that the reference to “other authorised person” includes a director or company officer.<sup>7</sup> There is however no case law on this point – and no director has ever been prosecuted for failing to comply with his or her duties as an employer.

## **YUKON, CANADA<sup>8</sup>**

The Occupational Safety Act 1996 imposes principal obligations upon an employer. So section 3(1) states that:

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<sup>3</sup> McGovern (2005).

<sup>4</sup> McGovern (2005). He says that if 30 charges were filed each year, 25 of them would be against the company, three would be against supervisors and the other two against employees.

<sup>5</sup> Correspondence with D. Grundy, the Communications and Information Officer of Northwest Territories Workers Compensation Board, has assisted with this section.

<sup>6</sup> Section 4 of the Safety Act, 1988.

<sup>7</sup> Grundy (2005). He told the authors that, “who will be an authorised person will depend on the facts of the case. Depending on the facts a director could have the same obligations as a manager.”

<sup>8</sup> Correspondence with K. Dieckmann, Director, Occupational Health and Safety Branch, Yukon Workers Compensation, Health and Safety Board, assisted with this section.

- “Every employer shall ensure, so far as is reasonably practicable, that
- (a) the workplace, machinery, equipment and processes under his control are safe and without risks to health,
  - (b) work techniques and procedures are adopted and used that will prevent or reduce the risk of occupational illness and injury, and
  - (c) workers are given necessary instruction and training and are adequately supervised, taking into account the nature of the work and the abilities of the workers.”

However the Act also imposes duties upon ‘supervisors’. Section 7 states that:

- “A supervisor shall be responsible for
- (a) the proper instruction of workers under his direction and control and for ensuring that their work is performed without undue risk,
  - (b) ensuring that a worker uses or wears the equipment, protective devices, or clothing required under this Act or by the nature of the work,
  - (c) advising a worker of the existence of any potential or actual danger to the health or safety of the worker of which the supervisor is aware, and
  - (d) where so prescribed, providing a worker with written instructions as to the measures and procedures to be taken for the protection of the worker.”

A supervisor is defined as: “a competent person who has charge of a workplace or authority over a worker”. This term could apparently apply to a company director who directs work and is involved in the day to day management of the company - which is more likely the situation in small companies. It is also possible that a company director in a large company could be considered a supervisor for the purposes of the Act in relation to the staff that work with them in the office. No director has ever been prosecuted as a supervisor.<sup>9</sup>

No review of the Act has taken place since 1986.

## **MANITOBA, CANADA<sup>10</sup>**

The Workplace Safety and Health act places its principal responsibilities upon ‘employers’. So section 4(1) states that:

- Every employer shall in accordance with the objects and purposes of this Act
- (a) ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his workers; and
  - (b) comply with this Act and regulations.

However it also imposes duties upon supervisors. Every supervisor shall;

- “(a) so far as is reasonably practicable,
- (i) take all precautions necessary to protect the safety and health of a worker under his or her supervision,

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<sup>9</sup> Diekmann (2005).

<sup>10</sup> Correspondence with Victor Minenco, Workplace Safety and Health Division, Manitoba, assisted with this section.

- (ii) ensure that a worker under his or her supervision works in the manner and in accordance with the procedures and measures required by this Act and the regulations, and
- (iii) ensure that a worker under his or her supervision uses all devices and wears all clothing and personal protective equipment designated or provided by the employer or required to be used or worn by this Act or the regulations;
- (b) advise a worker under his or her supervision of all known or reasonably foreseeable risks to safety and health in the area where the worker is performing work;
- (c) co-operate with any other person exercising a duty imposed by this Act or the regulations; and
- (d) comply with this Act and the regulations.”<sup>11</sup>

A ‘supervisor’ is defined as ‘a person who has charge of a workplace or authority over a worker’.

In theory, a company director could be deemed to be a supervisor, though it would depend upon the circumstances.<sup>12</sup> However, to date there has not been a case where a director has been prosecuted for failing to comply with his or her duties as a supervisor.

### **SASKATCHEWAN. CANADA<sup>13</sup>**

The Occupational Health and Safety Act 1993 imposes principal duties upon employers. Section 3 states, for example, that:

“Every employer shall:

- (a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer’s workers;
- (b) consult and co-operate with any occupational health committee or the occupational health and safety representative at the place of employment for the purpose of resolving concerns on matters of health, safety and welfare at work;
- (c) ensure, insofar as is reasonably practicable, that the employer’s workers are not exposed to harassment at the place of employment;
- (d) co-operate with any other person exercising a duty imposed by this Act or the regulations; and
- (e) comply with this Act and the regulations.”

It does impose duties upon supervisors – defined as “a person who is authorized by an employer to oversee or direct the work of workers”. It does appear that a director could be a supervisor when the director is involved in the direct supervision of work. Indeed in the last year directors have been prosecuted for breaching these obligations.<sup>14</sup>

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<sup>11</sup> Section 4.1 of the *Workplace Safety and Health Act*.

<sup>12</sup> *Minenko* (2005)

<sup>13</sup> *Correspondance with C. Sabat, Crown Prosecutor (responsible for OHS Offences), Saskatchewan, assisted with this section.*

<sup>14</sup> *Sabat* (2005)

## CHAPTER SEVEN

### NO DUTIES ON DIRECTORS OR SENIOR MANAGERS

The following countries do not have legislation that imposes any health and safety duties upon company directors and do not allow them to be prosecuted.

- The Netherlands
- USA

### THE NETHERLANDS<sup>1</sup>

#### FORMS OF COMPANY AND CORPORATE ORGANISATION

There are two main kinds of company in the Netherlands: the private limited company<sup>2</sup> and the public limited company<sup>3</sup> - both of which are managed by a board of directors.<sup>4</sup> In addition, many companies will also have a supervisory board, comprising ‘controlling officers’ who are responsible for supervising the policy of the board.<sup>5</sup>

#### ORGANISATION OF OHS DUTIES

The Working Conditions Act 1998 and the Work Conditions Decree are the main pieces of legislation that set out health and safety obligations in the Netherlands.<sup>6</sup> The principal duties are placed upon an employer – and in relation to a business that is incorporated, the employer will be the legal entity of the company. Article 3, for example, states that:

- “1. The employer shall conduct a working conditions policy that is as sound as possible and, given the prevailing state of knowledge and professional service shall duly observe the following points:
- a) unless this cannot reasonably be required, the employer shall organise the work in such a way that it does not have any adverse effect on the safety and health of the employee;
  - b) unless this cannot reasonably be required, the dangers and risks to the safety or the health of the employer must be prevented or limited in the first instance at their source; to the extent to which such dangers and risks cannot be prevented or limited at source, other appropriate measures shall be taken, whereby measures aimed at collective protection shall be given priority over measures aimed at individual protection; only in cases where the employer cannot

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<sup>1</sup> Research in this chapter was assisted by interviews with the following people: Nathalie Peeters (Policy Advisor, Enforcement Team, Centre of Expertise, Netherlands Labour Inspectorate) and Ferry van Veghel and Marieke Ten Cate (CMS Derks Star Busmann NV).

<sup>2</sup> Known as ‘besloten vennootschap’ (BV).

<sup>3</sup> Known as ‘naamloze vennootschap’ (NV) In addition, there are cooperative societies (Co-operatieve vereniging).

<sup>4</sup> The Dutch word for director is *Directeur* – though this should not be confused with the personal title of ‘directuer’, which is sometimes conferred on managers who are not management board members.

<sup>5</sup> Article 140.

<sup>6</sup> There is also the Working Conditions Decree and the Working Conditions Recommendation.



- reasonably be required to take measures aimed at individual protection, effective and appropriate personal protective equipment shall be made available to the employee;
- c) the layout of the place of work, the working methods and the work resources used for the work, and the contents of the work, shall be adapted to the personal characteristics of the employees for as far as can reasonably be required;
  - d) unvarying, repetitive work carried out within a short period of time and work with a tempo that is controlled in such a way that the employee is prevented from influencing the tempo of the work shall be avoided for as far as reasonably can be required; if work of this nature cannot be avoided or can only be avoided to an insufficient extent, the employer shall regularly alternate this work by other types of work or by breaks;
  - e) adequate measures shall be taken to enable the employee, if a situation arises that represents a direct threat to safety or health, to quickly render himself safe or take other appropriate measures to ensure that the harm to health is limited as much as possible.”

Duties are also imposed upon employees. Article 11 states:

“The employee is obliged to take due care in relation to the work and to do his best to ensure his/her own safety and health and that of other persons. In particular, he is obliged to:

- a) use work resources and dangerous substances correctly;
- b) correctly use the personal protection equipment made available to him/her and after its use to store it in the designated place, in so far as it is not stipulated by or pursuant to this Act that employees are not obliged to use personal protection equipment as referred to above;
- c) make no change to or unnecessarily take away safety devices fitted to work resources otherwise installed and to use them correctly;
- d) co-operate with the instruction arranged for him as referred to in article 8;
- e) immediately notify the employer or the person in charge on-site on his/her behalf of any danger to safety or health that comes to his notice;
- f) if necessary, to assist the employer and the employees, and other persons and services referred to in Article 14, in the fulfillment of their obligations and tasks pursuant to this Act.”

Although it is technically possible that duties imposed upon employees could apply to directors employed by the company, the Dutch Labour Inspectorate does not apply the duty on employees in that way. As a result, no safety legislation in the Netherlands imposes direct duties upon any person who could either be a director of the company or a senior manager.

## **OFFENCES**

There are two forms of sanction under this Act – but they can only be imposed upon employers (companies) and employees. A recent amendment to the Act states that:

“If an act punishable by fine is committed by a legal entity, the fine can be imposed on

1. the legal entity, or
2. the person who has ordered the behaviour which has resulted in the non-compliance with the obligations arising from this law or the provisions based on them, as well as the person who has actually directed the behaviour in question;
3. the parties referred to under 1 and 2 jointly.”<sup>7</sup>

This offence could possibly result in fines being imposed upon directors or senior managers if they ‘ordered’ or ‘directed’ the conduct, which resulted in the breach by the company. There is no other provision for the prosecution of directors.<sup>8</sup>

There are a number of penal law offences that directors, along with any other individuals, could commit. These are set out below:

“A person who by negligence or carelessness is responsible for the death of another is liable to a term of imprisonment or of detention of not more than nine months or a fine of the fourth category.”<sup>9</sup>

“A person who by negligence or carelessness is responsible for serious bodily harm of another or such bodily harm as causes temporary illness or temporary inability to perform the duties of office or practice a profession is liable to a term of imprisonment or of detention of not more than six months or a fine of the fourth category.”<sup>10</sup>

“Where the serious offences defined in this title are committed in any official or professional capacity, the judge may increase the term of imprisonment by one third, he may order disqualification from practicing the profession in which the serious offence was committed, and he may order publication of the judgment.”<sup>11</sup>

In addition, Article 51 allows directors in certain circumstances to be prosecuted when a company has committed an offence. They can be prosecuted for having ‘ordered the commission of the criminal offence’ or having been ‘in control of such unlawful behaviour’. It appears that a director would be able to be prosecuted for this offence if he or she knew about a dangerous situation but failed to act.

## ENFORCEMENT

Directors cannot be prosecuted for an offence under the Working Conditions Act 1998. In addition, there is no record of any director being convicted of such an offence following a work-related death or injury.<sup>12</sup>

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<sup>7</sup> Article 33 a. Amendment took place in June 2005.

<sup>8</sup> There are two kinds of offences under the Act – a criminal and a fineable offence. Only companies can commit criminal offences, and this only when their conduct is “in conflict with this Act or its provisions, if such acts or omissions, of which he could reasonably have been expected to be aware, lead or could be expected to lead, to a threat to life or serious harm to the health of one or more employees”.

<sup>9</sup> Article 307, Penal Code.

<sup>10</sup> Article 308, Penal Code.

<sup>11</sup> Article 309, Penal Code.

<sup>12</sup> Peeters, 2005.

## PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE

We were unable to obtain any information on this.

## UNITED STATES OF AMERICA

### LEGISLATIVE STRUCTURE

The duties set out in the Occupational Safety and Health Act (OSHA) of 1970 is Federal law and applies to 29 states. The remaining 21 states have all obtained Federal approval to establish their own legislation.<sup>13</sup>

The principal obligations imposed by OSHA are upon the employer, which in relation to an incorporated business will be the company.

There are no obligations upon directors or officers of the company. The only possible exception to this relates to where a director has complete control of a company. In one case, involving a death of an employee, the court concluded that an officer's or a director's role in a corporate entity (particularly a small one) may be so pervasive and total that the officer or director is in fact the corporation and therefore the employer.<sup>14</sup> The court wrote that to conclude that such a person cannot be held liable under the Act would strip OSHA of much of its force when applied to closely held corporations where the owner and principal officer is also the person actively supervising the work in which OSHA regulations were violated.

In relation to the statutes of the 21 states to whom OSHA does not apply, none impose duties upon directors or officers of the company.<sup>15</sup> The only possible exception to this appears to be the California Corporate Criminal Liability Act 1991 which makes it an offence for "any corporation, limited liability company or person who is a manager with responsibility for a product, facility, equipment, process, place of employment or business practice" to knowingly conceal certain dangers and fail to inform OSHA and ensure that workers are warned.

A 'manager' means a person who has (a) management authority in or as a business entity and (b) significant responsibility for any part of a business that includes actual authority for the safety of a product.

### Offences

Directors can not be prosecuted for any offences as directors under OSHA; they can however be prosecuted for a number of offences that any individual can be prosecuted like giving advance notice of an inspection, making a false statement etc.

It is unclear whether any of the state statutes contain director specific offences.

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<sup>13</sup> Alaska, Arizona, California, Hawaii, Indian, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington and Wyoming.

<sup>14</sup> Cusack, 806 F. Supp, 47.

<sup>15</sup> We are reliant on a survey kindly undertaken by Dechert Solicitors for the CCA.

## CHAPTER EIGHT

### SUMMARY OF FINDINGS

#### PRESENCE OF DIRECTORS DUTIES

The main finding of the research report is that seven out of nine countries contain safety legislation that imposes positive safety obligations upon either directors (or their equivalents) or senior managers of companies. These are:

- Germany
- France
- Italy
- Sweden
- Japan
- Canada (four out of fourteen<sup>1</sup> jurisdictions)
- Australia (two out of nine<sup>2</sup> jurisdictions)

They can be divided into two categories.<sup>3</sup>

- those with legislation that imposes direct and clear positive safety obligations upon directors (Germany, the Canadian jurisdictions of Ontario, British Columbia and the Northwest Territories, and the Australian state of Queensland);
- those with legislation that impose positive duties upon a person who is either a director or senior manager (France, Italy, Sweden, Japan, the state of South Australia and the Canadian state of Alberta).

There is in addition another category of jurisdictions which impose significant responsibilities upon company directors through the creation of offences that are targeted at them. In this category are the four Australian states of:

- Victoria
- Tasmania
- New South Wales
- Australian Capital Territory.

There are also jurisdictions that impose either minimal or no duties upon directors. These can be grouped into three categories.

- those that create an offence similar to that of section 37 of the Health and Safety at Work Act 1974. In this category are two Australian states (Northern Territories and Western Australia) and eight Canadian jurisdictions (British Columbia, New Brunswick, Manitoba, Saskatchewan, Prince Edward Island, New Foundland and Labrador, Nova Scotia and Quebec).

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<sup>1</sup> Includes federal legislation.

<sup>2</sup> Includes federal legislation.

<sup>3</sup> These are categories that we have found useful as an analytical tool; however they can be divided in different ways.

- those that impose duties upon an employer or supervisor that could theoretically apply to directors but do not in practice. In this category are the five Canadian states of Manitoba, Yukon, New Brunswick, Northwest Territories and Saskatchewan.
- those that do not impose any duties and do not create any relevant offences. These are Netherlands and the United States.

### **Direct and clear positive safety obligations upon directors**

In this category we have put five jurisdictions – they all contain legislation that imposes clear and explicit positive duties upon company directors. The jurisdictions are:

- Germany
- Ontario, Canada
- British Columbia, Canada
- Northwest Territories, Canada,
- Queensland, Australia

The manner in which this is done is relatively similar in each of the jurisdictions. A duty is imposed upon a director to ensure that the company, the primary duty holder, complies with the obligations that are imposed upon it.

- In Germany, the directors have an obligation to “fulfill” the responsibilities that are imposed upon the company. Failure to do so can result in the imposition of ‘enforceable orders’. Administrative fines can be imposed or prosecutions initiated if the director has acted with ‘neglect’ in certain circumstances.
- In the Canadian province of Ontario, directors have a duty to “take all reasonable care” to ensure that the company complies with its obligations. Failure to do so can result in the imposition of notices or prosecution.
- In the Canadian province of British Columbia, directors must ensure that the company complies with the duties imposed upon it. Failure to exercise “due diligence” in preventing the company committing the offence, can result in prosecution of the director.
- In the Northwest Territories in Canada, directors (of mining companies) must ‘ensure to the extent practicable’ that the company complies with its duties. Failure to do so can result in a prosecution.
- In the Australian state of Queensland, directors “must ensure that the corporation complies” with the law. An offence by the company is considered to be an offence by the directors unless they can show that they exercised ‘reasonable diligence’ or were ‘not in a position to influence the conduct’ of the company.

It should be noted that:

- in Germany and the province of Ontario, ‘enforcement notices’ (or their equivalents) can be imposed upon the directors for failure to comply with this duty.<sup>4</sup>
- in British Columbia and Queensland the duty is an absolute one and an offence will be deemed to have been committed unless the director can show that he or she ‘exercised diligence’ or ‘exercised reasonable diligence.’ respectively. In Ontario and Northwest Territories, the duties are relative ones to take ‘reasonable care’ and ‘to ensure to the extent practicable’ that companies comply with the law. In Germany the duty is an absolute one, though for an administrative fine to be imposed or prosecution initiated, ‘neglect’ must be shown.
- the duty is imposed upon all directors.

### **Positive duty imposed upon a person who is either a director or senior manager**

In this category we have placed six jurisdictions. This category differs to the previous one in that the legislation itself is not exact in imposing duties upon directors, and whilst the effect of its application may indeed to impose duties upon directors, the duties might instead be upon senior managers. The jurisdictions in this category are:

- France
- Italy
- Sweden
- Japan
- South Australia, Australia
- Alberta, Canada

There are some but not many similarities in the manner in which duties are imposed in these different jurisdictions.

In both France and Italy, the legal entity of the company is almost entirely bypassed as an object upon which duties are imposed, and instead duties are imposed upon individuals within the company:

- in France the principal duties are imposed upon a person called the Head of the Establishment who will, depending upon the circumstances of the company, be a director (or equivalent) or a senior manager.
- in Italy, the principal duties are imposed upon the employer who will always be an individual with the power to make decisions including that of expenditure. This person will always be a director or senior manager of the company.

In Sweden the legislation imposes its principal duties upon an employer who will, in relation to incorporated businesses be the company; but case law says that this responsibility is ‘borne primarily by the highest manager i.e in a limited company usually by its managing director’.

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<sup>4</sup> It is not clear whether this is the case in relation to the other three jurisdictions. Clarification is being sought.

In France, Italy and Sweden, the law allows directors to delegate their responsibilities – in each, however, certain conditions (set out in case law) need to apply – principally that the person has sufficient control and autonomy:

- in France, if the delegation abides by the conditions, delegation is total;
- in Italy, even if delegation abides by the conditions, certain responsibilities cannot be delegated (principally those around risk assessments), and the person who delegates retains certain supervisory responsibilities over the person whom he or she has delegated responsibility;
- in Sweden, even if delegation does take place according to the conditions, the person will, like in Italy, continue to have certain supervisory responsibilities

The situation in Japan and South Australia is relatively similar – in both the legislation imposes its principal duties upon the company (as the employer) and requires the company to appoint a particular person with safety responsibilities:

- in Japan the person appointed is called a General Health and Safety Manager and should be the person “who exercises overall management over the execution of the undertaking at the workplace concerned.” The legislation sets out specific responsibilities for this person including “overall management” of “measures for the prevention of the hazards or health impairment of workers” and “education on the health and safety of workers.” It is unusual for this person to be a director and is more likely a senior manager.
- in South Australia, the person appointed is called a ‘responsible officer’ and – like that of the Canadian and Australian states in the previous category – has the responsibility to take “reasonable steps to ensure” that the company complies with the law. This person may be a director but could also be a ‘chief executive officer’ of a company who may not be on the Board.

In the Canadian province of Alberta, duties are imposed upon employers who are defined to include not only companies but also the director or officer of the company who “oversees the occupational health and safety of the workers”. Alberta would have been in the first category of jurisdictions – but (a) a duty only exists if a director or officer has been appointed (something which is not mandatory). and (b) the person on whom duties may be imposed need not be a director but could be an officer of the company, which is defined to include certain senior managers and other senior officials.

It is notable that Alberta and Japan are the only jurisdictions that talk about companies appointing a senior company manager/ director with particular responsibilities for safety.

### **Significant Duties imposed through the creation of offences**

In this category there are four jurisdictions – each of them states in Australia. The legislation in each of the states does not impose positive duties upon directors (as in Ontario, British Columbia or Northwest Territories) however they create offences which has a very similar effect. This category needs to be distinguished from the subsequent category that contains those jurisdictions, which contains offence provisions similar to section 37 1974 Act in Britain. The reason for the distinction is in the nature and extent of the offence. The jurisdictions in this category are:

- Victoria, Australia
  - Tasmania, Australia
  - New South Wales, Australia
  - Australian Capital Territory, Australia
- In Victoria, if a company commits an offence and this is “attributable to a company officer failing to take reasonable care” the officer is guilty of an offence.

In effect this imposes a duty upon company officers to ‘take reasonable care’ to prevent the company committing an offence.

- In Tasmania, each director is considered to have committed an offence when the company commits an offence unless:
  - the offence took place without the director’s knowledge or whether the director was not reasonable able to have acquired that knowledge, or;
  - the director used all due diligence to prevent the company committing the offence.

In effect this imposes a duty upon directors to either take reasonable steps to determine whether the company is complying with its obligations and to stop any violation, or to use all due diligence in prevention the offence commission.<sup>5</sup>

- In New South Wales, if a company commits an offence, each director is considered to have committed an offence unless:
  - the director was not in a position to influence the conduct of the company, or;
  - the director used all due diligence.

In effect this imposes a duty upon directors to use all due diligence to prevent the company committing an offence unless he was not in a position to influence the conduct of the company.

- In Australian Capital Territory, manslaughter legislation imposes a duty upon ‘senior officers’ of the companies to ensure that their conduct, or something in their control or possession does not creae ‘a danger to the life, safety or health’ of a worker. The duty is only engaged when a death takes place and an offence can be committed if this duty has been negligently complied with.

## ENFORCEMENT

Two issues were considered in the report - in what circumstances did relevant regulatory bodies actually enforce the duties and what was the level of enforcement. The report only considered these questions in relation to jurisdictions that fell within chapters two to four.

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<sup>5</sup> This formulation is very similar to the positive duty on directors that is present in the law of Queensland, Australia.



Only limited information about levels of enforcement of these duties was able to be obtained – and in relation to the information that has been accessed it is difficult to make an effective assessment of whether the levels are high or low.

## **Chapter Two Jurisdictions**

**Germany:** enforcement through the imposition of enforceable orders usually only take place if the director is not complying with a request to make changes or if the violation is serious. It is generally only when the directors do not make the changes requested that administrative fines are imposed. Enforcement is seen as ‘a last resort in a sequence of graduated measures available to the inspectors’.

In 2003, the Labour Inspectorate imposed 1,292 administrative fines on directors and others, and reported 106 cases to the police. The inspectors of the occupational accident insurance funds issued a further 1,810 cases.

**Ontario:** The enforcement policy is not a publicly available document – but an issue that is considered relevant in deciding whether or not to prosecute is whether the directors had ‘any practical influence on operational matters, not just on policy’. One factor that limits prosecutions is the fact that prosecutions must start within a year of the offence.

In 2002 and 2003, there were a total of 459 and 618 convictions respectively – but it is not known how many of these relate to the convictions of director or officers. Prosecutions do happen but they are not frequent.

**British Columbia:** There is no published guidance setting out the circumstances when prosecutions will take place. However, in relation to the imposition of notices, the Workers Compensation Board “will not automatically issue an order to officers, directors or agents of a corporation each time an order is written to the corporation. The Board will, however, issue orders to officers, directors or agents where there is evidence that they were responsible for the failure by the corporation. Being “responsible” includes authorizing, permitting or acquiescing in the failure.

There are no publicly available statistics on the numbers of prosecutions against directors for breach of the duty. Prosecutions do happen, but they are unusual. One of the reasons for this is that the offence must be prosecuted within a six month time period.

**Northwest Territories:** no information on enforcement policy is available and no prosecution is known to have taken place.

**Queensland:** The guidance to inspectors states that:

“When investigating workplace incidents where the alleged offender is a corporation, the inspector should always consider the culpability of executive officers of the corporation. In doing so the inspector should elicit evidence to confirm or negate the defences available to the executive officers.

In circumstances where the evidence indicates that an executive officers was in a position to influence the conduct of the corporation and the executive officers did not exercise reasonable diligence to ensure the corporation complied with the provisions of the Act, it is appropriate that the executive officer is charged with the offence.

Factors that ought to be considered include:

- the approach to health and safety of the company
- management systems instigated by the corporation's board for reporting health and safety issues;
- knowledge of the executive officer or any failed system causing the accident or whether the executive officer should have known of the failure.”

Between 2001 and 2004, there were 22 convictions of executive officers involving 19 cases. Six also involved a conviction of a company.

### **Chapter Three Jurisdictions**

**France:** When dangerous situations are identified, directors/senior managers who are judged to be ‘heads of establishments’ may receive formal notices to take any necessary action. Prosecution proceedings can be initiated if action is not taken.

In 2003, the Ministry of Labour reports that 132 individuals received a warning, 428 were convicted of a first offence, 13 were convicted of a second offence, and 107 received either a prison or suspended sentence. One person received a professional ban. It is however not known how many of these individuals were directors or their equivalent, or senior managers.

**Italy:** Inspectors must send details of any violation by the director or senior manager who is deemed to be the ‘employer’ to the prosecutor for prosecution. However, prosecution can be deferred if the changes proposed by the inspector is complied with.

There are no national details published of the number of prosecutions against ‘employers’. In one region, however, in 1999, inspectors identified 8,239 infringements – 88% of which were rectified. A total of 4,440,000 Lira was obtained in fines.

**Sweden:** It is only when there has been ‘intentional’ or ‘negligent’ non-compliance with an injunction or prohibition that a prosecution against one or more of the employer’s representatives can take place. Companies cannot be prosecuted under Swedish law – and as a result prosecution of a legal representative (a natural person), or a person to whom powers have been delegated, will be prosecuted.

In 2002, the Work Environment Authority report that a total of 44 people were convicted and received either a fine or suspended sentence. These people were in one of the following positions: supervisor, assistant director of training, head of loading staff, head of production department, factory manager, removal worker, group leader, head of high school, proprietor of a firm, machine supervisor, site manager, production supervisor, production manager, safety manager, proxy for a limited company, issuer of testimonial and a managing director

**Japan:** Prosecution of General safety and health managers are not common, and the “emphasis in Japan is on preventative inspection and fixing the problem.” There is no information on the number of prosecutions of these managers

**South Australia:** Enforcement need not only be via prosecution; enforcement notices can be issued against a ‘responsible officer’ – though it is not known how often these are used. The Enforcement Policy does not mention ‘responsible officers’ and in the last two years there does not appear to have been a conviction of such a person.

**Alberta:** Senior company officers have been prosecuted as ‘employer’ – but it has only been used against small companies. No director has ever received a jail sentence. Prosecutions are generally ‘rare’ in Alberta, although ‘their number is increasing’

## **Chapter Four Jurisdictions**

**State of Victoria:** Guidelines to inspectors state that inspectors must ask themselves a number of questions concerned with whether or not to take enforcement action:

“Did the measures which might reasonably have been taken to avoid the incident fall properly and reasonably within the duties, responsibilities, and scope of the officer’s functions, for example:

- making arrangements for facilitating ongoing training and supervision; and
- creating, monitoring, and maintaining systems for identifying, assessing, and controlling hazards and risks to health and safety? .....
- Did the officer fail to take obvious steps to prevent the incident?
- What was the degree of culpability involved in the officer’s behaviour?
- Has the officer had previous advice or warnings regarding matters leading to the incident, or should the officer have reasonably known about the advice or warnings?
- Did the officer knowingly compromise safety for personal gain, or for commercial gain of the organisation, without undue pressure from the organisation to do so?
- Was the contravention attributable to another person, and if so, to what extent?
- What could reasonably be expected of the officer, bearing in mind all the relevant circumstances including:
  - the officer’s role and knowledge; and
  - the nature and context of the relevant activity being conducted by the organisation?”

We have no information on the number of prosecutions.

**State of Tasmania:** There are no guidelines for prosecutors on when to prosecute directors or not – so it is difficult to assess what the extent of the duty on directors is in practice.

Prosecutions for the offence have taken place – since 1996, three directors and one managing director are reported to have been convicted under this provision. In practice this provision is not used as frequently as it might be: most companies in Tasmania are small and it is considered appropriate in such a situation to prosecute the company.

**New South Wales:** There are no clear criteria concerning when directors or managers will be prosecuted in practice. The prosecution guidance simply says:

“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.”

The guidance sets out general considerations that will be taken into account, “in choosing the appropriate defendant in a particular case”. These are:

- a) who is primarily responsible for the alleged offence, that is, who was primarily responsible for the acts or omissions giving rise to the alleged offence or the material circumstances leading to the alleged offence or who formed any relevant intention;
- b) in relation to (a) above, what was the culpability of the proposed defendant;
- c) the effectiveness of any court order that might be made against the proposed defendant.

No official statistics concerning numbers of convictions under section 26 of the 2000 Act are available; however it is known that there have been at least 35 prosecutions between 1983 (when similarly worded offence existed in the previous legislation) and 2004. Most of these identified prosecutions (27 out of 35) were against directors rather than individuals ‘concerned in the management’ of the company.

## **REASON FOR THE IMPOSITION OF DIRECTORS DUTIES AND PERCEPTIONS OF THE IMPACTS OF SUCH DUTIES**

Only a small amount of information has been obtained as to why particular legal regimes have been adopted and the perception by regulatory bodies and others about their effectiveness. It has been difficult to obtain this information. In relation to the effectiveness of the regime, we could not identify any research that appears to have been done in any of the jurisdictions about the *actual* effectiveness of imposing duties. This appears to be because either the regimes have been long-standing so no-one knows why the law developed in this particular way or, where the law has been changed more recently, there appears to have been little institutional memory.

### **The European Jurisdictions**

In relation to the four states of Europe with positive duties – Germany, France, Italy and Sweden – the legal regimes are long-standing and the specific reasons for their development are not easily identifiable. However, it appears that a key influence on their development has been the fact that, historically, these jurisdictions have only allowed for the prosecution of natural persons and not legal entities. Consequently OHS legislation can only be enforced through the imposition of duties upon natural persons. Though this is now changing in certain jurisdictions

In relation to the perceived impacts of the existence of directors duties within the European jurisdictions studied, only information from Germany has been obtained.

**Germany:** The Ministry of Economics and Labour considers that their system of duties and accountability works well. Company directors are considered to have real incentives to comply with the legislation that explains the low level of penal cases. One regulator interviewed stated that: “I think it is good to have health and safety duties upon individuals in the company because it stresses the need for health and safety in a better way if they know that they are responsible.”

## The Canadian and Australian Jurisdictions

In relation to the Canadian and Australian jurisdictions, the imposition of directors duties has resulted from more recent reforms of OHS legislation. In addition, a number of further jurisdictions within Australia are giving consideration to reform. It has not been possible to obtain background information relating to the reforms that were implemented during the 1990s in the relevant Canadian jurisdictions and there is often little institutional memory in regulatory bodies. However, we have managed to obtain the following information relating to recently implemented or proposed reforms to Australian OHS legislation.

**State of Queensland, Australia:** The reason given by the regulator for the introduction of the section imposing positive safety obligations on executive officers was that “corporations often turn out to be 'straw men’”. It was felt that such a provision was necessary in order to ensure an effective penalty could be imposed on the most appropriate 'person' responsible for a breach. This same section exists in other state legislation: the Electrical Safety Act 2002; the Dangerous Goods Safety Management Act 2001; Coal Mining Safety and Health Act 1999; and the Mining and Quarrying Safety and Health Act 1999.

**State of Tasmania, Australia:** In a recent study on criminal liability of corporations the Tasmania Law Reform Institute stated that:

“Of course it is important for senior officers, like all other people, to be able to be held criminally liable for their actions or negligence. Where a particular senior officer is responsible for a death or injury it may be appropriate that they be personally charged with manslaughter or grievous bodily harm. In other instances they may simply have contributed towards their employer committing the crime. The potential to find senior officers criminally liable in such cases may motivate senior officers to work towards compliance by their organisation.”

**New South Wales, Australia:** The regulator told us that the reform was: “Essentially to ensure that directors and managers who run corporations will not be shielded from responsibility by the corporate legal structure.”

However, recent legal advice given to the regulatory body in 2004 has suggested that the current legislative provisions creating director liability continue to allow directors to escape prosecution even when their behaviour has been culpably negligent. The reasons are stated as follows:

“... directors or managers can in fact be shielded from liability by relying upon the complexity of the hierarchy in an organisation or the multiplicity of operations and responsibilities to be able to satisfy the above grounds of defence (i) that is they were not in a position to influence or alternatively under (ii) that, at their level of seniority, they used all due diligence to prevent a contravention (eg. by promulgating a policy or issuing a directive) and then relying upon a breach or breaches further down the chain by one or more persons in order to isolate or insulate themselves from causative acts or omissions.”

As suggested by various commentators in relation to the absence of positive legal obligations in Britain, the lawyers argued that this, situation perversely, creates an incentive for directors to

abstain from taking responsibility for OHS and is thus likely to have a negative impact on health and safety:

“Generally speaking the greater level of involvement of management in issues affecting safety (such as in relation to integrated safety systems) the safer will be the organisation. However, the greater the integration the greater the potential exposure of directors and managers to liability. On this basis it would be safer for directors and managers to take refuge in a non-integrated system that does not expose them as referred to above.”

Consequently, the Advice has suggested that there is a need to impose clear, positive, legal duties on directors and other senior managers:

“There is an increasing requirement for senior management to be integrated into safety management systems.

“The process of integration reduces the scope of senior managers to distance themselves from operational events by relying upon the hierarchy concept.

“Law reform in this area should be directed towards encouraging and promoting positive constructive safety conduct.

“Constructive or positive conduct can be encouraged by raising the potential bar on the liability of individuals. The prospect of personal liability increases vigilance and a proactive culture.

“... a Code of Practice would be the means of positively creating benchmarks against which liability issues can then be evaluated in terms of culpability and the scope for escaping liability but only in circumstances where it can be demonstrated that a manager/director has been relevantly proactive.”

The Advice concludes:

“The above approach seeks to negate what is common place in large or medium size organisations, namely, management by exception, whereby compliance is treated as a routine matter to be delegated to inferiors and handled by them, unless specifically brought back to the attention of senior management. A proactive approach mandates internal discipline and preventative reform. A genuine well-run compliance system in accordance with the proposed Code of Practice should give directors and managers little to fear and also enhance safety. Compliance would permit directors/managers to rely upon statutory grounds of defence.<sup>6</sup>

**Western Australia:** In Western Australia where direct legal obligations have not yet been imposed on company directors, a mandatory review of the existing OHS legislation concluded:

“WorkSafe has submitted that changes are required to s.55 to clarify the applicable

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<sup>6</sup> “Advice in relation to Workplace Death, Occupational Health and Safety Legislation and other matters” (June 2004) Professor Ron McCallum; Mr Peter Hall QC; Mr Adam Hatcher, Barrister at law, Mr Adam Searle, Barrister at Law. Para 214.

penalties. Another important consideration is the extent of the personal liability of directors, officers and members of a body corporate in circumstances where systems of work have lead to death or serious injury. The section presently makes such persons liable only in respect of actual acts or omissions leading to the breach. It does not cover situations where persons are not directly involved in the breach but fail to perform their organisational responsibilities.

“As noted earlier, a literature review undertaken by WorkSafe concluded that offences that provided for personal liability reinforced by credible enforcement are the most significant motivators of senior staff. Loss of corporate image and credibility were also significant. Interestingly, the review noted the importance that was placed on “safety pays” as a motivation but that there was a range of circumstances where safety did not pay. As a result it was a limited strategy in some circumstances. Other important motivators, however, included safety and health management systems in larger businesses, the perceived legitimacy of the legislation as a moral guideline, supply chain pressure, information strategies and leverage for small and medium sized business.

“It is clear from this that any offence that has direct application to individuals would carry the greatest impact. Certainly the possibility of a director or Chief Executive Officer personally facing charges appears the most significant and effective penalty. The willingness in some jurisdictions to establish a “systems approach” to penalties also increases the accountability of senior executives. It opens up that possibility as the need to have evidence of the direct involvement of senior personnel in events involving fatalities or serious injury may not be required. Instead it requires only that the responsible executives permitted the unsafe circumstances to develop without taking reasonable steps to ensure safety and prevent failures. That style of legislation, if implemented, could make prosecutions more effective and the Act more enforceable.

“The Victorian and Queensland Governments have recently considered new offences and penalties to address circumstances of a serious breach of the occupational safety and health laws with the objective of ensuring a director or other senior corporate officer can be held liable if he or she was in a position to influence the circumstances of the corporation’s offence and did not exercise due diligence to prevent the offence. While these proposals ultimately did not proceed, they are indicative of strong community concern over the apparent lack of accountability of directors and senior officers. ....”

“[We recommend that] the Act be amended to more clearly establish the accountability of corporations, their directors and senior officers for the occupational safety and health of employees.”<sup>7</sup>

These recent reports, commissioned by state regulatory bodies in Australia, suggest that the trend amongst those jurisdictions in Australia that have *not* imposed direct legal obligations upon company directors is towards the imposition of such duties.

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<sup>7</sup> Laing (2002), *Review of the Occupational Safety and Health Act 1984, Western Australia*.

It is important to note that the reasons advanced in the reports recommending the imposition of directors duties in Australia are virtually identical to the arguments of those who support such reforms in Britain, namely:

- that the evidence shows that the greater the involvement of management in issues affecting health and safety within an organization, the safer and healthier that organization will be;
- that since greater involvement in occupational health and safety (OHS) may increase individual directors liability, legislation that fails to impose direct legal obligations on company directors creates an incentive for company directors to remain 'ignorant' of, and remote from, OHS issues;
- that the evidence suggests that the imposition of personal liability through direct legal obligations would provide a powerful and positive incentive for directors and senior managers to take responsibility for OHS.



**Table 1:** Summary of research – position of different jurisdictions in relation to imposition of health and safety duties on directors/senior managers

	Direct Duty on Boardroom Director	Direct Duty on person who will be a director or senior manager	Broad duties on directors through offences	Duties on directors via section-37 like offences	Duties that might be placed upon directors - role specific	No duties
Britain				X		
Germany	X					
France		X				
Italy		X				
Sweden		X				
Holland						X
Japan		X				
USA						X
<b>Canada</b>						
Criminal Code			X			
Ontario	X					
British Columbia	X			X		
NW Territories					X	
NW Territories (mines)	X					
Alberta		X				
New Brunswick				X	X	
Yukon					X	
Manitoba				X	X	
Saskatchewan				X	X	
Nova Scotia				X		
Prince Edward Island				X		
New Foundland				X		
Quebec				X		
<b>Australia</b>						
Tasmania			X			
Victoria			X			
Queensland	X					
Western Australia				X		
Capital Territory			X			
New South Wales			X			
South Australia		X				
Northern Territory				X		
Federal						

## CHAPTER NINE

### CONCLUSION

This research report was commissioned by the Health and Safety Executive to assist the Health and Safety Commission (HSC) in deciding how it should advise the Government on whether and how the law should be changed to impose responsibilities on directors. This section of the report therefore looks at what lessons emerge out of the comparative research.

#### General observations

- It is fair to say that the legislative framework for regulating occupational health and safety (OHS) in Great Britain appears unusual in not imposing positive duties on directors. The majority of the nine countries studied do have this kind of legislation. It would not, therefore, be anything out of the ordinary from an international perspective if the HSC did propose such a reform. Indeed it is clear from Australia, which has legislation similar to that of the 1974 Act 1974, that the trend is for more states to change the law to impose such duties.
- In all these jurisdictions the duties are imposed through provisions in safety legislation rather than company law.
- None of the survey respondents suggested that the existence or enforcement of directors' legal OHS responsibilities resulted in 'director flight'. Nor are we aware of any social scientific research that has identified this as a problem in those jurisdictions that have imposed directors' duties.
- None of the survey respondents suggested that the imposition of directors' legal OHS responsibilities resulted in excessive 'risk aversion' amongst company directors (though this was not explicitly asked). Nor are we aware of any social scientific research that has identified this as a problem in those jurisdictions that have imposed directors' duties.
- The reasons advanced by regulatory and other official bodies for imposing directors' duties, and the perceived benefits of such duties, reflect the arguments of those groups and individuals that support such reform in Great Britain.
- No research could be identified in the jurisdictions studied that actually assessed whether the imposition of duties was actually effective in improving health and safety.
- It is clear that imposing duties does make it easier to prosecute directors for failures on their part of directors; however it is also clear that in those jurisdictions which have legal duties upon directors and where either a company or/and a directors, could be prosecuted, the levels of prosecutions remain low.
- It is also clear that the safety record of a jurisdiction is not contingent on whether or not it imposes duties on directors. Britain, which has a relatively good safety record, does not impose duties on directors, but some other countries which impose duties do not have a

particularly good record. There are many other factors other than the imposition of duties that will determine the jurisdiction's safety record.

### **Possible Models for the Legislative Imposition of Directors Duties**

Although France, Italy and Sweden impose duties on directors/senior managers it could be argued that the legal regimes of these countries do not provide a useful template for reform in Britain since the legislation and jurisprudence in this area is quite different from British law.

The corollary to that is that the jurisdictions which impose positive duties that may be of most interest are those in Canada and Australia. This is because they have common law regimes and have legislation that is similar in structure to the Health and Safety at Work Act 1974.

It is notable that the Hepburn private members bill<sup>1</sup> used a legal formulation – “to take all reasonable steps to ensure that the company complies” with the law - which is very similar to the provisions in the Canadian jurisdictions of Ontario and Northwest Territories, and the Australian state of Queensland.

- Ontario - “take all reasonable care”
- Northwest Territories - must “ensure to the extent practicable”
- Queensland - “must ensure”

In considering which legal model might be appropriate as a guide for reform in Britain it is also worth looking at the four Australian jurisdictions of Victoria, Tasmania, New South Wales and Australian Capital Territory. This is because the duties – although created through an offence – are wide.

That being said, the advantage of clear positive duties on the face of the Act – rather than duties created through the wording of an offence - is that they can be enforced without the need for prosecution. In Ontario, for example, notices can be imposed directly upon directors. In addition, as discussed above, recent advice received by the regulatory authority of New South Wales has recommended that direct legal obligations replace the imposition of an implied duty through a wide offence.

### **Possible Models for an ACOP**

With respect to defining in more detail the possible nature, scope and content of directors' duties, our research provides a useful basis for thinking about the kind of detailed guidance that could be incorporated in an Approved Code of Practice in Britain (that might go along with any legislation).

In **New South Wales (Australia)**, the Advice mentioned above stated that the purpose of such a Code would be to:

“both define and impose obligations on senior management personnel thereby encouraging and indeed mandating a proactive approach to safety and which would have the effect of limiting avenues of escape from liability. The Code of Practice

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<sup>1</sup> See Introduction.

would address matters such as the following:

1. The definition of directors' and managers' functions and responsibilities;
2. Particularisation of the steps required by directors and managers to discharge safety obligations attaching to managerial roles (eg. The issue of directions, the carrying out of inspections, the mandatory supply of supervisor's periodic reports and discussion of the implementation of safety measures in quarterly board meetings);
3. The formulation of obligations of members of senior management to integrate themselves into safety systems effecting operations including, but not limited to, the receipt of quarterly reports on the integrity of identified safety management systems themselves and as to any identified risks based on predictive methodologies."

In **Ontario (Canada)**, the court ruling in *R v Bata* stated that in determining the meaning of 'reasonable care' the following should be taken into account:

- “(a) did the board of directors establish a pollution prevention ‘system’ .... i.e. was there supervision or inspection? Was there improvement in business methods? Did he exhort those he controlled or influenced?
- (b) Did each director ensure that the corporate officer have been instructed to set up a system sufficient within the terms and practices of the its industry of ensuring compliance with environmental laws, to ensure that the officers report back periodically to the board on the operation of the system, and to ensure that the officers are instructed to report any substnail non-compliance to the board in a timely manner? ....
- (c) the directors are responsible for reviewing the environmental compliance reports provided by the officers of the corporation, but are justified in placing reasonable reliance on reports provided to them by corporate officers, consultants, counsel or other informed parties,
- (g) The directors should substantiate that the officers are promptly addressing environmental concerns brought to their attention by government agencies or other concerned parties including shareholders.
- (h) The directors should be aware of the standards of their industry and other industries which deal with similar environmental pollutants or risk.
- (i) The directors should immediately and personally react when they have notice the system has failed.

Within this general profile and dependent upon the nature and structure of the corporate activity, one would hope to find remedial and contingency plans for spills, a system of ongoing environmental audit, training programs, sufficient authority to act and other indices of a pro-active environmental policy.”

Although this was a case involving compliance with environmental regulations, there are many parallels with health and safety.

In the **State of Victoria (Australia)**, WorkSafe published the following guidance relating to what is required of company officers to comply with the legislation:

”Officers must use the level of sound judgment, prudent decision-making and taking of action that any reasonable person would use to prevent and reduce hazards and risks to health and safety.

Officers should know what their own and their organisation’s OHS obligations are and how they are managed, including:

- appointing a member of the executive with overall responsibility for health and safety;
- defining, documenting and communicating to all levels in the organisation their specific health and safety responsibilities, authority to act and reporting requirements;
- holding managers accountable for their health and safety responsibilities;
- allocating financial and physical resources so that their organisation’s health and safety actions comply with the Act;
- employing or engaging sufficient numbers of qualified and competent people to advise on and to implement OHS requirements;
- ensuring that there are procedures in place for the systematic identification of workplace hazards, evaluation of their risk and implementation of controls to manage the risk;
- providing induction programs and training on OHS for all employees including management;
- ensuring there is a system in place for the reporting of hazards and incidents and for a prompt response to investigate and rectify them; and
- understanding their organisation’s OHS performance and monitoring it over time.”

In **South Australia**, WorkCover provides guidance on what a health and safety policy should look like and in so doing the kind of responsibilities that are required of the ‘responsible officer’:

“The [title of responsible officer] as the Responsible Officer has the overall responsibility to provide a healthy and safe workplace for employees and will ensure adequate resources are provided to meet the health and safety objectives and implement strategies.

In particular the [title of responsible officer] will ensure:

- appropriate health and safety policies and procedures are developed and implemented to enable the effective management of health and safety and control of risks to health and safety
- mechanisms are provided to enable the identification, development, implementation and review of appropriate health, safety and welfare related policies and procedures
- mechanisms are provided to enable employees and their representatives to be consulted on any proposals for, or changes to the workplace, work practices, policies or procedures which may affect the occupational health, safety and welfare of employees

- managers are provided with the necessary knowledge and skills to effectively enable them to carry out their health and safety responsibilities
- mechanisms are provided to enable the assessment of managers' and supervisors' health and safety performance
- occupational health and safety performance is an integral component of the [organisation's name] business and financial plans
- mechanisms are provided to regularly monitor and report on health and safety performance
- annual health and safety strategic plans are developed and implemented to meet health and safety objectives.”

## **Conclusion**

Some of the jurisdictions considered in this report contain legal duties upon directors which could be easily copied into the Health and Safety at Work Act 1974. Whilst no jurisdiction contains a document, similar to an Approved Code of Practice, a number of documents can cases provide the basis upon which an ACOP can be drafted.



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# International comparison of health and safety responsibilities of company directors

This report looks at whether the law in nine different countries imposes health and safety duties upon boardroom directors (and other senior managers), and if so, what these duties comprise and whether they assist in the prosecution of directors.

The main finding is that seven out of nine countries contain safety legislation that imposes positive safety obligations upon either directors or senior managers of companies. These are: Germany, France, Italy, Sweden, Japan, Canada (four out of fourteen jurisdictions) and Australia (two out of nine jurisdictions).

There is in addition another category of jurisdictions which, whilst not imposing explicit positive duties upon directors, do impose significant responsibilities through the creation of offences that are targeted at directors. This category includes four Australian states.

There are also, however, jurisdictions which either impose minimal or no duties upon directors. Two countries – USA and Holland – do not impose any obligations.

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