

The effectiveness of the duty of officers to exercise due diligence under section 27 of the Work Health and Safety Act in achieving good corporate governance.

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I INTRODUCTION

On 3 July 2008, the Council of Australian Governments (**COAG**) signed the Inter-Governmental Agreement for Operational Reform in Occupational Health and Safety; an agreement to form a consistent national law for the regulation of occupational health and safety¹. At the time, each state and territory had its own legislation which was similar in some respects, but which also differed substantially including in relation to the individual liability of directors, officers and managers of a corporation.

Safe Work Australia (**SWA**) was established pursuant to the *Safe Work Australia Act 2008* to drive the nationalisation process. That body includes members from each of the Commonwealth, state and territory governments, and members representing the interests of employers and workers.

In 2008, a review was conducted by an advisory panel chaired by Robin Stewart-Crompton, with Barry Sherriff and Stephanie Mayman as panel members (**Advisory Panel**). Following the review, the Advisory Panel submitted two reports to SWA.

The first report of the Advisory Panel noted that:

A company cannot comply with a duty of care placed upon it, unless those who manage the company make appropriate decisions and ensure necessary actions are taken. The values and culture of the company, which are important to encourage appropriate attitudes and behaviours for health and safety, are determined and influenced by those who make the relevant decisions².

The recommendations of the Advisory Panel included the imposition of a positive duty on 'officers' to exercise due diligence to ensure that an entity complies with its health and safety obligations³. The Advisory Panel emphasised the importance of key individuals taking proactive steps to achieve the primary object of work health and safety laws - to protect workers and other persons from harm to their health, safety and welfare through the elimination or minimisation of risks arising from work⁴.

The imposition of a positive duty on officers was a different approach to the work health and safety laws in most jurisdictions throughout Australia, although such an approach had previously been recommended by review panels⁵. Traditionally state and territory work health and safety laws have imposed liability on officers or other key management personnel only where those persons have been knowingly involved in, or have contributed to the entity's contravention⁶.

¹ Safe Work Australia, *About Safe Work Australia* (2008) <<http://www.safeworkaustralia.gov.au/sites/swa/about/pages/about>> at 12 July 2013.

² Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. First Report to the Workplace Relations Ministers' Council* (2008) paragraph 8.3; see also Richard Johnstone, Elizabeth Bluff, Alan Clayton, *Work Health and Safety Law and Policy* (3rd ed, 2012) p 372.

³ Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. First Report to the Workplace Relations Ministers' Council* (2008) Part 2

⁴ See for example *Work Health and Safety Act 2011* (Cth) s 3.

⁵ Chris Maxwell, Victoria, *Occupational Health and Safety Act Review* (2004).

⁶ *Occupational Health and Safety Act 2000* (NSW) s 26; *Occupational Health and Safety Act 2004* (Vic) ss 144 and 145; *Work Health Act 1986* (NT) s 180; *Occupational Safety and Health Act 1984* (WA) s 55; *Workplace Health and Safety Act 1995* (Tas) s 53; *Workplace Health and Safety Act 1995* (Qld) s 167; *Occupational Health, Safety and Welfare Act 1986* (SA) ss 4 and 59C.

SWA adopted the recommendations of the Advisory Panel. Section 27 of its National Model Work Health and Safety Act, provides that 'officers' of a person conducting a business or undertaking (**PCBU**) must exercise due diligence to ensure that the PCBU complies with its duties under the WHS Act.

On 1 January 2012, the WHS Act commenced operation for employers who are covered by the Commonwealth work health and safety scheme, as well as for work performed in New South Wales (**NSW**), Queensland, the Australian Capital Territory and the Northern Territory. The WHS Act was enacted in Tasmania and South Australia, commencing 1 January 2013.

Victoria and Western Australia have not adopted the WHS Act and continue to operate under the respective state legislation⁷.

The Work Health and Safety Act adopted in each state and territory differ slightly, however the terms of the officers' liability under the relevant state and territory legislation is identical to that under section 27 of the National Model Work Health and Safety Act and the *Work Health and Safety Act 2011* (Cth) (**WHS Act**). Accordingly, reference to the WHS Act throughout this paper will include reference to the Work Health and Safety Act enacted in each state and territory (excluding Victoria and Western Australia).

For the purpose of section 27 of the WHS Act, officer is defined as an officer within the meaning of section 9 of the *Corporations Act 2001* (Cth) (**Corporations Act**) (other than a partner of partnership), or an officer of the Commonwealth or a public authority⁸. The WHS Act also expressly excludes volunteers from liability⁹.

The primary obligation of PCBU's under the WHS Act is to ensure, so far as is 'reasonably practicable', the health and safety of workers engaged by the PCBU or workers whose activities in carrying out work are influenced or directed by the PCBU (i.e. contractors)¹⁰. Further, a PCBU must ensure, so far as is 'reasonably practicable', that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking¹¹. There are other specific duties, such as notifying the relevant authority of any notifiable incidents¹² and consulting with workers about ways of ensuring health and safety¹³.

The primary obligation under section 19 of the WHS Act, to ensure, so far as is 'reasonably practicable', the health and safety of workers expressly requires the PBCU to:

- a. provide a safe work environment;
- b. maintain safe plant and structures;

⁷ *Occupational Health and Safety Act 2004* (Vic); *Occupational Safety and Health Act 1984* (WA).

⁸ *Work Health and Safety Act 2011* (Cth) s 4.

⁹ *Work Health and Safety Act 2011* (Cth) s 34.

¹⁰ *Work Health and Safety Act 2011* (Cth) s 19(1).

¹¹ *Work Health and Safety Act 2011* (Cth) s 19(2).

¹² *Work Health and Safety Act 2011* (Cth) s 38.

¹³ *Work Health and Safety Act 2011* (Cth) s 47.

- c. provide and maintain safe systems of work;
- d. ensure the safe use, handling and storage of plant, structures and substances;
- e. provide adequate facilities for the welfare of workers;
- f. provide information training, instruction and supervision necessary to protect workers from risks to their health and safety;
- g. monitor the health of workers and the conditions at the workplace for the purpose of preventing illness or injury of workers¹⁴.

'Reasonably practicable' is defined as what a person is reasonably able to do, taking into account and weighing up all relevant matters including: the likelihood of the hazard or the risk concerned occurring; the degree of harm that might result from the hazard or risk; what the person concerned knows or ought reasonably know about the hazard or risk; ways of eliminating or minimising the risk; the availability and suitability of ways to eliminate or minimise the risk; and the cost of eliminating or minimising the risk¹⁵.

In exercising due diligence under section 27 of the WHS Act, an officer must:

- a. acquire and keep up to date knowledge of work health and safety matters;
- b. gain an understanding of the nature of the operations of the business or undertaking;
- c. ensure that the PCBU has, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety;
- d. ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information;
- e. ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU; and
- f. verify the provision and use of the resources and processes at (c) to (e) above¹⁶.

This is not an exhaustive list of what is required to discharge due diligence¹⁷.

¹⁴ *Work Health and Safety Act 2011* (Cth) 19(3).

¹⁵ *Work Health and Safety Act 2011* (Cth) s18.

¹⁶ *Work Health and Safety Act 2011* (Cth) s 27(5).

¹⁷ Explanatory Memorandum, Model Work Health and Safety Bill 2010 paragraph 125.

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The primary objects of the WHS Act are aimed at the protection of workers and include providing workers and other persons with the highest protection against harm to their health, safety and welfare and providing a framework for continuous improvement and progressively higher standards of work health and safety¹⁸.

On the other hand, company law, including the Corporations Act and corporate governance principles, such as the ASX Corporate Governance Principles and Recommendations¹⁹ have traditionally been focused on protecting shareholders rights and ensuring profitability of the enterprise. There are no specific protections in corporations law of workers or other persons who may be affected by a corporation's activities.

One of the fundamental general duties of directors and officers of a corporation is to 'discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of a corporation...'²⁰

Whilst this duty and other general duties imposed by the Corporations Act would necessarily extend to any functions or powers exercised as a director or officer of the corporation, without specific legislation like the WHS Act, there is no 'duty' on an officer to consider the interests of employees and other stakeholders or to protect the health, safety and welfare of workers and other persons.

It has been reported that bad work health and safety practices may have a significant impact on the overall viability of a corporation, through decreased productivity due to increased lost time due to injury, higher workers' compensation premiums, penalties for breach of health and safety legislation, decreased employee morale and adverse publicity²¹. Ensuring workplace health and safety is clearly a matter that is central to good corporate governance²² and achieving the aims of any enterprise (including corporate entities), to generate a profit and/or provide goods and services. The officers' duty to exercise due diligence under the WHS Act is directed towards achieving the objects of the WHS Act by promoting good corporate governance practices²³, but in turn is also likely to generate broader rewards for the business.

The fact that company law and general corporate governance standards are not aimed at protecting health and safety and the interests of stakeholders other than shareholders begs the question as to how work health and safety duties fit into the overall corporate governance framework and the effectiveness of section 27 of the WHS Act at achieving good corporate governance.

¹⁸ *Work Health and Safety Act 2011* (Cth) s 3.

¹⁹ ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations with 2010 Amendments 2nd Edition* (2010) <http://www.asxgroup.com.au/media/PDFs/cg_principles_recommendations_with_2010_amendments.pdf> at 15 June 2013.

²⁰ *Corporations Act 2001* (Cth) s 180.

²¹ Karen Wheelwright, 'Some Care, Little Responsibility? Promoting Directors' and Managers' Legal Accountability for Occupational Health and Safety in the Workplace' (2005) 10(2) *Deakin Law Review* 470, 473 to 474.

²² Corporate governance is defined as 'the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations. It encompasses the mechanisms by which companies, and those in control, are held to account...corporate governance influences how the objectives of the company are set and achieved, how risk is monitored and assessed, and how performance is optimised': ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations with 2010 Amendments 2nd Edition* (2010) p 3

<http://www.asxgroup.com.au/media/PDFs/cg_principles_recommendations_with_2010_amendments.pdf> at 15 June 2013.

²³ See generally Karen Wheelwright, 'Some Care, Little Responsibility? Promoting Directors' and Managers' Legal Accountability for Occupational Health and Safety in the Workplace' (2005) 10, 2 *Deakin Law Review* 470; Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. First Report to the Workplace Relations Ministers' Council* (2008) Chapter 8.

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This paper will consider and critically evaluate the effectiveness of the duty under section 27 of the WHS Act, covering the following areas:

- a. who owes the duty;
- b. to whom is the duty owed;
- c. to content of the duty;
- d. how the duty effects the composition and functions of the board; and
- e. prosecution and penalties.

II WHO OWES THE DUTY?

The Advisory Panel²⁴ made it clear that all persons who had oversight and overall responsibility for the decision making within an organisation should have a duty to ensure that it complied with its obligations²⁵. However, there was much controversy over how to define the class of persons that should be held responsible.

State and territory legislation described the duty holders in various ways, including:

- 'officers' as defined by the Corporations Act²⁶;
- 'director or a person concerned in the management of a corporation'²⁷;
- 'director, manager, secretary or any other officer'²⁸;
- directors²⁹;
- an appointed 'responsible officer'³⁰;
- an 'executive officer', which was defined as a person concerned with, or who takes part in, the corporation's management³¹;

²⁴ Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. Second Report to the Workplace Relations Ministers' Council* (2009) paragraph 23.140.

²⁵ Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. Second Report to the Workplace Relations Ministers' Council* (2009) Recommendation 86.

²⁶ *Occupational Health and Safety Act 2004* (Vic) ss 144 and 145; *Work Health Act 1986* (NT) s 180.

²⁷ *Occupational Health and Safety Act 2000* (NSW) s 26.

²⁸ *Occupational Safety and Health Act 1984* (WA) s 55.

²⁹ *Workplace Health and Safety Act 1995* (Tas) s 53.

³⁰ *Workplace Health and Safety Act 1995* (Tas) ss 10 and 11.

³¹ *Workplace Health and Safety Act 1995* (Qld) s 167.

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- an 'officer' (member of the governing body or executive) or an employee of the administrative unit (public service)³².

The WHS Act adopted the definition of 'officer' from the Corporations Act, because it was well known and clearly defined³³. It was also said to cover those who make the key decisions and provide leadership³⁴.

The duty under section 27 of the WHS Act applies to 'officers' of both companies and unincorporated associations, as well as 'officers' of the Commonwealth or a public authority. The duty does not extend to partnerships and volunteers³⁵.

As noted by Sheriff, the officers' duty is targeted at developing an organisational culture and values that are aimed at ensuring health and safety, and accountability from the top down³⁶. This approach aligns with the definition of 'officer' under the Corporations Act, which is directed at those persons making the high level decisions within a corporation; rather than persons who are in control of the day to day management³⁷.

Relevantly however, the duty also extends to individuals within unincorporated associations, the Commonwealth and government bodies, recognising that health and safety matters are of primary importance to, and affect any business or undertaking.

A Who is an Officer?

'Officer', in relation to a corporation, under the Corporations Act includes:

- a director or secretary of a corporation;
- a person who makes or participates in making decisions that affect the whole or a substantial part of the business of the corporation;
- a person who has the capacity to affect significantly the corporation's financial standing;
- a person in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice provided in the proper performance of functions in the person's professional capacity)³⁸.

³² *Occupational Health, Safety and Welfare Act 1986 (SA)* ss 4 and 59C.

³³ Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. Second Report to the Workplace Relations Ministers' Council* (2009) Recommendation 86.

³⁴ Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. Second Report to the Workplace Relations Ministers' Council* (2009) paragraph 23.115.

³⁵ *Work Health and Safety Act 2011 (Cth)* ss 4 and 34.

³⁶ Barry Sheriff, Safe Work Australia, *Promoting Effective Health and Safety Leadership Using the Platform in the Model Work Health and Safety Act (2011)* <www.safeworkaustralia.gov.au> at 13 July 2013.

³⁷ See for example *Kirk v IRC; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales* [2010] HCA 1.

³⁸ *Corporations Act 2001 (Cth)* s 9.

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It also includes a receiver, administrator, liquidator or a trustee³⁹.

Similarly, officer of an entity that is not incorporated means:

- a partner in a partnership (although, partners are expressly excluded from the duty under section 27 of the WHS Act);
- an officer of an unincorporated association;
- a person who makes or participates in making decisions that affect the whole or a substantial part of the business of the entity;
- a person who has the capacity to affect significantly the entity's financial standing⁴⁰.

An interesting point to note is that the WHS Act makes it clear that an officer or a member of an unincorporated association may only be found liable for a breach of the duties of officers, workers or other persons at a workplace⁴¹; not the duties of a PCBU⁴². Therefore, the duty under section 27 of the WHS Act actually limits the liability of officers of an unincorporated association; comparable with that of officers of a corporate entity. This is fair and reasonable. No such limitation applies to natural persons, partners⁴³ or public entities who are employers.

Sections 247 and 252 of the WHS Act provide that a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of a business or undertaking of the Commonwealth or a public authority, is an officer of the Commonwealth or the public authority for the purpose of the WHS Act. Ministers are expressly excluded from the definition⁴⁴. This adopts the language of the Corporations Act, but is adapted to the specific circumstances of government and public authorities.

1 **Directors and Secretary**

A company search will generally reveal who are the current and former directors and secretary of a corporation. However, in the case of *Inspector James v Ryan*⁴⁵, the NSW Industrial Relations Commission confirmed that, despite what is recorded on the company register, a 'director' must be properly appointed. In that case, the CEO of the parent company was also nominally appointed as a director of each of its subsidiaries. Ryan had no active role to play on the board of the subsidiary, Dekorform, and was not validly appointed in accordance with its constitution; he was therefore not a 'director' for the purpose of the *Occupational Health and Safety Act 2000* (NSW) (**NSW Act**).

³⁹ *Corporations Act 2001* (Cth) s 9.

⁴⁰ *Corporations Act 2001* (Cth) s 9.

⁴¹ *Work Health and Safety Act 2011* (Cth) ss 27, 28, 29 and 34(3).

⁴² *Work Health and Safety Act 2011* (Cth) s 34(2).

⁴³ *Work Health and Safety Act 2011* (Cth) s 5(3).

⁴⁴ *Work Health and Safety Act 2011* (Cth) s 247.

⁴⁵ [2009] NSWIRComm 215.

Like the definition of 'officer', 'director' under section 9 of the Corporations Act extends to a person who acts in that position or in accordance with whose instructions and wishes the directors are accustomed to act⁴⁶.

The duties of directors and secretaries under the Corporations Act are imposed on the premise that a director or secretary is in a fiduciary relationship with the shareholders; although not all directors' duties under the Corporations Act are of a fiduciary nature⁴⁷. Directors and secretaries of a corporation are not however in a fiduciary relationship with workers and or other persons. Nevertheless, health and safety issues are of utmost importance and can result in serious illness, injury, or even death. It is therefore necessary that the 'controlling minds'⁴⁸ of an entity are required to ensure compliance with health and safety standards in carrying out their duties⁴⁹.

2 Other Officers

The definition of 'officer' under the Corporations Act also extends to de facto and shadow directors. This extension has been quite controversial, given the potential broad reach and the high standard required by section 27 of the WHS Act.

Submissions were made to the Advisory Panel to the effect that imposing the definition of 'officer' under the Corporations Act, rather than limiting the definition to 'directors' or 'executive officers', may extend the obligation to senior management⁵⁰, for example human resources and occupational health and safety officers. This approach was criticised for placing an unnecessary burden on such individuals.

Despite the broader scope of the duty to exercise due diligence, it is unclear why the adoption of this definition caused so much concern, given that the term was already used to impose liability in states such as Victoria and an even broader definition was applied in states such as NSW, which covered a 'person concerned in the management of a corporation'. In the *Powercoal* case the definition under the NSW Act was said to extend to managers at 'many levels' and was 'not confined to matters performed by directors or managing directors of a company'⁵¹.

⁴⁶ *Corporations Act 2001* (Cth) s 9.

⁴⁷ Robert P Austin and Ian M Ramsay, *Ford's Principles of Corporations Law*, online edition (2011) paragraph 8.014; *Corporations Act 2001* (Cth) s 180.

⁴⁸ [2010] NSWIRComm 116, 218.

⁴⁹ See for example *DPP v Orbit Drilling Pty Ltd* [2010] VCC 417, 35, where the Court noted that behind every policy is a person whose health and safety must be protected.

⁵⁰ See for example ACCI, Sub No. 136 to the Department of Education, Employment and Workplace Relations, *National Inquiry into Model Occupational Health and Safety Laws*, July 2008, Part 8.6.

⁵¹ *Morrison v Powercoal Pty Ltd & Anor* [2004] NSWIRComm 297, 41.

(a) De facto Director

De facto directors include both those persons who make or participate in making decisions that affect the whole or a substantial part of the business of the entity, and persons who have the capacity to affect significantly the entity's financial standing⁵².

SWA's Guideline on the WHS Act officers' duty⁵³ notes that case law has not defined what is a 'substantial part' of the business, but relevant considerations include the degree to which that part of the business contributes to the revenue of the business and is significant to the reputation of the business, whether that part of the business is considered a core part of the business, the proportion of personnel engaged in that part of the business and whether those who manage that part of the business make significant strategic or policy decisions⁵⁴. That Guideline is not legally binding, but will likely be persuasive.

SWA's Guideline⁵⁵ also notes that a person who has the capacity to significantly affect the financial standing of an entity includes someone involved in the financial management of the corporation (i.e. CFO) or who is involved in decisions relating to significant investments or projects.

A notable example of a de facto director, is the James Hardie litigation where Mr Shafron, the company's legal counsel and Mr Morley, the company's Chief Financial Officer, were both found to be 'officers' of the company because they had repeatedly participated in decisions beyond the administrative arrangements and provided advice and information to the board on which the board acted⁵⁶.

Given that the decisions must affect the whole or a substantial part of the business, the definition could not include those persons who have influence over only one aspect of the business' operations that is not substantial, such as health and safety, or human resources officers.

(b) Shadow Directors

Shadow directors only apply to corporations and include persons in accordance with whose instructions or wishes the directors of the corporation are accustomed to act⁵⁷.

The leading case on the definition of shadow director is *Chameleon Mining NL v Murchison Metals Ltd*⁵⁸, where the Federal Court said at paragraphs [94] to [98]:

⁵² *Corporations Act 2001* (Cth) s 9.

⁵³ Safe Work Australia, *Interpretive Guideline – Model Work Health and Safety Act The Health and Safety Duty of an Officer under Section 27* (2011) <www.safeworkaustralia.gov.au> at 12 July 2013.

⁵⁴ See also WorkSafe Victoria, *Prosecution of an offence under an act and/or a Regulation* (2005) <http://www.worksafe.vic.gov.au/__data/assets/pdf_file/0005/10598/compliance_policy_summary.pdf> at 15 June 2013. [2010] FCA 1129, which applies a similar test.

⁵⁵ Safe Work Australia, *Interpretive Guideline – Model Work Health and Safety Act The Health and Safety Duty of an Officer under Section 27* (2011) <www.safeworkaustralia.gov.au> at 12 July 2013.

⁵⁶ *Morley v ASIC* (2010) 247 FLR 140; 274 ALR 205; *Shafron v ASIC* (2012) 286 AALR 612, which related to a breach of the *Corporations Act 2001* (Cth) s 180.

⁵⁷ *Corporations Act 2001* (Cth) s 9.

⁵⁸ [2010] FCA 1129; see also *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2010) 238 FLR 384.

...the purpose of the definition is to identify the persons, other than professional advisors, who have real influence or control over the corporate affairs of the company...[it] only requires that, as and when the Board is instructed or directed, it is accustomed to act in accordance with the shadow director's instructions or wishes.

However, the definition requires 'acts' over a period of time, rather than one individual act⁵⁹.

The express exclusion of those persons who are providing advice in the proper performance of their functions will necessarily exclude persons who provide discrete advice and do not influence broader decisions within the organisation.

3 Excluded Persons

Section 27 of the WHS Act expressly excludes partners of a partnership and volunteers⁶⁰. The WHS Act also generally excludes voluntary associations from liability as a PCBU⁶¹.

Partners and volunteers are not excluded from the duty applied to workers under the WHS Act⁶². The standard applied to workers to exercise 'reasonable care' is lower than the standard of due diligence⁶³ and the penalty for a breach of a duty by an officer is higher than that for an individual⁶⁴.

The Advisory Panel had recommended that 'officers' of a partnership should be covered by the officers' duty under the WHS Act⁶⁵. The *Occupational Health and Safety Act 2004* (Vic) (**Victorian Act**) includes partners of a partnership⁶⁶.

The exclusion of partners was not explained by SWA. However, partners are most likely excluded from the officers' duty because, unlike unincorporated associations⁶⁷, they may be prosecuted directly for any breach by the partnership of the primary duties under the WHS Act. In fact, section 5(3) of the WHS Act makes it clear that the partners are liable if the partnership commits an offence.

Volunteers are also excluded from the definition of 'officer' under the Victorian Act⁶⁸. 'Volunteer' is defined as a person who is acting on a voluntary basis (irrespective of whether the person receives out-of-pocket expenses, such a travel or meal expenses)⁶⁹.

⁵⁹ *Chameleon Mining NL v Murchison Metals Ltd* [2010] FCA 1129, 94 to 98.

⁶⁰ *Work Health and Safety Act 2011* (Cth) ss 4 and 34.

⁶¹ *Work Health and Safety Act 2011* (Cth) s 5(7).

⁶² *Work Health and Safety Act 2011* (Cth) s 34(3).

⁶³ *Work Health and Safety Act 2011* (Cth) s 28.

⁶⁴ *Work Health and Safety Act 2011* (Cth) ss 31 to 33.

⁶⁵ Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. First Report to the Workplace Relations Ministers' Council* (2008) paragraph 8.4; Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. Second Report to the Workplace Relations Ministers' Council* (2009) paragraph 23.128.

⁶⁶ *Occupational Health and Safety Act 2004* (Vic) s 145.

⁶⁷ *Work Health and Safety Act 2011* (Cth) s 34(2).

⁶⁸ *Occupational Health and Safety Act 2004* (Vic) s 145(5).

The Advisory Panel noted that volunteers may be excluded from liability in order to avoid deterring volunteers' offering their time, which was of great benefit to the public⁷⁰. However, the Advisory Panel also noted that volunteers are involved in making the key decisions within organisations that may cause high risk to workers and others, such as organisations working with drug and alcohol affected individuals⁷¹. The Advisory Panel concluded that volunteers should be liable, but only for a category one offence, involving recklessness⁷². SWA did not adopt this recommendation.

The exclusion of volunteers from liability as an officer reduces the protection otherwise afforded by the WHS Act; but when weighted against the benefits to the community and the fact that volunteers are required to take 'reasonable care' for their own health and safety and the health and safety of others affected by their acts or omissions⁷³, their exclusion from the officers' duty is appropriate.

B Middle Management

Often middle management or an employee contribute to, or cause, a breach of work health and safety laws; sometimes despite the best efforts of the Board in setting up safety systems and procedures⁷⁴. However, this does not mean that the officers' duty should extend to middle management.

Under the old *Occupational Health and Safety Act 1985* (Vic), liability extended to anyone concerned in the management of the body corporate⁷⁵, which could include everyone at a supervisory level, whether or not they were involved in the decisions ordinarily reserved for directors or officers. That definition was removed following the Maxwell review in 2004⁷⁶, when a duty was imposed on officers to exercise reasonable care⁷⁷, rather than holding an officer/manager liable where they engaged in wilful negligence.

The fact that the officers' duty under section 27 of the WHS Act is a positive duty that pertains to governance issues means that it should be limited, so as not to unnecessarily burden those persons who do not have the capacity to influence the overall governance of the organisation. Generally, middle management's role is clearly distinct from governance⁷⁸.

⁶⁹ *Work Health and Safety Act 2011* (Cth) s 4; Explanatory Memorandum, Model Work Health and Safety Bill 2010 paragraphs 16 and 17.

⁷⁰ Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. First Report to the Workplace Relations Ministers' Council* (2008) para 6.11; Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. Second Report to the Workplace Relations Ministers' Council* (2009) paragraph 23.122.

⁷¹ Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. Second Report to the Workplace Relations Ministers' Council* (2009) paragraph 23.145.

⁷² Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. Second Report to the Workplace Relations Ministers' Council* (2009) paragraph 23.146; *Work Health and Safety Act 2011* (Cth) s 31.

⁷³ *Work Health and Safety Act 2011* (Cth) ss 28 and 29.

⁷⁴ *R v Commercial Industrial Construction Group Pty Ltd* [2006] VSCA 181, 48; see also *DPP (Vic) v Coates Hire Operations Pty Ltd* [2012] VSCA 131.

⁷⁵ *Occupational Health and Safety Act 1985* (Vic) s 52(3)(c).

⁷⁶ Chris Maxwell, Victoria, *Occupational Health and Safety Act Review* (2004).

⁷⁷ *Occupational Health and Safety Act 2004* (Vic) s 145.

⁷⁸ Thomas Clark, *International Corporate Governance: A Comparative Approach* (2007) p 37.

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The definition of officer under the Corporations Act, and as extended by the WHS Act, sufficiently captures those persons involved in governance⁷⁹.

C Dialogue with Management

The duty under section 27 of the WHS Act necessarily requires open and consistent communication with middle management and sometimes workers, to ensure that those persons in charge of the day to day operations are complying with the practices and processes set up to ensure health and safety.

There are specific duties requiring a PCBU to consult with workers in relation to health and safety matters⁸⁰, and officers are required to exercise due diligence to ensure the company's compliance with that duty⁸¹. Workers also have a duty under the WHS Act to cooperate with any reasonable policy or procedure of the PCBU in relation to health and safety⁸². Case law supports the view that workers (particularly senior management) are required to assist the board⁸³.

The interaction between officers, management and workers that is instilled by the duty under section 27 of the WHS Act and related obligations sets up a clear process to achieve the objects of the WHS Act⁸⁴ and mechanisms for achieving good corporate governance.

III TO WHOM THE DUTY IS OWED

The duty under section 27 of the WHS Act is for the benefit of workers and others affected by the business or undertaking⁸⁵.

Directors' and officers' duties under the Corporations Act are aimed at the protection of shareholders' interests. In particular, section 181 of the Corporations Act imposes a duty on directors to discharge their duties in good faith and in the best interests of the corporation. The best interests of a corporation have been linked to shareholders' interests, having been defined in the case of *Greenhalgh v Arderne Cinemas* as 'the corporators as a general body', rather than 'the company as a commercial entity'⁸⁶.

Whilst the WHS Act extends beyond corporations, the interests of workers and other persons⁸⁷ may be in direct conflict with the interests of shareholders and the duties under the Corporations Act. For example, in determining what is 'reasonably practicable' under the WHS Act, it is only after assessing the other relevant factors, including the extent of the risk and available ways of eliminating the risk, that the PCBU may

⁷⁹ *Work Health and Safety Act 2011* (Cth) s 28.

⁸⁰ *Work Health and Safety Act 2011* (Cth) Part 5.

⁸¹ *Work Health and Safety Act 2011* (Cth) s 27.

⁸² *Work Health and Safety Act 2011* (Cth) s 28.

⁸³ *Jones v Brite Services* [2013] FWC 3392.

⁸⁴ *Work Health and Safety Act 2011* (Cth) s 3.

⁸⁵ *Work Health and Safety Act 2011* (Cth) s 19.

⁸⁶ [1951] Ch 286, 281.

⁸⁷ *Work Health and Safety Act 2011* (Cth) s 3.

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consider whether the cost of risk management is grossly disproportionate to the risk. Cost would however be the primary interest for shareholders.

Nevertheless, in the long term, it has been reported that bad work health and safety practices may have a significant impact on the overall viability of a corporation, through decreased productivity, higher workers' compensation premiums, penalties for breach of health and safety legislation and adverse publicity⁸⁸.

In 1989, a Senate Standing Committee recommended that the 'companies legislation be amended to make it clear that the interests of a company's employees be taken into account by directors in administering the company'⁸⁹. This did not however eventuate.

Unlike Australian corporations law, the United Kingdom *Companies Act 2006*⁹⁰ provides that the duty of directors to act in good faith requires consideration of what 'would be most likely to promote the success of the company for the benefit of its members as a whole' having regard to several matters, relevantly including the interests of employees of the company and the impact upon the community and the environment.

Despite the lack of specific recognition of other stakeholders' rights in Australian company law, there does appear to be a shift in the thinking of at least some directors towards a more holistic approach to decision making⁹¹. In 2008, 87.3% of Australian directors surveyed reported that increasing employee morale was important to them as a director and 94.3% said that directors' duties allowed them to take account of the interests of other stakeholders; employee interests being ranked third, after shareholders' interests and the interests of the company⁹².

Clark notes that:

The concept of shareholder primacy, and the concomitant insistence that the only real purpose of the corporation is to deliver shareholder value...is corrosive of any effort to realise the deeper values companies are built upon...and the broader set of relationships they depend upon for their success⁹³.

This is certainly true in reflecting upon the long term value that can be gained from ensuring safe work practices.

Australia is clearly a long way from recognising broader interests as equal to shareholders interests, but the imposition of the due diligence obligation under section 27 of the WHS Act must shift this balance somewhat,

⁸⁸ Karen Wheelwright, 'Some Care, Little Responsibility? Promoting Directors' and Managers' Legal Accountability for Occupational Health and Safety in the Workplace' (2005) 10, 2 *Deakin Law Review* 470, 473 to 474.

⁸⁹ Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth, *Company Directors Duties Report on Social and Fiduciary Obligations on Company Directors* (1989) paragraph 6.3.

⁹⁰ *Companies Act 2006* (UK) s 172.

⁹¹ Ian Ramsay and Geoff Stapledon, "Institutional Investors, Corporate Governance and The New International Financial Architecture", in Say Goo, Douglas Arner and Zhongfei Zhou (editors), *International Financial Sector Reform: Standard Setting and Infrastructure Development* (2002) pp 455 to 466.

⁹² M Anderson, M Jones, S Marshall, R Mitchell and I Ramsay, 'Shareholder Primacy and Directors' Duties: An Australian Perspective' (2008) 8 *Journal of Corporate Law Studies* 161, Tables 4 and 5.

⁹³ Thomas Clark, *International Corporate Governance: A Comparative Approach* (2007) pp 67 to 69.

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at least in terms of the decisions pertaining to eliminating or minimising risks to health and safety. However, that is not to say that shareholders' interests are not protected.

IV CONTENT OF THE DUTY

The duty under section 27 of the WHS Act imposes a positive and separate duty on officers to exercise due diligence.

One of the key reasons expressed by the Victorian Government for not adopting the WHS Act was the disproportionate financial cost⁹⁴, including the costs associated with the officers due diligence requirement, which was ranked the second largest cost of the implementation process⁹⁵.

Traditionally, both the WHS Act and corporations law have prescribed general obligations, which allow flexibility for duty holders to adopt a suitable approach to managing risk, within the structure of their organisation⁹⁶. It has however been argued that the obligations under section 27 of the WHS Act set too higher standard and are rigid, imposing an unnecessary burden, particularly on smaller businesses⁹⁷.

A Due Diligence

1 Due Diligence Compared to Other Standards

The Explanatory Memorandum to the WHS Bill notes that:

these provisions [section 27 of the WHS Act] reflect a deliberate policy shift away from applying 'accessorial' or 'attributed' liability to officers...the positive duty requires officers to be proactive and means that officers owe a continuous duty to ensure compliance with duties and obligations...⁹⁸

The Advisory Panel's first report noted that officers are in a position more senior to workers and should be held to a higher standard of care than 'reasonable care'⁹⁹. The second report of the National Review noted that 'reasonable care' (as required of a worker and an officer under state laws¹⁰⁰) may only require enquiries

⁹⁴ Kim Wells MP Treasurer of the State of Victoria, 'Victorian Budget 2012-13 Treasurer's Speech Budget Paper No. 1' (Speech delivered to Parliament of Victoria, Victoria, 1 May 2012).

⁹⁵ PricewaterhouseCoopers Australia, *Impact of the Proposed National Work Health and Safety Laws in Victoria, Summary Report of Supplementary Impact Assessment* (2012) Victorian Government <http://www.rcsa.com.au/documents/RCSA%20submissions/Impact_of_the_proposed_national_model_work_health_and_safety-PwC.pdf> at 16 June 2013.

⁹⁶ Chris Maxwell, Victoria, *Occupational Health and Safety Act Review* (2004); *Holmes v R.E. Spence & Co Pty Ltd* (1992) 5 VIR 119 at 123; ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations with 2010 Amendments 2nd Edition* (2010) p 3 <http://www.asxgroup.com.au/media/PDFs/cg_principles_recommendations_with_2010_amendments.pdf> at 15 June 2013; Financial Reporting Council (UK), *Response to the European Commission Green Paper on the EU Corporate Governance Framework* (2011) pp 31 to 37.

⁹⁷ PricewaterhouseCoopers Australia, *Impact of the Proposed National Work Health and Safety Laws in Victoria, Summary Report of Supplementary Impact Assessment* (2012) Victorian Government <http://www.rcsa.com.au/documents/RCSA%20submissions/Impact_of_the_proposed_national_model_work_health_and_safety-PwC.pdf> at 16 June 2013.

⁹⁸ Explanatory Memorandum, Model Work Health and Safety Bill 2010 paragraph 125.

⁹⁹ Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. First Report to the Workplace Relations Ministers' Council* (2008) paragraph 8.42.

¹⁰⁰ *Occupational Health and Safety Act 2004* (Vic) s 145.

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and action in relation to what is known or ought to be known by them about particular circumstances¹⁰¹. The positive obligation to exercise due diligence is a greater standard than reasonable care, but was thought to be appropriate in the context of an officer's position of seniority. Given the purpose of providing a suitable governance framework for the exercise of health and safety duties¹⁰², this approach clearly has merit.

By comparison, the *Occupational Safety and Health Act 1984* (WA) (**WA Act**) imposes an even more limited duty on officers than 'reasonable care', relying on the consent or connivance of the duty holder¹⁰³. The limitations of this approach were highlighted in the case of *Oxford Cold Storage Co Pty Ltd and Fleiszig*¹⁰⁴, where the company and its director, Mr Fleiszig, were prosecuted under the old Victorian *Occupational Health and Safety Act 1985* (which was in similar terms to the WA Act). In that case, the employees had reported feeling unpleasant to Mr Fleiszig, who reported it to the general manager, but did nothing further. The employees had carbon monoxide poisoning. On appeal, the Supreme Court reversed a finding that Fleiszig was liable. Kellam J expressed the view that liability required 'full knowledge of the essential facts which made what was done an offence'¹⁰⁵. This is clearly an unsatisfactory approach.

On the other hand, it is a big task to require that each and every officer of an entity exercise due diligence. Perhaps a model such as the previous Tasmanian Act, which allowed an entity to appoint a 'responsible officer' to take charge of this duty¹⁰⁶, is more appropriate. That approach was however criticised by the ACTU, who claimed that it allowed 'a responsible officer who does not have complete control of a workplace, and therefore overall budgetary control to make decisions about OHS'¹⁰⁷. A collaborative approach is better.

The due diligence approach is also consistent with previous case law, whereby corporate entities have been held liable for the acts of its employees, despite having clear programs and processes in place to manage risk¹⁰⁸. If the entity is to be held liable, surely the controlling mind(s) of the entity should be liable. This approach emphasises the importance of work health and safety matters and provides a credible and transparent method of ensuring that PCBU's obligations are met, through good corporate governance.

2 What is Due Diligence?

There is no case law under the WHS Act defining the scope of due diligence.

¹⁰¹ Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. Second Report to the Workplace Relations Ministers' Council* (2009) paragraph 23.167.

¹⁰² *Work Health and Safety Act 2001* (Cth) s 3; Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. Second Report to the Workplace Relations Ministers' Council* (2009) paragraph 23.167.

¹⁰³ *Occupational Safety and Health Act 1984* (WA) s 55; *Occupational Health and Safety Act 1985* (Vic) s 52; *Occupational Health, Safety and Welfare Act 1986* (SA) s 59C.

¹⁰⁴ (2008) 8 VR 288.

¹⁰⁵ *Fleiszig v Arnott* (2008) 8 VR 288, 306.

¹⁰⁶ *Workplace Health and Safety Act 1995* (Tas) ss 10 and 11.

¹⁰⁷ ACTU, Sub No. 214 to the Department of Education, Employment and Workplace Relations, *National Inquiry into Model Occupational Health and Safety Laws*, July 2008, paragraph 104.

¹⁰⁸ *R v Commercial Industrial Construction Group Pty Ltd* [2006] VSCA 181; *DPP (Vic) v Coates Hire Operations Pty Ltd* [2012] VSCA 131.

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The Advisory Panel noted that the positive duty requires an individual to be 'actively engaged in the governance of the corporation', to ensure that the PCBU complies with its obligations¹⁰⁹.

The duty of due diligence, as set out in section 27(2) of the WHS Act specifically requires an officer to:

- develop clear reporting lines to keep up to date with knowledge of work health and safety matters within the business;
- understand the hazards and risks associated with the business;
- put in place mechanisms for controlling risks; and
- verify that those processes are implemented¹¹⁰.

SWA's Guideline¹¹¹ notes that due diligence is threefold and requires technical, situational and strategic knowledge of work health and safety matters within the business. The information may be collected by others, including senior management or experts, but must be analysed by the officer. As noted above, this requires active dialogue with management and employees and a proactive hands-on approach, albeit from a high level perspective.

The duty which is probably closest to the positive duty under the WHS Act is that under the NSW Act. Under section 26 of the NSW Act, a director or a person concerned in the management of a corporation was liable for a breach by the corporation unless that individual satisfied the Court that they were either not in a position to influence the conduct of the corporation in relation to the contravention, or being in such a position they exercised all due diligence to prevent the contravention by the corporation. NSW has had considerably more reported prosecutions of officers/managers than other states and territories; although it is not clear that this is because of the nature of the duty.

Due diligence was not defined in the NSW Act, unlike under section 27 of the WHS Act. Case law is also somewhat unclear as to what this standard requires.

In the case of *Inspector James v Ryan*¹¹², the Commission found that it was not realistic to require the 'chief executive officer of a large and disparate group of companies which operates internationally to take steps to ensure that he be informed [of the operation of the sawing machine in question]'. Rather, the Commission found that, if Ryan was a director,

¹⁰⁹ Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. Second Report to the Workplace Relations Ministers' Council* (2009) paragraph 23.135.

¹¹⁰ Safe Work Australia, *Interpretive Guideline – Model Work Health and Safety Act The Health and Safety Duty of an Officer under Section 27* (2011) <www.safeworkaustralia.gov.au> at 12 July 2013.

¹¹¹ Safe Work Australia, *Interpretive Guideline – Model Work Health and Safety Act The Health and Safety Duty of an Officer under Section 27* (2011) <www.safeworkaustralia.gov.au> at 12 July 2013.

¹¹² [2009] NSWIRComm 215, 179.

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unless he had been alerted to any particular difficulty, including the failure of senior personnel operating the Dekorform business to comply with occupational health and safety obligations, it would have been unnecessary and inappropriate for him to have become involved¹¹³.

This was in contradistinction to the case of *Inspector Kumar v Ritchie*¹¹⁴, where the Commission found that, whilst not required to be involved in the day to day operations in a 'hands-on' way, Ritchie, who was located offshore in New Zealand, was required to ensure that a company policy was adopted, that safety audits were conducted and that there were effective reporting lines and 'recommendations from those with expertise' in relation to the cleaning of chemical tanks.

In the *Bata* decision¹¹⁵ (a Canadian case), which involved a chemical leak causing damage to the ground and potentially the ground water, Thomas Bata (the CEO and chairman) was found to have met his obligation of due diligence, whilst other directors were found not to have discharged their duty. Relevantly, Mr Bata had a technical advisory committee commissioned to investigate the company's compliance with environmental responsibilities, ensured that mechanisms were in place to bring environmental risks to his attention and completed a walk around the office once or twice a year. This is more akin to the standard imposed in *Kumar v Ritchie*¹¹⁶.

The National Review noted the limited case law dealing with the issue of what is due diligence and determined that due diligence should be expressly defined in the legislation¹¹⁷. The WHS Act appears to adopt the high water mark (consistent with the *Ritchie*¹¹⁸ and *Bata*¹¹⁹ decisions), requiring that each director keep apprised of health and safety issues, appreciate the nature of the risks in the specific business and ensure that there are processes and procedures in place to manage risks, which are utilised. There may however be some flexibility in these obligations which will be borne out in future case law, as discussed at section C below.

B What about Actual Knowledge or Negligence?

As noted above, many state and territory Acts relied upon accessorial liability and actual knowledge of the offending conduct in order to hold an individual officer or manager liable for the company's breach¹²⁰.

In support of imposing a positive obligation on directors, the Maxwell review had noted that directors should not be held liable unless they had actual knowledge of the breach¹²¹.

¹¹³ *Inspector Kumar v Ritchie* [2009] NSWIRComm 215, 212.

¹¹⁴ *Inspector Kumar v Ritchie* [2006] NSWIRComm 323, 173.

¹¹⁵ *R v Bata Industries Limited* 7 C.E.L.R (N.S) 2459 OR (3d) 329.

¹¹⁶ *Inspector Kumar v Ritchie* [2006] NSWIRComm 323,173.

¹¹⁷ Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. Second Report to the Workplace Relations Ministers' Council* (2009) paragraph 23.172.

¹¹⁸ *Inspector Kumar v Ritchie* [2006] NSWIRComm 323, 173.

¹¹⁹ *R v Bata Industries Limited* 7 C.E.L.R (N.S) 2459 OR (3d) 329.

¹²⁰ *Occupational Health and Safety Act 2004* (Vic) s145; *Occupational Safety and Health Act 1984* (WA) s 55; *Occupational Health, Safety and Welfare Act 1986* (SA) s 59C; *Work Health Act 1986* (NT) s 86.

¹²¹ Chris Maxwell, Victoria, *Occupational Health and Safety Act Review* (2004) paragraph 786.

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The ACCI also repeated the recommendations of the CAMAC report titled *Corporate Liability for Corporate Fault* in its submissions to the Advisory Panel dated July 2008¹²², stating that directors and officers should only be held liable where they have 'personally helped in or been privy to that misconduct', including because holding directors personally liable for the acts of a corporation 'does not sit well with the Australian preferred governance model of boards constituted by a majority of non-executives'; presumably because such persons do not have a hand in the day to day running of the business¹²³.

This approach was not adopted by the Advisory Panel¹²⁴ or the WHS Act. Rather, the duty of due diligence rests on the presumption that all officers have some capacity to exercise influence or control over the activities of the business. As noted by Walker, this

encourage[s] an approach that considers the immediate cause of safety breaches...[and does not] enable managers in large companies to put cursory 'paper systems' of OHS management in place, and blame supervisors or employees for the failure to implement them¹²⁵.

A company cannot simply pass blame onto those involved in the day to day running of the business¹²⁶, it must be held accountable – and so should those who govern the entity. It is necessary to ensure compliance with the spirit of the WHS Act that a culture of safety is enforced from the top down¹²⁷, rather than merely requiring that an officer exercises reasonable care in respect of matters that are specifically drawn to their attention.

C Reasonable Steps

The WHS Act requires that 'reasonable steps' are taken to fulfil the due diligence requirements, but does not define what constitutes 'reasonable steps'. SWA noted that case law should be relied upon in relation to the standard of care¹²⁸.

The Explanatory Memorandum to the WHS Bill provides that the '...standards should relate to the position and influence of the officer within the PCBU'¹²⁹. Presumably this goes to what are 'reasonable steps' and requires consideration of the person's position.

Similarly, SWA's Guideline notes that:

¹²² ACCI, Sub No. 136 to the Department of Education, Employment and Workplace Relations, *National Inquiry into Model Occupational Health and Safety Laws*, July 2008.

¹²³ See also Ministers Council for Corporations, 'MINCO agrees on principles for reform of directors' liability provision' (Press Release, 6 November 2009).

¹²⁴ Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. Second Report to the Workplace Relations Ministers' Council* (2009) Chapter 8.

¹²⁵ Karen Wheelwright, 'Some Care, Little Responsibility? Promoting Directors' and Managers' Legal Accountability for Occupational Health and Safety in the Workplace' (2005) 10, 2 *Deakin Law Review* 470, 491.

¹²⁶ *R v Commercial Industrial Construction Group Pty Ltd* [2006] VSCA 181.

¹²⁷ *Work Health and Safety Act 2011* (Cth) s 3.

¹²⁸ Richard Johnstone, Elizabeth Bluff and Alan Clayton, *Work Health and Safety Law and Policy* (3rd ed, 2012), 385.

¹²⁹ Explanatory Memorandum, Model Work Health and Safety Bill 2010 paragraphs 126 to 127.

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...what is reasonable will depend on the circumstances, including the role and influence able to be exercised by the individual officer¹³⁰.

This appears to pick up the standard under the NSW Act, which allowed a director to avoid liability where 'he or she was not in a position to influence the conduct of the corporation in relation to its contravention'¹³¹.

This defence has however been narrowly interpreted and would likely be even narrower under the WHS Act, where there are specific requirements to be met by all officers in exercising due diligence.

For example, in *Inspector Kumar v Ritchie*, the NSW Commission found that

all directors are capable of influencing the actions of the corporation...there may be situations where, for a variety of reasons, a director was not able to influence the conduct of the corporation. Hypothetical examples are of necessity artificial but it is not beyond the realms of possibility that a director may have been in a minority of the Board in urging a more costly but effective system of safety...at the relevant time the director was on leave of absence or suffering from some disability when a particular policy decision was taken...¹³²

If this approach is followed, which is likely given the nature of the express duty under section 27 of the WHS Act, all officers must actively exercise due diligence, except to the extent that they are incapacitated.

The Explanatory Memorandum to the WHS Bill expressly notes that '*where the officer relies on the expertise of a manager or other person, that expertise must be verified and the reliance must be reasonable*'¹³³.

Whilst some reliance may be placed on experts, the case law is also clear that each director must carefully consider the information and satisfy themselves that the safety systems are effective. For example, in the case of *Inspector Alderd v Herbert* the Commission found that the directors

were entitled to rely on others who possessed the relevant experience and expertise but only if they satisfied themselves that those other persons...could discharge and were discharging that function. An occasional site inspection and an otherwise passive role adopted by the defendants in relation to safety issues does not and cannot amount to reliance on others for the purpose of successfully establishing a defence¹³⁴.

¹³⁰ Safe Work Australia, *Interpretive Guideline – Model Work Health and Safety Act The Health and Safety Duty of an Officer under Section 27* (2011) <www.safeworkaustralia.gov.au> at 12 July 2013.

¹³¹ *Occupational Health and Safety Act 2000* (NSW) s 26; *Work Health and Safety Act 1995* (Qld) s 167; *Workplace Health and Safety Act 1995* (Tas) s 53.

¹³² *Inspector Kumar v Ritchie* [2006] NSWIRComm 323, 170; see also *Inspector James v Ngai and ors* [2007] NSWIRComm 203, 130, where the directors did not have the capacity to influence decisions regarding health and safety because of the terms of the articles of association.

¹³³ Explanatory Memorandum, Model Work Health and Safety Bill 2010 paragraph 127; see also *Corporations Act 2001* (Cth) ss 190 and 198D; *ASIC v Hellicar* (2012) 86 ALJR 522; [2012] HCA 17; *ASIC v Healey* [2011] FCA 717.

¹³⁴ *Inspector Alderd v Herbert and ors* [2007] NSWIRComm 170, 59.

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There are however circumstances where reliance may be reasonable. For example, in *Kirk*, Heydon J (dissent) stated

it is absurd to have prosecuted the owner of a farm and its principal on the ground that the principal had failed properly to ensure the health, safety and welfare of his manager, who was a man of optimum skill and experience – skill and experience much greater than his own – and a man whose conduct in driving straight down the side of a hill instead of on a formed and safe road was inexplicably reckless¹³⁵.

By including the words 'reasonable steps' the standard must allow some flexibility. For example, it may be reasonable within a smaller entity for the directors to have a hands-on role and direct communication with workers on a regular basis with little formality, but within a larger entity it may be more appropriate to have more formal policies, delegations and reporting lines which could mean that the control and the reasonable steps available to of an individual officer (particularly a de facto or shadow director) are limited in certain circumstances. Nevertheless, every officer would be required to be familiar with health and safety issues, adopt safety policies and procedures for consultation and carefully consider and assess the information received.

V COMPOSITION AND FUNCTIONS OF THE BOARD

In *Daniels v Anderson*¹³⁶, the NSW Court of Appeal said:

...it would be unreasonable to expect every director to have equal knowledge and experience of every aspect of the company's activities. Furthermore traditionally non-executive directors have been appointed for perceived commercial advantage such as attracting customers or adding to the prestige and status of the company¹³⁷.

There was an average of three-quarters non-executive directors on the board of the top 300 companies in 2008¹³⁸. Statistics show that non-executive directors spend on average of 22.1 hours per month performing duties for each board on which they sat; with approximately 29% of time spent on strategy, 20% on reviewing performance and 13% on risk oversight¹³⁹. Whilst this demonstrates that even non-executive directors spend considerable time on devising and reviewing strategies, presumably including health and safety strategies, the limited amount of time that is dedicated to the board could not possibly allow time to properly understand the health and safety issues, monitor the implementation of processes and procedures

¹³⁵ *Kirk v IRC; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales* [2010] HCA 1, 125. Note that the majority agreed on this point.

¹³⁶ *Daniels v Anderson* (1995) 37 NSWLR 438; 118 FLR 248, 501.

¹³⁷ *Daniels v Anderson* (1995) 37 NSWLR 438; 118 FLR 248, 500.

¹³⁸ Australian Council of Super Investors, *Board Composition and Non-Executive Director Pay in the Top 200 Companies: 2011* (2011) p 140 <<http://www.the100percentproject.com.au/Resources/Documents/ACSI-Boardcompositionandnon-executivedirectorpayinthetop100companies.pdf>> at 16 June 2013.

¹³⁹ Australian Institute of Company Directors, *Directors Social Impact Study 2012 Examining the contribution of directors to Australia's not-for-profit sector* (2012) Curtin University <<http://www.companydirectors.com.au/General/Header/Media/Media-Releases/2012/~//media/Resources/Media/Media%20Releases%20and%20Speeches/2012/2012%20Director%20Social%20Impact%20Study.aspx>> at 12 July 2013.

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and verify that the provision and use of resources in relation to health and safety, in addition to other duties. The directors may nevertheless be liable for a breach of section 27 of the WHS Act.

Further, not all board members have health and safety expertise, as highlighted by previous case law¹⁴⁰. Relevantly, the WHS Act requires ensuring both the physical and psychological welfare of employees¹⁴¹. On the BHP Billiton board in 2012, 12 of the 13 directors had skills and experience in workplace health and safety¹⁴². Whilst, at Coca Cola Amatil Ltd, work health and safety issues had been delegated to the Compliance and Social Responsibility Committee, who were required to regularly report to the board on compliance with legislation¹⁴³. Despite delegation to a specialist team, the duty under section 27 of the WHS Act requires that all directors understand and can assess work health and safety issues, which may be quite complex. That is probably why 12 of the 13 directors on the BHP board have health and safety expertise.

Corporations case law indicates that the same standard may apply to both executive and non-executive directors in exercising due care under the Corporations Act. For example, in the case of the *Centro*¹⁴⁴, the Court held at paragraphs [504] to [505]:

...non-executive directors failed to turn their mind to the omission and solely relied upon advice...No non-executive director gave evidence that he gave any consideration or proper consideration to the issue of disclosure...

Health and safety case law has taken a similar approach to *Centro*¹⁴⁵. For example, in the case of *Chevalley*¹⁴⁶, the Court noted that it is for the legislature to create the offence, not for the court to determine whether a distinction should have been made between managers and non-executive directors. In that case, the quarry manager, the managing director and the chairman were all successfully prosecuted.

The duty under section 27 of the WHS Act has the potential to significantly impact upon those persons who are appointed to a board of directors or senior management roles within an organisation. That is because, the WHS Act requires that each and every 'officer' acquires and keeps up-to-date knowledge of work health and safety matters and gains an understanding of the nature of the operations of the business.

¹⁴⁰ *Inspector James v Ryan* [2009] NSWIRComm 215; *Inspector Kumar v Ritchie* [2006] NSWIRComm 323; *Inspector James v Sunny Ngai and Ors* [2007] NSWIRComm 203.

¹⁴¹ *Work Health and Safety Act 2011* (Cth) s 19.

¹⁴² BHP Billiton, *Annual Report 2012* (2012) page 114

<<http://www.bhpbilliton.com/home/investors/reports/Documents/2012/BHPBillitonAnnualReport2012.pdf>> at 15 July 2013.

¹⁴³ Coca Cola Amatil Ltd, *Annual Report 2012* (2012)

<http://ccamatil.com/InvestorRelations/AnnualReports/2012/CO27_CCA%20Annual%20Report%20-%20A4_220313_FIN_LR_single.pdf> at 16 June 2013; see also CSR, *Annual Report 2012* (2012) <<http://www.csr.com.au/Investor-Centre-and-News/Annual-Meetings-and-Reports/Pages/Annual-Report-2012.aspx>> at 16 June 2013.

¹⁴⁴ *ASIC v Healey* [2011] FCA 717; however see *ASIC v Rich* [2009] NSWSC 1229, 7196, where the Court said that non-executive directors are not subject to the same standard as executive directors because the office held must be considered.

¹⁴⁵ *ASIC v Healey* [2011] FCA 717.

¹⁴⁶ *Chevalley & Anor v Inspector Rodney Morrison & Ors* [2012] HCATrans 31, 284.

VI PROSECUTION AND PENALTIES

There have been very few prosecutions under state and territory work health and safety laws and no prosecutions to date under the WHS Act¹⁴⁷ of officers and/or managers for failing to meet the requisite standard. Johnstone reported that approximately 90% of prosecutions are against employers¹⁴⁸. The lack of prosecutions does not however mean that the legislation, in so far as it imposes duties on officers, is ineffective. Rather, it may be due to the limited resources for prosecutions and the fact that contraventions often involve the acts of many individuals and so it is easier to prosecute the corporation¹⁴⁹.

Arguably, it will be easier to prosecute an individual for a breach of the duty under section 27 of the WHS Act, when compared to previous state law, because the duty requires proactive steps and does not rely on actual knowledge or negligence on the part of the officer, nor a contravention on the part of the corporation. This does not however necessarily mean that prosecutions will increase.

A *The Nature of Proceedings*

1 *Criminal Versus Civil*

Proceedings under the WHS Act against directors are 'quasi' criminal proceedings. There is no requirement to prove mens rea¹⁵⁰ (except for category one offences, which require recklessness¹⁵¹), however a breach of the duty is a criminal offence and monetary penalties apply¹⁵².

In the *Chevalley* case, the court explained that the reason the proceedings are criminal is

despite not being inherently wrongful, if left unregulated the activity would result in dangerous conditions being imposed on vulnerable members of the community¹⁵³.

In *Orbit Drilling*, the judge at first instance also noted that

behind every procedure designed to ensure plant and systems of work are safe...is a real person...¹⁵⁴

This is different to the duty under section 180 of the Corporations Act, which is a civil penalty provision¹⁵⁵.

¹⁴⁷ There were cases heard in 2012 and 2013, however, these cases related to matters under the old state or territory legislation.

¹⁴⁸ Richard Johnstone, "Safety, Courts and Crime, Working Paper 6", National Research Centre for OHS Regulation, 8 (2002) as cited in Karen Wheelwright, 'Some Care, Little Responsibility? Promoting Directors' and Managers' Legal Accountability for Occupational Health and Safety in the Workplace' (2005) 10, 2 *Deakin Law Review* 470, 478.

¹⁴⁹ Breen Creighton and Peter Rozen, *Occupational Health and Safety Law in Victoria* (3rd ed, 2007) p 138; Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. First Report to the Workplace Relations Ministers' Council* (2008) pp 79 to 84.

¹⁵⁰ *Chevalley & Anor v Inspector Rodney Morrison & Ors* [2012] HCATrans 31, 213 to 214.

¹⁵¹ *Work Health and Safety Act 2011* (Cth) s 31.

¹⁵² *Work Health and Safety Act 2011* (Cth) ss 31 to 33.

¹⁵³ *Chevalley & Anor v Inspector Rodney Morrison & Ors* [2012] HCATrans 31, 215.

¹⁵⁴ *DPP v Orbit Drilling Pty Ltd* [2010] VCC 417, 35.

¹⁵⁵ *Corporate Law Reform Act 1992* (Cth) ss 2(3), 17.

As early as 1989, the Senate Standing Committee on Legal and Constitutional Affairs report on directors' duties under company law noted that directors should only be held criminally liable where they acted fraudulently or dishonestly¹⁵⁶. This approach is now adopted under the Corporations Act.

It may be that if civil proceedings were available under the WHS Act, more prosecutions would follow. Whilst the criminal nature of proceedings offers less flexibility and makes it more difficult for the prosecution to prove a contravention (beyond reasonable doubt), the objectives of the WHS Act¹⁵⁷ and the policy behind imposing criminal liability for breach of work health and safety duties – that is, the potential serious consequences of a breach – support the imposition of criminal liability.

Even if civil penalties were applied under the WHS Act, it would be very difficult for the Regulator to justify bringing civil proceedings, given that proceedings are ordinarily only commenced where death or serious injury has arisen¹⁵⁸. Research indicates that ASIC has not effectively used the civil penalty provisions under the Corporations Act due to political pressures¹⁵⁹. The ineffective use or underutilisation of civil penalties in work health and safety matters (if they were introduced) is likely to be even more profound.

2 Who may Bring Proceedings?

Under the WHS Act, an action may only be brought by the Regulator¹⁶⁰, or an Inspector with the Regulator's authority¹⁶¹. If the Regulator does not bring proceedings within 12 months of an alleged offence, and a person reasonably considers that a person had committed a category one or a category two offence (causing serious injury or illness¹⁶²), the person may make a written request to the Regulator to prosecute¹⁶³. The Regulator however retains the right to choose whether or not to prosecute¹⁶⁴.

Otherwise, an affected individual has no power to seek redress for a breach of the WHS Act¹⁶⁵, except perhaps through the workers compensation scheme.

Under the Corporations Act, proceedings may only be commenced by ASIC for a declaration of contravention of section 180 of the Corporations Act¹⁶⁶. If a declaration of contravention is made, a

¹⁵⁶ Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth, *Company Directors Duties Report on Social and Fiduciary Obligations on Company Directors* (1989) paragraph 13.5.

¹⁵⁷ *Work Health and Safety Act 2011* (Cth) s 3.

¹⁵⁸ WorkSafe Victoria, *Prosecution of an offence under an act and/or a Regulation* (2005)

<http://www.worksafe.vic.gov.au/_data/assets/pdf_file/0005/10598/compliance_policy_summary.pdf> at 15 June 2013; NSW WorkCover, *Compliance Policy and prosecution guidelines* (2012) <<http://www.workcover.nsw.gov.au>> at 15 June 2013.

¹⁵⁹ Michelle Welsh, 'Civil Penalties and Responsive Regulation: The Gap between Theory and Practice' (2009) 33(3) *Melbourne University Law Review* 908, 910.

¹⁶⁰ *Work Health and Safety Act 2011* (Cth) s 4.

¹⁶¹ *Work Health and Safety Act 2011*(Cth) s 230.

¹⁶² *Work Health and Safety Act 2011*(Cth) ss 31 and 32.

¹⁶³ *Work Health and Safety Act 2011* (Cth) s 231(1).

¹⁶⁴ *Work Health and Safety Act 2011* (Cth) s 213(2) and (3).

¹⁶⁵ Although the Court may receive Victim Impact Statements. See for example *Hillman v Ferro con (SA) Pty Ltd (in liq) and Anor* [2013] SAIRC 22; *Orbit Drilling Pty Ltd v R* [2012] VSCA 82.

¹⁶⁵ [2009] NSWIRComm 215.

¹⁶⁶ *Corporations Act 2001* (Cth) ss 1317E and 1317J(1).

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pecuniary penalty may be ordered of up to \$200,000¹⁶⁷ and/or the court may disqualify the director from managing a corporation¹⁶⁸.

However, even if no declaration is made, ASIC or the company may apply to the court for compensation for any damages suffered as a result of the breach¹⁶⁹ and the corporation may intervene in proceedings for a declaration of contravention that is issued by ASIC¹⁷⁰. Individual shareholders, employees or others who may be affected by the corporation's breach cannot seek compensation.

The criminal nature of proceedings under the WHS Act limits the redress that may be offered to individuals. If civil remedies were introduced, an affected worker may be able to seek compensation. However, this would also seriously undermine the prosecution policy (to only prosecute the most serious offences¹⁷¹) and the policy supporting the criminal nature of proceedings under the WHS Act. It may also lead to an unnecessary encroachment on officers' exercise of power.

3 Time Limits for Bringing Action

There are strict time limits within which action may be commenced under the WHS Act. Proceedings must be brought within two years after the offence first came to the notice of the Regulator, or within one year of a coronial report (except in limited circumstances where fresh evidence becomes available)¹⁷².

This is an extremely short period when compared to the six year time limit to commence action for breach of the civil penalty provisions¹⁷³, and five years to commence criminal proceedings under the Corporations Act¹⁷⁴.

There are also strong policy grounds for this limited timeframe, based on the criminal nature of proceedings and the need to allow procedural fairness to alleged offenders in defending a charge¹⁷⁵.

¹⁶⁷ *Corporations Act 2001* (Cth) s1317G.

¹⁶⁸ *Corporations Act 2001* (Cth) s 206C.

¹⁶⁹ *Corporations Act 2001* (Cth) ss 1317H and 1317(j)(2).

¹⁷⁰ *Corporations Act 2001* (Cth) s 1317(3).

¹⁷¹ WorkSafe Victoria, *Prosecution of an offence under an act and/or a Regulation* (2005)

<http://www.worksafe.vic.gov.au/__data/assets/pdf_file/0005/10598/compliance_policy_summary.pdf> at 15 June 2013; NSW WorkCover, *Compliance Policy and prosecution guidelines* (2012) <<http://www.workcover.nsw.gov.au>> at 15 June 2013.

¹⁷² *Work Health and Safety Act 2011* (Cth) s 232.

¹⁷³ *Corporations Act 2001* (Cth) s 1317K.

¹⁷⁴ *Corporations Act 2001* (Cth) 1316.

¹⁷⁵ Breen Creighton and Peter Rozen, *Occupational Health and Safety Law in Victoria* (3rd ed, 2007) pp 185 to 186.

B Evidence

The Stewart-Crompton report noted that:

As the effective prosecution of offences is critical for the ongoing enforcement of the OHS laws, we consider that a natural person should not be entitled to rely on a right to silence to refuse to answer questions during an investigation of breaches¹⁷⁶.

Section 172 of the WHS Act provides that a person cannot use the defence of self-incrimination to refuse to answer a question or provide information or a document to the Regulator or an Inspector. However, that evidence may not be admissible in civil or criminal proceedings against that individual¹⁷⁷. Similar protections apply under the Corporations Act¹⁷⁸.

In the *Kirk* decision¹⁷⁹, the conviction was overturned, including on the basis that Mr Kirk was required to give evidence for the prosecution in relation to the company's breach in joint proceedings against himself and the company. This was found to be contrary to the rules of evidence¹⁸⁰.

Under the WHS Act, officers may be the key persons in a position to give evidence as to the corporation's compliance with its primary obligation¹⁸¹ and in turn, their own liability for a breach of the failure to exercise due diligence¹⁸². That is probably why officers are seldom prosecuted directly for a contravention.

C Penalties

The WHS Act sets up a three tier penalty structure. The most serious offence, a category one offence¹⁸³, applies where a person has, without reasonable excuse, recklessly engaged in conduct that exposes an individual to a risk of death or serious injury or illness¹⁸⁴. A category one offence carries a maximum penalty of \$600,000 or five years imprisonment for an officer.

A category two offence¹⁸⁵ applies where a person's failure to comply with his/her duty exposes an individual to a risk of death or serious injury or illness. The maximum penalty for such offences is a fine of \$300,000.

There is no requirement that anyone actually suffered an injury or illness in order to prosecute under the WHS Act. Accordingly, a category three offence¹⁸⁶ applies where a person simply fails to comply with their duty. The maximum penalty for such offences is a fine of \$100,000.

¹⁷⁶ Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. Second Report to the Workplace Relations Ministers' Council* (2009) paragraph 49.79.

¹⁷⁷ *Work Health and Safety Act 2011* (Cth) s172.

¹⁷⁸ *Corporations Act 2001* (Cth) ss1317, 1317R and 1316A.

¹⁷⁹ *Kirk v IRC; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales* [2010] HCA 1.

¹⁸⁰ *Kirk v IRC; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales* [2010] HCA 1, 76.

¹⁸¹ For example, *Work Health and Safety Act 2011* (Cth) s19.

¹⁸² *Work Health and Safety Act 2011* (Cth) s 27.

¹⁸³ *Work Health and Safety Act 2011* (Cth) s 31.

¹⁸⁴ *Work Health and Safety Act 2011* (Cth) s 36.

¹⁸⁵ *Work Health and Safety Act 2011* (Cth) 32.

The penalties for officers are higher than those for individuals under the WHS Act, as is the standard of care. This reflects the seniority of officers within the organisation.

There are however alternatives to prosecution. The Authority or an Inspector may also issue an improvement notice under the WHS Act, to require that a person take certain steps to stop or prevent a contravention¹⁸⁷. The Authority may also issue a prohibition notice to remove an 'immediate or imminent exposure to a hazard'¹⁸⁸. The failure to comply with an improvement notice may result in a penalty of \$50,000 for an individual¹⁸⁹ and the failure to comply with a prohibition notice carries a penalty of \$100,000 for an individual¹⁹⁰.

In WHS Act proceedings, the Court also has broad powers to make orders, in addition to penalties, including adverse publicity orders, which require the offender to publicise its contravention¹⁹¹, restoration orders¹⁹², orders to undertake a work health and safety project (for example an education program)¹⁹³, or an order for workers to undertake training¹⁹⁴. The Court may also order an injunction¹⁹⁵.

Finally, the Regulator may accept enforceable undertakings, except for a category one offence¹⁹⁶. These often involve alternative penalties such as publicity or education programs. There are a couple of current enforceable undertakings by officers posted on WorkSafe Victoria's website¹⁹⁷, but there are none on the Queensland Regulator's list of enforceable undertakings from 2008 to 2013¹⁹⁸. The Regulator may bring proceedings for breach of an enforceable undertaking and the Court may then order that the person comply with the undertaking, order an applicable penalty for the contravention¹⁹⁹ and costs²⁰⁰.

Braithwaite and Ayres argue that 'responsive regulation theory' achieves the greatest compliance; whereby there is a variety of sanctions and the harshest sanction (criminal liability) is used the least²⁰¹. The ideal is to ensure the greatest compliance at the least cost, and to foster self-regulation through predominantly cooperative and non-confrontational approaches. Although there are no civil sanctions for breach of the WHS Act duties, it is apparent that the Regulators have several less severe mechanisms available and that these mechanisms are utilised.

¹⁸⁶ *Work Health and Safety Act 2011* (Cth) s 33.

¹⁸⁷ *Work Health and Safety Act 2011* (Cth) s 191.

¹⁸⁸ *Work Health and Safety Act 2011* (Cth) s 195.

¹⁸⁹ *Work Health and Safety Act 2011* (Cth) s 193.

¹⁹⁰ *Work Health and Safety Act 2011* (Cth) s 197.

¹⁹¹ *Work Health and Safety Act 2011* (Cth) s 236.

¹⁹² *Work Health and Safety Act 2011* (Cth) s 237.

¹⁹³ *Work Health and Safety Act 2011* (Cth) s 238.

¹⁹⁴ *Work Health and Safety Act 2011* (Cth) s 241; see for example *Hillman v Ferro con (SA) Pty Ltd (in liq) and Anor* [2013] SAIRC 22, 88, where the Court ordered publication of the contravention in a notice to workers and in the newspaper.

¹⁹⁵ *Work Health and Safety Act 2011* (Cth) s 241.

¹⁹⁶ *Work Health and Safety Act 2011* (Cth) s 216.

¹⁹⁷ WorkSafe Victoria, *Enforceable Undertakings* (2013) <<http://www.worksafe.vic.gov.au/laws-and-regulations/enforcement/enforceable-undertakings>> at 12 July 2013.

¹⁹⁸ Department of Justice and Attorney General, *Enforceable Undertaking List* (2013) Queensland Government <<http://www.deir.qld.gov.au/workplace/law/enforceable-undertakings/summary/index.htm>> at 12 July 2013.

¹⁹⁹ *Work Health and Safety Act 2011* (Cth) s 219.

²⁰⁰ *Work Health and Safety Act 2011* (Cth) s 220.

²⁰¹ John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985); Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) as cited in Michelle Welsh, 'Civil Penalties and Responsive Regulation: The Gap between Theory and Practice' (2009) 33(3) *Melbourne University Law Review* 908, 910 to 911.

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Prosecution policies in Victorian and NSW provide that the Regulators will only issue proceedings for the most serious matters, where the evidence is sufficient and where it is in the public interest to commence proceedings as a deterrent²⁰². Most reported prosecutions relate to the death or serious injury of a worker.

It is therefore likely that the penalty provisions under the WHS Act are, at least objectively, effective. Statistics also show that only 5.3% of working people in Australia had experienced a work-related injury or disease, with 64% of injuries relating to sprains, strains or open cut wounds²⁰³. Whilst workplace injuries are unavoidable, it is clear that serious injury or illness and death is not a common occurrence.

VII CONCLUSION

It is necessary to have a separate and specific duty for officers under the WHS Act, because the duty extends beyond corporate entities, to unincorporated associations, the Commonwealth and public authorities.

The duty under section 27 of the WHS Act aims to set up a corporate culture that encourages appropriate attitudes and behaviours towards health and safety matters²⁰⁴. The definition of 'officer' adequately captures those persons who are in a position to influence relevant decisions within an entity (including company policies, programs and the allocation of resources) that should in turn encourage compliance throughout the organisation.

The duty also imposes a fair balance between the interests of certain 'officers' and ensuring compliance, by limiting liability (i.e. officers of unincorporated associations, partners and volunteers).

The due diligence standard is clearly set out in the legislation, which will make it easier for officers to ensure compliance. There is however some flexibility in relation to what may constitute 'reasonable steps' in the circumstances of the case. Reliance on others' expertise may only be used in limited circumstances, where the officer has carefully considered the basis of the information received. Every officer must exercise a degree of diligence. Whilst this sets a high bar, it ensures accountability and sets up the framework for a corporate culture that is focused on ensuring health and safety.

Corporations law and corporate governance are generally focused on the rights of shareholders as a whole²⁰⁵. There is little scope for consideration of workers interest. The duty under section 27 of the WHS Act requires an officer to place workers' rights at the forefront of their decision making, at least in relation to matters that may impact upon health and safety. This reflects a shift in corporate governance practices, but is necessary to ensure the objects of the WHS Act are achieved and is also likely to provide significant

²⁰² WorkSafe Victoria, *Prosecution of an offence under an act and/or a Regulation (2005)* <http://www.worksafe.vic.gov.au/__data/assets/pdf_file/0005/10598/compliance_policy_summary.pdf> at 15 June 2013; NSW WorkCover, *Compliance Policy and prosecution guidelines (2012)* <<http://www.workcover.nsw.gov.au>> at 15 June 2013.

²⁰³ ABS Multipurpose Household Survey data, 2009-2010 as cited in Richard Johnstone, Elizabeth Bluff, Alan Clayton, *Work Health and Safety Law and Policy* (3rd ed, 2012) pp 14 to 16.

²⁰⁴ Robin Stewart-Crompton, Barry Sherriff and Stephanie Mayman, Commonwealth, *National Review into Model Occupational Health and Safety Law. First Report to the Workplace Relations Ministers' Council (2008)* paragraph 8.3; see also Richard Johnstone, Elizabeth Bluff, Alan Clayton, *Work Health and Safety Law and Policy* (3rd ed, 2012) p 372.

²⁰⁵ *Greenhalgh v Arderne Cinemas* [1951] Ch 286, 281.

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benefits for the entity as a whole (including shareholders) in the long term. This approach seems to have been accepted by directors.

The duty under section 27 of the WHS Act may however affect those persons who are eligible or willing to join a board, or take up senior leadership positions within an organisation, because every officer must be familiar with, and understand both the physical and psychological health and safety issues within the organisation.

There are strong policy grounds for only allowing the Regulator to take action for breach of section 27 of the WHS Act and for the imposition of a criminal penalty regime; as opposed to a civil penalty regime. Those grounds include the potential risks associated with a breach of the provision, which include death. It is unlikely that a civil penalty regime would be appropriate or effectively utilised under the WHS Act.

Whilst there are very few prosecutions of officers under health and safety legislation, there are several matters which may explain the lack of prosecution, including the alternative penalty regimes, the evidentiary burden and the cost of proceedings. The Regulators do utilise alternate enforcement mechanisms and they appear to offer an effective enforcement scheme, as evidenced by the small number of serious injuries in workplaces.

The due diligence obligation promotes voluntary compliance, but may also make it easier to prosecute officers, as required, when compared to previous state legislation.

Overall, the WHS Act officers' duty achieves an appropriate balance between ensuring the health and safety of workers and other persons affected by a business or undertaking and allowing officers to carry out their duties unimpeded. Although it is a higher standard than has been applied in the past, and despite the inconsistencies with corporate laws, section 27 of the WHS Act appears to offer an effective corporate governance mechanism.

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