Received 29 May 2013
Revised 29 May 2013
Accepted 2 June 2013

Overseers down under

Director and officer culpability for health and safety offences in the UK and in Australian jurisdictions

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Abstract

Purpose – The purpose of the paper is to examine and contrast director duties in health and safety in the UK and Australian jurisdictions, the former influencing the latter's health and safety regime until Australia introduced a new more progressive regime.

Design/methodology/approach – The authors are practitioners who have combined desk based research with professional knowledge of how the law in both jurisdictions is applied. The approach was a comparative study of the underlying principles behind the enforcement regimes.

Findings – The paper found that the UK position could be strengthened but whilst the new Australian position could be a preferable development, it is too early to tell whether or not the Australian model would be more effective.

Research limitations/implications – Research was desk-based only.

Practical implications – Practitioners in both jurisdictions should consider potential developments in the area of director duties, particularly in the UK where Section 37 could arguably be strengthened.

Originality/value – This is the first comparison of the UK and Australian jurisdictions in respect of health and safety and examines an alternative to the consent, connivance and neglect model used in the UK to attach culpability to directors and officers. It also examines the possibility of introducing due diligence in the UK.

Keywords Health and safety, Consent connivance and neglect, Director duties, Directors and officers, Health and Safety at Work Act, WorkSafe

Paper type Viewpoint

There is no disputing the strong link between effective safety leadership and improved organisational culture. This paper seeks to compare the approach taken in the Health and Safety at Work, etc. Act 1974 ("HSWA") of imposing an implicit duty on directors with the positive duty of due diligence imposed on officers in the model Work Health and Safety Act 2011 (Cth) (the "Model Act") enacted by the Commonwealth Government of Australia and replicated substantially by most of the state and territory governments of Australia. The paper will first summarise generally the operation of Section 37 of the HSWA, and then the operation of Section 27 of the recently implemented Model Act. A fundamental purpose of the Model Act is to provide the framework for nationally consistent workplace health and safety legislation to be adopted throughout Australia.

International Journal of Law and Management
Vol. 55 No. 5, 2013
pp. 372-384

1754-243X
DOI 10.1108/IJLMA-05-2013-0020

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The author is grateful to the Business Accountability and Responsibility Centre at the University of Wales, Newport Business School for the opportunity to submit this paper for publication.

Introduction

The Centre for Corporate Accountability (2007) released a paper entitled "International comparison of health and safety responsibilities of company directors" Research Report 535. The International Comparison focused on a number of jurisdictions with a variety of director duties including:

- positive safety obligations placed directly on company directors as in Queensland, Australia;
- safety obligations placed directly on a person who is either a company director or senior manager as in South Australia;
- significant duties placed upon directors through the creation of particular offences as in Victoria, Tasmania, New South Wales and the capital territory of Australia; and
- jurisdictions with implicit duties upon directors through offences similar to Section 37 of the Health and Safety at Work Act 1974 such as in the UK, Western Australia and the Northern Territory.

Additionally there were those jurisdictions which imposed duties upon employers or supervisors which could apply to directors but do not in practice, as well as those which imposed no duties on directors or senior managers. Both of these latter categories were not represented by the UK or by Australian jurisdictions.

Since that study was completed, six out of eight Australian jurisdictions have introduced the Model Act which places a positive safety obligation directly on company officers. The author has previously called for a similar duty in the UK, perhaps by way of an amendment to Section 37 HSWA or by the introduction of a new section (Safety and Health Practitioner, 2012b).

Section 37 HSWA

Section 37(1) HSWA currently provides:

> Where an offence under any of the relevant statutory provisions committed by a body corporate who 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 is 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.

Use of provisions containing the terms consent, connivance and neglect (CCN) provide for the criminal culpability of persons in positions as listed in Section 37, as well as those who purport to "act in any such capacity". The principal authority for identifying somebody with such authority is *R* v. *Boal* [1992] 95 Cr App R 272 in which it was held that the intention of a (similarly-worded) section was to attach criminal culpability to those persons in the workplace who were in a position of "real authority". CCN is intended to attach to those decision-makers within a company who have both power and responsibility to decide corporate policy and strategy. CCN is not intended to "strike at underlings".

It will be noted from the wording of Section 37 that an offence must have been committed by a body corporate (employer) in the first instance. These are usually offences under Sections 2 or 3 HSWA, failing to ensure so far as is reasonably practicable the health and safety of employees or members of the public. Section 37 is therefore a predicate offence.

It is the prosecution that must prove all elements of Section 37 against the defendant, including an employer's offence. There is no requirement that the employer be prosecuted or convicted. However, where an employer is convicted, Section 74 of the Police and Criminal Evidence Act 1984 can be used to evidence the conviction.

Once the prosecution has proved that a company has committed an offence, it is a relatively short step for an inference to be drawn that there was connivance or neglect on the part of a director. Indeed, in the Republic of Ireland the Safety, Health and Welfare at Work Act 2005 contains Section 80(1) which turns this short step into a presumption (similar presumptions also existed in New South Wales, Queensland and Australia prior to the introduction of the Model Act). Section 80(1) provides that where an employer has committed an offence (which need not be evidenced by conviction), it is presumed, until the contrary is proven, that the offence was committed with the CCN of the director. It is then for the director to show that the offence was not attributable to his CCN, rather than for the prosecution to show what it was. The Irish offence is punishable with imprisonment for up to two years.

This reverse burden of proof makes uncomfortable inroads into the presumption of innocence and we will see that the new Australian provision in respect of directors is perhaps preferable to that step against tradition.

CCN are not mutually exclusive alternatives and what amounts to CCN can be determined with reference to case law.

Consent can be established by inference as well as proof of expressed agreement. As noted by Matthews and Ageros (2010), and the Attorney General (1996), a director must be proved to know the material facts which constituted the employer's offence and to have agreed to the conduct of the employer's business on the basis of those facts, knowing that there was a reasonably practicable step that the employer could have taken to reduce the risk. Ignorance that such conduct on behalf of the employer was illegal is no defence.

It is self-evident that the more remote the director's sphere of responsibility from the breach, the harder it will be to draw an inference of any kind regarding his responsibilities.

Connivance is something different to consent and has been described as "wilful blindness" to facts that a director did not want to acknowledge (*Gipps* v. *Gipps and Hume* [1861] 11 HO Cas 1 at 14). It can be said to be a state of mind in which a director is aware of what is going on within the organisation but does nothing to stop it; his agreement is tacit.

Unlike consent and connivance, neglect requires a causal connection to the offence. The offence by the company should be partly attributable to the director's neglect (*Wotherspoon* v. *HM Advocate* [1978] JC 74).

Following the case of *R* v. *P* [2007] All ER (D) 173 (July) the Court of Appeal has ruled that neglect requires either actual knowledge on the part of the director or the "turning of a blind eye" by the director to the material facts of an employer's breach. The court said that in any case deciding whether a director had been negligent, the court must look to whether the director failed to take some steps which fell within the scope of the functions of his role to prevent the commission of an offence. The director should know of the need for action or the existence of a state of fact requiring action before it could be said that he "ought to be aware".

There is no need for the prosecution to prove that the defendant actually knew the material facts, it simply has to be his responsibility to know. In a sense, this has increased the ease with which a director can be prosecuted under Section 37, utilising the neglect argument. As reported by the Safety and Health Practitioner, it may have led to an increase in the number of prosecutions under Section 37 HSWA.

Conviction for an offence committed by way of Section 37 can result in a six month term of imprisonment in the Magistrates' Court or a fine of up to £20,000, or a period of imprisonment for two years in the Crown Court as well as an unlimited fine. The sentencing court can also disqualify directors. However, disqualification is rarely used and periods of imprisonment are extremely rare.

(a) Criticism of Section 37

This author has previously written at length regarding the shortcomings of Section 37 and the indirect duty of directors (Safety and Health Practitioner, 2012a). In short, it is felt that there is a lack of equality in HSWA which imposes duties on employers, manufacturers and employees, but not on those who stand to benefit most from any business: its employees.

The UK currently adopts a voluntary approach to director duties, with HSE and Institute of Director publication on director responsibilities only being guidance. Research by Databuild Limited for the Health and Safety Executive (2010) has shown that a minority of directors are aware of it, much less read it, and so their businesses do not operate in accordance with it. They are not required to.

Other critics have included Donaghy (2009) in her publication "One death is too many". The response of trade unions to Baroness Donaghy's report was "overwhelmingly positive". It also received support from the Work and Pensions Committee (2009).

Section 37 HSWA does not give rise to a positive duty in the way that Sections 2, 3 and 7 HSWA do. It is what the CCA termed an implicit duty in International Comparison. "Bringing justice to the board room" states that Section 37 "does not impose any positive obligations upon directors". This means that ensuring health and safety compliance by their companies is effectively a voluntary task for directors.

At best it imposes a duty upon directors to take action if they are aware that their company is committing an offence and are aware of the reasonable and practicable steps that can be taken to avoid it. This implicit duty exists because if directors did not act in such a situation, they could potentially be prosecuted for conniving "in the commission of the offence".

However, no director is required to ensure employers comply with their health and safety duties. There is no requirement for a director to take reasonable care neither for the safety of his staff through the management of health and safety, nor to exercise due diligence to ensure that a company does not commit an offence.

This is to be contrasted with the position involving employees who according to Section 7 HSWA are obliged by statute to take reasonable care for health and safety on behalf of others, a duty which does not attach to directors under Section 37. When one considers that it is directors who can best affect the culture of a workplace and who

benefit most from a company's work, this inequality of burden is a glaring omission in HSWA and one the author believes is worthy of rectification. As noted by Databuild Ltd (2010) the benefit would likely be improved health and safety compliance as the regime moved away from a voluntary one in which a minority of directors have regard to the leading health and safety guidance, to an enforced obligation to actively manage the employer's compliance with the law.

In 2010, the Right Honourable Frank Doran MP, a Solicitor, proposed a Private Members Bill seeking to introduce positive duties. He cited The Centre for Corporate Accountability for UCATT's (2007) "Bringing justice to the board room" in his submissions to the House of Commons as justification for imposing positive duties on directors (Hansard, 2010). That Bill, which would have imposed a positive duty on directors to ensure that companies complied with health and safety duties, was not passed. In April 2011, the Health and Safety Executive confirmed that further regulation in the area of director duties would not be pursued.

Stone (2011) suggested that further evaluative work should be conducted to determine the most effective levers for encouraging director involvement and leadership on health and safety. He correctly highlighted that the danger of relying on data from the UK was that surveys, studies and comments may be biased or flawed.

It is hoped that the new Australian Model Act may be influential in this regard.

(b) The Australian position

Introduction

The International Comparison is now not only almost six years old but also out-of-date, at least in respect of the UK and Australia.

Since then the UK has introduced the Health and Safety (Offences) Act 2008 which introduced the possibility of imprisonment for up to two years for directors that fall foul of Section 37. The authority of *R* v. *P* [2007] All ER (D) 173 (July) has also widened the scope of neglect under Section 37 to the point that some argue that Section 37 is wide enough and there is no need for a positive duty as a result.

A more significant development is the introduction of the Model Act in seven out of nine Australian jurisdictions.

The introduction of the Model Act

The Model Act and the associated regulations have now commenced operation in Queensland, New South Wales, Australian Capital Territory, the Northern Territory, Tasmania, South Australia and the Commonwealth. The states of Western Australia and Victoria have yet to adopt the Model Act. Western Australia does remain committed to the principle of a harmonisation but has not yet adopted the model laws. It is continuing the assessment of the likely impact of the legislation and is considering transitional arrangements. The Western Australian Government maintains its previously stated intention not to adopt the model laws in full. In particular, the Western Australian Government proposes to depart from the model laws with regard to penalty levels, union rights of entry, the right of health and safety representative to stop work and the reverse onus of proof in discrimination matters. Perhaps, more dangerously for the efforts of harmonisation, the Victorian Government has stated publically that it will not sign up to the current proposal for harmonised legislation for occupational health and safety, although it does remain committed to harmonisation.

A review of the harmonised laws is to take place in 2014 and so Victoria continues with its own Occupational Health and Safety Act 2004 which it believes is sufficient for the protection of the health and safety of its workers which the CCA placed in the "significant duties" category, being more onerous than Section 37.

As reported by Safety Solutions (2011), the prosecution of company officers for breach of health and safety legislation has been more prevalent in New South Wales and Queensland than in other Australian jurisdictions for some time. Victoria has seen an increased focus on individual culpability, amounting to more prosecutions and also heavier penalties. However, most prosecutions of individuals in Victoria arose in circumstances where there were serious breaches which also involved systemic safety failures.

Prior to the harmonisation of Australian health and safety legislation by the introduction of the Model Act, a range of differing duties were imposed on officers across Australian jurisdictions. Corporations operating across state and territory borders were faced with the expensive task of complying with varying duties throughout Australia. It was generally accepted though that officers should have duties of some kind.

For this, and many other reasons, there were calls for harmonisation of Australian health and safety law. These calls were met with varying degrees of success until a Workplace Relations Ministers' Council (WMRC) Meeting on 1 February 2008 saw agreement to introduce model legislation.

Safe Work Australia (SWA, 2010b) released a draft Model Work Health and Safety Act for public comment in September, when it took into account 480 submissions from a variety of stakeholders.

Justifying harmonisation after the introduction of the Model Act, the explanatory memorandum from SWA (2010a), states that the objects of harmonising work health and safety laws through a model framework were:

- to protect the health and safety of workers;
- to improve safety outcomes and workplaces; and
- to reduce compliance costs for business, and to improve efficiency for regulators.

Access Economics Pty Limited, for SWA, released a paper in December 2009 setting out some of the observations made by stakeholders in respect of the proposed duties. It was a regulatory impact assessment (RIS) which assessed the cost and benefits of adopting the Model Act.

The conclusions of the paper are to be considered with a hint of caution bearing in mind that it states at page i, "The actual costs of OHS compliance in Australia are not known" and at page iii that the "Costs and the benefits of the model act are not readily quantifiable", meaning that any comment regarding cost and benefit could not be measured against existing, unknown costs.

However, Access Economics conducted consultations with "key government, business and worker bodies" as well as undertaking "extensive literature searches". Despite its best efforts to survey "businesses across a range of sizes, industries and regions in an effort to obtain primary data on compliance costs and safety benefits", Access Economics did not consider that the survey results were robust enough to build a quantitative analysis that could replace the qualitative analysis of the consultation RIS. It relied on the consistency of results between this RIS and the consultation RIS to support the conclusions of the paper.

The RIS addressed a number of issues in the Model Act, including the proposition that duties should be imposed on directors. One of the key matters raised in submissions from businesses and employer associations was the "scope of the duty imposed on officers" which was said to be "unclear". A definition of "due diligence" was called for (Access Economics Pty Limited, 2009, p. 41).

The Strategic Issues Group met in November 2009 and agreed to various amendments to clarify provisions including a definition of due diligence to clarify an officer's duty. It was recommendation 3 that included the provision for director duties, and recommendations 40-43 which covered the scope and extent of those duties.

At page 47 Access Economics stated:

> The model act creates a positive duty of care for "officers" to ensure that the business complies with health and safety requirements (although volunteer officers will not be liable to prosecution). The provision applies to officers of a corporation, unincorporated association, partnership or equivalent persons representing the Crown.

Business and worker benefits of such a duty were said to include "reduced uncertainty; greater OHS compliance". Government benefits were said to include a reduced need for enforcement and in turn a reduced administration cost.

The cost of these benefits was to be training for businesses and workers, and "compliance costs" and "education programmes" for the government.

Ultimately, the implications by jurisdiction were that the introduction of positive duties for officers represented a change in legislation in each jurisdiction to some extent (Access Economics Pty Limited, 2009, p. 82) (South Australia was the only Australian jurisdiction prior to the Model Act to impose positive director duties but only did so for "specified" officers) but the anticipated incremental cost impact was said to be minimal (Access Economics Pty Limited, 2009, p. 47). Indeed, in a summary of qualitative cost benefit analysis, regarding the introduction of director duties, it was stated that government benefits, worker benefits, government costs and business costs would be "small". The benefit to business was said to be "medium". There would be no cost to the workers.

In short, it concluded that the Model Act would confer an "overall marginal to small net benefit" and therefore the adoption of the Model Act was the recommended outcome.

Given that the positive duty was introduced into law it is fair to assume that on balance, in company with Access Economics, it was felt by other duty-holders that such a development in health and safety law was desirable and would be of benefit to the government, businesses and workers.

Section 27

Officers

Section 27 of the Model Act imposes a personal duty of due diligence on an "officer" of a person conducting a business or undertaking (PCBU) to ensure that the PCBU complies with its duties under the Model Act.

"Officer" is defined to mean an officer within the meaning of Section 9 of the Corporations Act 2001 (Cth), an officer of the Crown and an officer of a public authority, but expressly excludes a partner in a partnership. Section 9 of the Corporations Act 2001 defines "officer" broadly to capture as a:

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

The definition of "officer" therefore covers people who make the key decisions as to how the organisation is to be run, whether or not they occupy a position on the board of directors of an organisation. This is important as it covers those officers prohibited from taking such a position, or those persons who are in positions of "real authority" without recognition of title.

There will also be senior advisors in or attached to any organisation who might not actually be officers of the company but given their influence on policy, should be culpable for offences as duty-holders if those duties are within their control and sphere of influence. The impact on health and safety could be indirect.

A person may be an officer even when they participate in a decision which, whilst not affecting the whole of an organisation, at least affects a substantial part of it. This will be a question of fact and degree.

Whilst volunteer officers are obligated to comply with the duty in Section 27, they will not be prosecuted in the event that they fail to exercise due diligence. A volunteer officer can be the subject of an enforcement notice.

The definition of "officer" found in the Model Act serves to limit the reach of Section 27 to those officers within a corporation who are involved in making the key strategic and organisational decisions. Section 27 does not extend to the middle managers and supervisors who are involved in the day to day decision making with respect to the systems and processes of an organisation. This means that most managers (perhaps with the exception of some executive managers) will not be considered officers for the purposes of the Model Act. Non-executive managers can still be held personally liable for breaching the employee duty if they fail to take reasonable care for the safety of themselves or others, particularly persons who they supervise, just like under Section 7 of the Health and Safety at Work Act in the UK.

This signifies a "deliberate policy shift" away from applying an indirect duty to an officer and requires pro-activity on his part (SWA). It is only right that those persons who manage organisations and whose decisions create and influence the culture of their workforce should be responsible for failures by the workforce or the PCBU to comply with health and safety duties. If an officer can determine where resources will be focussed, they have the key to ensuring that corners are not cut and each job is adequately resourced.

A PCBU is operated by individuals who, through their decision making, influence the specific activities and behaviours that determine the success or failure of health and safety initiatives and compliance by the PCBU with health and safety legislation. These individuals, through their decisions and behaviour, influence the culture of the business or undertaking, and accountability within it. They make important decisions

on the resources that will be made available for the purposes of work health and safety and the policies that will be developed to support compliance. They are the proper targets.

The duty of due diligence

Section 27 imposes a positive duty on officers of a PCBU, to exercise "due diligence" to ensure that the PCBU complies with any duty or obligation under the Model Act.

A PCBU's duty to comply can broadly be defined as a duty to ensure, so far as is reasonably practicable, the health and safety of workers and other specified persons.

A breach of the duty found in Section 27 is not contingent upon the PCBU also being found to be in breach of a duty imposed by the Model Act upon the PCBU. According to Subsection 27(4) of the Model Act. An officer need only have failed to exercise due diligence in ensuring that the PCBU complied with its duties, in order to be convicted or found guilty regardless of whether the PCBU is also in breach. This may mean that officers of organisations which have a strong history of safety performance, but poor governance in reporting structure, may be exposed to prosecution in the event that they do not exercise due diligence, a scenario which is unlikely in the UK.

The standard of due diligence applies in all jurisdictions that implemented the law and it is clearly defined. This is a departure from the previous test of reasonable care. While reasonable care and due diligence are said to be of a generally similar standard, the situation was said to be confusing and led to inconsistent outcomes across jurisdictions as reported by Safety Solutions (2011). Further, in jurisdictions where due diligence applied before the enactment of the Model Act, there was often uncertainty about precisely what the standard required. With a view to avoiding such uncertainty in the future (particularly in light of the expanded and positive nature of the new duty), so that duty-holders can understand what is required of them, and partly due to criticism received by Access Economics, it was recommended that a definition of "due diligence" be provided.

Section 27(5) of the Model Act contains a non-exhaustive list of steps that an officer must take to exercise due diligence. An officer will discharge his or her obligation to exercise due diligence by taking reasonable steps to:

(1) acquire and keep up-to-date, knowledge of work health and safety matters;

(2) gain an understanding of the nature of the operations of the PCBU and generally of the hazards and risks associated with its operations;

(3) ensure that the person conducting the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the PCBU;

(4) 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;

(5) ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under this Act (such as incident reporting, consulting with workers, ensuring the provision of training, etc.); and

(6) verify the provision and use of the resources and processes referred to in points 3-5.

Officers will be expected to take reasonable steps to ensure that they have the requisite knowledge and understanding. Reasonableness, as with jurisprudence in the UK, depends on the circumstances and is very often a matter of balancing a number of competing considerations, however, there is no doubt that the duty of due diligence is aimed at providing for the active involvement of the key decision makers in activities that will support a positive organisational culture. The definition of due diligence requires corporate governance which makes adequate provision for a high level consideration of health and safety issues which arise at a day to day level. In larger organisations, structures and systems must be put in place to assist officers in complying with the duty of due diligence. If the officer relies on another to assist in the satisfaction of the duty, that reliance must also be reasonable in the circumstances and the expertise of the person upon whom the officer relies must be verified.

Each case must depend on its own facts and so expecting all officers to do all things is unrealistic. As reported by SWA health and safety duties need to be included in the job descriptions of all officers as the Model Act applies the same standard on all officers regardless of their particular level of activity in the health and safety management of their organisation. It is arguable that a high standard should be imposed on the key decision makers who govern an organisation as it is these very people who allocate the resources necessary to ensure that the work of a PCBU is undertaken in a way that is safe and without risks to health. It is they who stand to benefit the most from the PCBU. It is only right that they are responsible for what it does and does not do. It has yet to be seen how the Australian courts will interpret and apply the officer's duty of due diligence found in Section 27.

Burden of proof and penalties

It is for the prosecution to prove all elements of an offence under the Model Act, beyond reasonable doubt. The reverse onus of proof which previously applied in New South Wales, Queensland and Tasmania no longer exists. The reverse burden operated in a similar way to Section 80(1) in the Republic of Ireland insofar as the breach of the company was attributed to the officers of that company unless the officers could prove that they were either not in a position to influence the decisions of the company or had exercised all due diligence to prevent the contravention.

The burden of proof imposed by the Model Act is identical to that applied in Victoria and Western Australia under the existing health and safety legislation in those states.

An offence can be committed recklessly and in those circumstances can be punished with imprisonment for up to five years, if the offence exposes an individual to a risk of death, serious injury or serious illness without reasonable excuse. These are termed category 1 offences.

Category 2 offences provide that a duty-holder only commits an offence if the failure to comply with the duty exposed an individual to a risk of death, serious injury or serious illness.

Less serious offences where there is a failure to comply with a duty are categorised as category 3 offences. It is likely that the majority of offences will be prosecuted under categories 2 and 3.

The Model Act also significantly increased the fines imposed for breach of health and safety legislation.

Assessment

The critical assessment of any health and safety legislation surely has to be accident statistics. They have little use in the UK given the inaccuracy of accident reporting (Tombs and Whyte, 2010) but Australian reporting could possibly be more reliable given that it includes vehicle incidents unlike the UK.

SWA reported that as of the 31 December 2012 192 Australian workers were killed whilst at work. During the same period in 2011, 166 deaths had occurred according to SWA (2013). Given the recent introduction of the Model Act it would be unfair to attribute the increase in the number of fatalities in 2012 to a weakening of health and safety legislation by the Model Act. Indeed, it will be some years before we see the full effects of the legislation. It should be borne in mind as well that at the date of the release of those statistics four Australian states had still not implemented the most recent legislation.

It is also difficult to assess the impact of the introduction of the positive duty on directors given that the legislation was a wholesale change and not simply an amendment of one section as the author has called for previously in relation to Section 37. It will therefore be difficult to assess the efficacy of Clause 27. It may be that statistics on prosecution of officers will be some kind of indicator but how remains to be seen.

What can be said of the Model Act is that it is robust and thorough, at least in respect of officers. It is believed that there will be a benefit to all stakeholders, even if only small. The counter-argument against reform that a "small" benefit is not worth the effort could easily be rebuffed by highlighting what that benefit means: improved health and safety which in turns means fewer accidents and in turn fewer deaths.

It has been suggested in the UK that reform of Section 37 might only improve health and safety outcomes by 5-10 per cent (CCA, 2007). 5 per cent fewer accidents each year for a reform that will cost very little is attractive by anyone's estimation, particularly where it can involve life and death issues.

As the UK's Coalition Government continues on a course of de-regulation and attack on the "health and safety monster" (*The Guardian*, 2012), it is unlikely in the extreme that we will see an amendment to Section 37 any time soon. Therefore, an analysis of the Australian position, if at all possible given the wholesale changes rather than an incremental improvement through the addition of director duties, may provide support to the calls for positive duties in the UK. If the Australian experiment does not yield obviously positive results, then overseers in the UK may continue to be almost devoid of obligation to those they oversee.

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