

**International Comparison of Health and Safety Responsibilities of  
Company Directors**

**Written by: David Bergman, Dr Courtney Davis and Bethan Rigby  
Centre for Corporate Accountability**

**with the assistance of Desirée Abrahams and Rajat Khosra**

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This is an initial report written in this form for two conferences organised by the HSE. Some details of the law still remain to be fully confirmed, and the final report – to be published towards the end of the year - will contain more information about enforcement issues, and the views of regulators on the adequacy of their legislative framework. It will also contain more information on those jurisdictions where there are no direct or indirect duties upon individual directors and senior managers, which are dealt with in this paper in a brief manner.

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## **CONTENTS**

<b>CHAPTER 1: INTRODUCTION</b>	<b>4</b>
<ul style="list-style-type: none"><li>- Background</li><li>- Legal position in Britain</li><li>- Direct and indirect duties</li><li>- Proposals for reform</li><li>- Comparing Britain to other countries</li><li>- Non-executive/executive directors and senior managers</li><li>- Structure of report</li></ul>	
<b>CHAPTER 2: SAFETY OBLIGATIONS PLACED DIRECTLY ON COMPANY DIRECTORS OR SENIOR MANAGERS</b>	<b>12</b>
<ul style="list-style-type: none"><li>- Germany</li><li>- France</li><li>- Italy</li><li>- Sweden</li><li>- Canadian States: Ontario, British Columbia, North West Territories</li><li>- Canadian Criminal Code</li><li>- Australian State: Queensland</li><li>- Japan</li></ul>	
<b>CHAPTER 3: DUTIES PLACED UPON DIRECTORS THROUGH THE CREATION OF PARTICULAR OFFENCES</b>	<b>61</b>
<ul style="list-style-type: none"><li>- Australian States: Victoria, Tasmania, New South Wales</li></ul>	
<b>CHAPTER 5: NO DUTIES ON DIRECTORS OR SENIOR MANAGERS</b>	<b>70</b>
<ul style="list-style-type: none"><li>- Netherlands</li><li>- USA</li></ul>	

# Chapter One

## INTRODUCTION

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

The Health and Safety Executive's interest in how other jurisdictions deal with the question of directors' legal obligations stems from the Government's request to the Health and Safety Commission for advice by the end of 2005 on whether the law in Britain needs to be changed.<sup>2</sup> This request was made in response to the recommendation of the Select Committee on Work and Pensions, that:

“the Government reconsiders its decision not to legislate on directors duties and brings forward proposals for pre-legislative scrutiny in the next session of Parliament.”<sup>3</sup>

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

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

The Government has asked HSC to undertake further evaluation to assess the effectiveness and progress of the current measures in place, legislative and voluntary, and to report its findings and recommendations by December 2005.”<sup>4</sup>

This research report is part of the overall research that the HSE has commissioned on the issue.

## BACKGROUND

Although the lack of prosecutions against company directors has been a long-standing concern of many organisations, the first time a clear demand for a change in the law concerning directors safety obligations was in a speech in Parliament in 1996 given by the then opposition Environment Spokesperson, Michael Meacher MP. He stated:

“I emphasise that responsibility for health and safety must be vested at the highest level of each organisation ... companies should appoint an individual at board level with overall responsibility for health and safety.”<sup>5</sup>

In 2000, a Government consultation, *Revitalising Health and Safety*, took place<sup>6</sup>.

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

<sup>2</sup> Response of Government to Select Committee Report.

<sup>3</sup> para 60

<sup>4</sup> p.4

<sup>5</sup> Hansard 26 March 1996, column 898. He was speaking in the context of corporate manslaughter.

In its response to the consultation process, the Government published a strategy statement which, in response to a number of stakeholder responses, contained Action point 11 which stated:

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

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

Subsequent to this publication, the HSC focused on the first part of this commitment by publishing a leaflet on voluntary guidance for directors and to then undertake research to consider its effectiveness. This research formed the basis for the HSC agreeing in October 2003 to advise ministers that a change in the law was not required<sup>8</sup>.

In 2005, Select Committee on Work and Pensions recommended that the law should be changed – and it is this recommendation that has resulted in the current research process.

## **THE LEGAL POSITION IN BRITAIN**

Although this research report is about the law in other countries, it is important to be able to compare the legal situation in these countries with the situation here. Understanding British law is also particularly useful when considering the law in certain Australian and Canadian states and provinces which is based around Britain's Health and Safety at Work Act 1974, though with some significant differences regarding the situation of directors.

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

When businesses, or other organisations, establish themselves as companies, a new legal entity is created distinct from the natural persons who either own the company (the ‘shareholders’) or who are appointed by the shareholders to manage the company (the ‘directors’). The company will be a legal ‘person’ – capable, just like a human person, of having duties, and civil and criminal liabilities.<sup>10</sup>

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<sup>6</sup> Document published by the Health and Safety Commission and the Department of Environment and Transport, as it was then. Michael Meacher MP was then the operative Minister with responsibility for health and safety in that department.

<sup>8</sup> Minutes of HSC meeting, October 2003. HSC/03/105

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

<sup>10</sup> There do remain some differences in the way the law treats legal compared with natural persons.

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

### **Section 7 of the HASAW Act**

Duties are also imposed upon ‘employees’. Section 7 states:

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

Company directors are ‘officers of the company’ with responsibilities to “manage the company”<sup>11</sup>. However company directors may not only be officers of the company but also a company employee under a contract of employment. Does section 7 of the 1974 Act impose duties upon these ‘executive directors’?<sup>12</sup>

On the face of it, section 7 of the Act does indeed impose the same duties upon executive directors as it imposes upon any other employee of the company. The HSE has recently indicated that this is its view.<sup>13</sup>

Assuming this view is correct, a number of points need however to be made:

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

There is also a view that the court would not allow section 7 to apply to directors as this was clearly never parliament’s intention<sup>14</sup>. However there is no caselaw on the application of section 7 to directors.

### **Section 37 of the HASWA 1974**

There is one section of the 1974 Act that does explicitly mention directors – section 37(1). This section – which enables directors to be prosecuted in certain circumstances – states that:

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<sup>11</sup> *Companies Act 1985*

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

<sup>13</sup> *OC 130/8*

<sup>14</sup> *Advice from Dechert Solicitors.*

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

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

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

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

In what circumstances can a director be prosecuted?

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

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

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

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

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<sup>15</sup> *R v Boal*

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

<sup>17</sup> unpublished transcript

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

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

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

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

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

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

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

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

However, to appreciate the content of those duties, it is not only necessary to look at the words themselves in the legislation; it is also important to look at the circumstances in which the prosecuting body says that prosecutions will take place. This is because the duty is not a free-standing one; it only exists in the context of a prosecution. Two documents set out the criteria that will be taken into account when considering prosecution.

The Enforcement Statement sets out when it would be in the public interest to prosecute the company – which can be summarised as requiring that the breach by the company be serious or the breach resulted in a death<sup>20</sup>. HSE’s Operational Circular sets out some of the criteria that will be taken into account when deciding whether to prosecute a director.<sup>21</sup>

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<sup>18</sup> Unpublished transcript

<sup>19</sup> *op cit*

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

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

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

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

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

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

## **DIRECT AND INDIRECT DUTIES**

A consideration of section 37 raises the issue of the difference between indirect and direct duties. Sections 2-7 impose direct and positive duties upon different duty holders to do something. They exist independent of any criminal offences, and breaches can be dealt with not only through prosecution but also enforcement notices.

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

## **PROPOSALS FOR REFORM**

The detailed proposals for reform in this area have been based around a ten minute rule bill originally drafted by Ross Cranston QC. After a few revisions, this became the basis for the bill that was taken by Stephen Hepburn MP as a Private Members Bill in 2005.

This bill amended the Companies Act 1985 and:

- imposed a duty on all directors to “to take all reasonable steps to ensure that the company acts in accordance with the obligations” under health and safety law;
- required the HSC to publish an Approved Code of Practice setting out what is required of directors to comply with this duty;

- imposed a duty upon directors of ‘large’ companies to appoint amongst themselves a ‘health and safety information director’ with responsibilities to keep himself and other members of the board informed about health and safety issues in the company.

It also amended health and safety law so that

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

It did not create any new criminal offences.

## **COMPARING BRITAIN TO OTHER COUNTRIES**

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

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

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

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

In many companies, senior managers who are not boardroom directors, are confusingly sometimes given the title of ‘director’. In relation to health and safety law in Britain, senior managers of companies – whatever titles they are given – are in essentially the same position as directors, though as employees they will have to abide by section 7 of the 1974 Act. However, as with the situation with directors, no senior manager has been prosecuted for breaching section 7.

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

## **STRUCTURE OF REPORT**

This report is divided into four sections.

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<sup>22</sup> *Gerants*

Chapter two considers those countries and those state jurisdictions (of the federal systems Canada and Australia) which impose duties directly upon boardroom directors or senior managers. This section is the largest and includes: Sweden, Germany, France, Italy, four states of Canada (Ontario, British Columbia, North West Territories, and Alberta), one state of Australia (Queensland) and Japan.

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

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

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

Chapter three considers those jurisdictions that impose duties upon company directors and senior managers indirectly through criminal offences. This includes three states of Australia.

Chapter four is not contained in this conference paper but in the final report will consider those jurisdictions that impose duties upon supervisors or others which could be directors. This includes the Canadian states of New Brunswick, main safety legislation of North West Territories, Manitoba, Yukon and Saskatchewan, as well as a number of Australian states.

Chapter five considers those jurisdictions does not impose any duties upon directors. This section includes the Netherlands, the USA, and some states of Canada and Australia. In this paper only the Netherlands is discussed.

## Chapter Two

### SAFETY OBLIGATIONS PLACED DIRECTLY ON COMPANY DIRECTORS OR SENIOR MANAGERS

There are a number of countries, as well as states within Canada and Australia, that place safety duties upon individuals who will either be a person who is a company director or a director equivalent (i.e. an officer of the company) or a senior manager. This is achieved differently in different countries and states:

**Germany:** duties are placed upon the employer (which is a legal entity) but a duty is also placed upon the company director to fulfil those duties that are imposed upon the company.

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

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

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

The three Canadian states of **Ontario**, **British Columbia** and **North West Territories** have legislation that requires directors and company officers to take steps to ensure that the company, upon which health and safety duties are imposed, complies with its duties.

In addition, the Canadian state of **Alberta** imposes duties specifically on those directors who “oversees occupational health and safety” in the company. It does this through defining an ‘employer’ – upon whom duties are imposed - to include these directors.

The Canadian Criminal Code also imposes a duty upon anyone throughout **Canada** who “undertakes, or has the authority, to direct how another person does work” which will include company directors depending on the circumstances. This duty can only be engaged through a criminal code offence.

The Australian state of **Queensland** imposes duties on directors like the three Canadian states of Ontario, British Columbia and North West Territories

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

## GERMANY<sup>23</sup>

### FORMS OF COMPANY AND COMPANY MANAGEMENT

There are two main types of companies. The most common form is the limited liability company<sup>24</sup> and is appropriate for small and medium sized enterprises or large ones with only a few shareholders. A limited liability company is managed by its ‘managing directors’<sup>25</sup> who are its legal representatives<sup>26</sup>. It may have a supervisory board, and one is required if the company has more than 500 employees.

Stock corporations<sup>27</sup> are used by enterprises that access the public capital market. A stock corporation is managed by a management board<sup>28</sup> that consists of one or more people who are appointed by a supervisory board<sup>29</sup> which is itself composed of representatives of the shareholders (though are usually not shareholders themselves) and employees (or their representatives).<sup>30</sup> The management board is the legal representative of the company.<sup>31</sup> In relation to both limited liability and stock companies, there is no distinction made between ‘executive’ and ‘non-executive’ directors.

### FRAMEWORK OF OHS DUTIES

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

- There are duties set out in statutes passed by the federal parliament – the most important of these being the framework legislation, the Occupational Safety Law<sup>32</sup> which contains general health and safety obligations. This legislation is enforced by the Labour Inspectorate, which has regional branches.
- There are more specific and detailed duties set out in ‘accident prevention rules’ which are enforced by inspectors from occupational accident insurance funds.<sup>33</sup>

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<sup>23</sup> Interviews and correspondence with the following people have assisted with research for this section. Achim Duve and Michael Koll (German Ministry of Economics and Labour) Dr Valeri Barth/Giovanni Russo, from Dechert LLP Germany, and Klaus Heuvels/Julia Pfeil from CMS LLP Germany. See reference at end for details.

<sup>24</sup> Gesellschaft Mit Beschränkter Haftung (GmbH)

<sup>25</sup> Geschäftsführer

<sup>26</sup> Article 35 of the German Act.

<sup>27</sup> Aktiengesellschaft (AG)

<sup>28</sup> Vorstand

<sup>29</sup> Aufsichtsrat

<sup>30</sup> If the company employs more than a certain statutorily defined number of employees.

<sup>31</sup> Article 78 of the German Stock Corporation Act.

<sup>32</sup> Arbeitsschutzgesetz (ArbSchG) Also known as the ‘Law for Implementation of Occupational Safety Measures for Improvement of Safety and Health Protection of Employees at Work’. Other health and safety legislation includes Personal Safety Equipment Regulations (PSA-Verordnung); Protection of working Mothers Act (Mutterschutzgesetz); Working Hours Act (Arbeitszeitgesetz) Protection of Minors at Work Act (Jugendarbeitsschutzgesetz); Load Handling Regulations (Lastenhebungsverordnung); Construction Site Health and Safety Regulations (Baustellenverordnung); Video Display Workstation Regulations (Bildschirmarbeitsverordnung); Work Equipment Regulations (Arbeitsmittelbenutzungsverordnung); Workplaces Regulations (Arbeitsstättenverordnung); Equipment Safety Act (Geräte- und Produktsicherheitsgesetz); Hazardous Substances Regulations (Gefahrstoffverordnung); Biological Agents Regulations (Biostoffverordnung); Seventh Book of the Social Code.

<sup>33</sup> The insurance funds have the responsibility for paying for any claims of compensation arising out of work-related injuries. This includes costs for medical treatments, vocational, social and supplementary benefits for rehabilitation, benefits in the case of long term needs etc. The funds produce codes, which have the force of law, that set out duties that ‘entrepreneurs’ should abide by and they are enforced by inspectors. Heuvels K and Pfeil J (2005); Duve (2005).

## Occupational safety law

The main obligations under this Law are imposed upon “employers”, which the Law defines as either natural or legal persons.<sup>34</sup> In the context of an incorporated business, the employer will be the legal entity of the company. Section 3 of the Law states, for example:

- (1) “It is the employer’s obligation to take all occupational protection measures in consideration of the conditions that influence safety and health of employees at work. He has to review the measures for their effectiveness and adapt them to changing conditions as required. He has to strive for an improvement of occupational protection of the employees.
- (2) For planning and execution of measures as per para. 1, and in consideration of the type of work and the number of employees, the employer has to:
  1. provide a suitable organisation and the required funds and
  2. make provisions that measures are observed in all activities and be incorporated into the management structure of the firm and the employees can fulfill their obligation to participate;
  3. the employer shall not pass on the costs of measures required under the law to the employee”.

Section 4 deals with general principles and states that:

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

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

## Obligations of ‘Responsible Persons’

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

- (1) “Responsible for fulfillment of duties arising from this section in addition to the employer are:
  1. his legal representative<sup>35</sup>

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<sup>34</sup> Section 2(3). Section 15 also impose duties upon employees. “(1) The employees are responsible for their own safety and health at work, as far as possible and in accordance with the employer’s instructions and directives. As per sentence 1, the employees are also responsible for the safety and health of those persons who are affected by their activities or omission at work. (2) With reference to para 1, the employees have to especially use machines, equipment, tools, materials, transport means and other working material and protective devices as well as personal protective equipment in accordance with the regulations.”

2. the authorised representative organ of a legal person
  3. the authorised representative of a partnership<sup>56</sup>
  4. persons in charge of the management of a company or business in the framework of assigned duties and authorities
  5. other persons commissioned according to para 2 or a legal provision based upon this law or person in charge according to the Accident Prevention Regulations in the framework of their duties and authorities
- (2) the employer can commission reliable and expert persons in writing with the performance of his duties from this law, within his sphere of responsibility”.

In relation to companies the relevant sections are:<sup>37</sup>

- section (1)2 which applies to the ‘managing directors’ of a limited company and to the members of the management board of a public limited company. In relation to a public limited company, each of the members of the management board have the same responsibility;
- section (1)4 which applies to “executive level managers” – one rung down from the managing directors or management board of a company. They could be the senior most executive manager or other senior managers that are responsible for separate sites, branches or factories of the company.<sup>38</sup>
- section (1)5 which applies to those individuals not covered by the other subsections but who, as experts, are allocated responsibility either specially the employer<sup>39</sup> or as a result of an obligation laid down by the accident prevention rules.<sup>40</sup>

The effect of this section is to make ‘company directors’ responsible for complying with the same duties as those imposed upon the employer.<sup>41</sup> Medium sized to large companies may of course have senior company managers (as defined by section (1)4) who will, in addition to the directors, be ‘responsible persons’ with the duty to comply with employer duties. The presence of these other senior managers within a company does not generally dilute the responsibility of the directors.<sup>42</sup>

If however, there is an appointment of a person to undertake specialised services (para (1)5), the company director will be considered to have ‘delegated’ his responsibility in relation to the specific activity for which the person has been selected. However even when delegation does take place, they will continue to have a control and supervisory obligation<sup>43</sup>. In fact to describe this process as one of delegation may be misleading since German law generally takes the approach that duties cannot be delegated but the original responsible person can employ others to help him or her fulfil their responsibilities<sup>44</sup>. The Labour and Economics Ministry explains this duty in the following manner:

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<sup>35</sup> A legal representative is a person whose authorisation to represent another person or a company is not based on a certificate of authority but on a statutory provision. Since the representatives of the various German companies are expressly mentioned in section 2 and 3 of Article 13, the main scope of this paragraph is likely to be an insolvency administrator who is the legal representative of a company being insolvent. (Berth V and Russo G (2005)).

<sup>36</sup> The legal representatives of German business partnership (Personenhandelsgesellschaften) is/are the managing partners (Articles 105, 164, 170 of the German Commercial Code).

<sup>37</sup> Berth V and Russo G, (2005); Heuvels K and Pfeil J, (2005)

<sup>38</sup> Heuvels K and Pfeil J ( 2005); Duve, (2005)

<sup>39</sup> such a person could be engaged to ensure that the employer complies with section 5 of the Act which requires employers to undertake an ‘evaluation of working conditions’. Koll (2005)

<sup>40</sup> Such as the safety inspector required by the Construction Site Ordinance 1998. Berth V and Russo G (2005a)

<sup>41</sup> If para 1 s. 2. applies, then s. 1 and s. 3 cannot apply.

<sup>42</sup> This is the general principle that applies in administrative law in Germany when more than one person is given the same responsibility. Heuvels K and Pfeil J (2005)

<sup>43</sup> No caselaw has been identified on the extent of this supervision.

<sup>44</sup> Pfeil (2005)

“There are no general rules on the extent or limits of employers' supervisory duties and control obligations. They largely depend on the conditions prevailing in the specific case at hand. An indication of the implementation intensity of supervisory duties may be whether there is a functioning control effort in the form of an in-house system for managing workplace safety and health protection and whether employers periodically and regularly monitor compliance with health and safety at work requirements or make unannounced, random inspections. An unusual state of affairs or irregularities increases the control intensity required of employers.”<sup>45</sup>

In addition, the Administrative Offences Act imposes a supervisory duty upon the owners of an enterprise. Section 130 of the Act states:

“Whoever, as the owner of a firm or an enterprise, wilfully or negligently fails to take the supervisory measures required to prevent contravention of duties in the firm or the enterprise which concern the owner in this capacity, and the violation of which is punishable by a penalty or a fine, shall be deemed to have committed an administrative offence if such a contravention is committed which could have been prevented or made much more difficult by proper supervision. The required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel.”<sup>46</sup>

In the context of a company, the owner will be the company's legal representatives (that is to say its directors). This is not seen as a parallel duty to the general supervisory duty, but rather particular aspect of it. Although this supervisory duty in principle could apply to the Occupational Safety Act, it is mostly applied in relation to financial and accountancy matters.<sup>47</sup>

### **Accident prevention regulations**

Accident Prevention Regulations impose duties upon a person called “the entrepreneur”.<sup>48</sup> In the context of an incorporated business, the entrepreneur will be the company. These regulations do not have an equivalent section 13 that imposes direct duties upon the legal representatives of the entrepreneur. However, duties do appear to be imposed upon them in an indirect fashion.

It is an offence under these regulations for the company to fail to abide by the duties in the regulations or directions issued by inspectors from the insurance funds. However in order to take action against the company, it is necessary to show that the legal representative<sup>49</sup> committed “a

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<sup>45</sup> Koll(2005)

<sup>46</sup> Unofficial translation.

<sup>47</sup> *The following measures have so far been considered necessary by the courts in relation to this supervisory duty: (a) Designation, diligent choice and supervision of supervisors. The owner cannot, however, delegate his duty by nominating supervisors; his duties are, however, limited to supervising the supervisors. (b) General attention to development of legal and technical norms and publication of such norms within the enterprise. (c) Random inspections. (d) Enforcement and implementation measures, like admonitions, directions and (if legally possible) termination of work contracts of unreliable employees. (e) Establishment of an enterprise security centre (f) Maintenance of operational equipment; (g) Clear and definite division and assignment of responsibilities, and establishment of an auditing department if necessary. See the legal commentary: Bohnert, Ordnungswidrigkeitengesetz, 2003, § 130 Rn. 20. (Heuvels K and Pfeil J (2005a and b)).*

<sup>48</sup> See Social Security code (SGB) VII, sections 14 to 25. Duties in these regulations, for example, concern “facilities, arrangements and action, which employers need to make or take in order to prevent industrial accidents, occupational illnesses and work-related health risks, together with the method of transferring such tasks to other people”.

<sup>49</sup> See 30(1) 4 of the Administrative Offences Act.

criminal or administrative offence”. The impact of this section is to impose a duty on the legal representatives of the ‘entrepreneur’ if he or she wants to avoid prosecution.<sup>50</sup>

## OFFENCES

### Occupational safety law offences

There is no offence for breach of the general duties in the Act itself – but only for breach of an ordinance or an enforceable order. Section 18 states that German Federal Government can enact “ordinances”<sup>51</sup> that:

“dictate the measures to be taken by the employer and other responsible persons and the behaviour of employees in fulfilling their duties arising from the this law.”<sup>52</sup>

In addition section 22(3) allows the competent public authorities in relation to particular cases to ‘direct’.<sup>53</sup>

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

These are also known as ‘enforceable orders’. Unless danger is imminent the authority can set a reasonable time for the implementation of the order. If the order is not complied with the authority can prohibit the activity taking place until the changes are made.

### Administrative Offences

The Act creates two kinds of offences – administrative and ‘penal’<sup>54</sup> – both of which can only be committed by natural persons. An administrative offence is committed in the following ways:

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

An administrative fine can only be imposed upon the employer (as legal entity) if a ‘responsible person’ has committed the offence.<sup>55</sup> It is entirely at the discretion of the inspector whether he or she imposes an administrative fine (see below).

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<sup>50</sup> Pfeil (2005). This is the best understanding that we have at the time of writing this interim report. Further clarification on duties arising from these insurance codes is being sought.

<sup>51</sup> These appear similar to regulations (Statutory Instruments).

<sup>52</sup> Emphasis added. Similar ordinances can be imposed to ensure compliance with European or other international law or decrees of international organisations or bilateral agreements.

<sup>53</sup> These ordinances can be written in the name of the company or responsible person. (Barth/Russo (2005)). In deciding whether to issue an enforceable order against the company or a director, the inspector will consider who is best suited to fulfil the order.

<sup>54</sup> These penal offences are dealt with in the same way as the penal code offences (see below).

<sup>55</sup> See section 30 of the Administrative Offences Act (Owig)

It should be noted that there is no administrative offence committed simply through a breach of general duties contained in the Act imposed upon employers or responsible persons.

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

- by a responsible person who “continuously” fails to comply with an enforceable order;<sup>56</sup>
- by a responsible person or employee who “risks life and health of an employee by intentionally failing to comply with an ordinance enacted according to §18 or §19”;

Whilst a Labour Inspector may exercise discretion when deciding whether or not to levy an administrative fine, an inspector has no discretion when he or she suspects that a penal offence has been committed – he or she must report it to police or prosecutor (see below). One violation can result in an administrative fine or in a prosecution for a penal offence – but not both.<sup>57</sup>

The inspector decides upon whom to impose the enforceable order or to impose the fine by looking at which person is best suited to bring about compliance with the relevant obligation. It may be the legal representative, senior manager or specialist.<sup>58</sup>

### **Accident prevention codes**

Section 209 of the Social Security code V11 creates a series of offences. It is an offence for 'a person' to 'deliberately or negligently' breach certain duties set out in a safety regulation or to be in contravention of an 'enforceable order' imposed by the insurance fund inspectors. These are administrative offences, which can result in a fine of up to 10,000 Euro. In order for action to be taken against a company for this offence, it would be necessary to identify a legal representative to prosecute. If the legal representative is found guilty, the company can be fined up to 1 million Euro (if there is evidence of intention) or 500,000 Euro (in the case of negligence).

### **Penal code offences**

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

“Whoever through negligence causes the death of a human being, shall be punished with imprisonment for not more than five years or a fine.”<sup>59</sup>

A similar offence exists when injury has taken place:

“Whoever negligently causes bodily injury to another person shall be punished with imprisonment for not more than three years or a fine”.<sup>60</sup>

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<sup>56</sup> Section 26 para 1

<sup>57</sup> *Duve. Prosecutions for penal offences may or may not go to a trial. It is possible for a prosecutor to simply get a judge to make a written order imposing a particular sentence. This process is more likely to be used if the offence is not serious, that custodial sentence not likely to be imposed or the prosecutor does not want the defendant to testify. (Heuvels K and Pfeil J).*

<sup>58</sup> *Heuvels K and Pfeil J (2005a and b)*

<sup>59</sup> Section 222

<sup>60</sup> Section 229

Negligence is not explicitly defined in German law. It is assumed that a person has been negligent if they have violated a duty that was imposed to avoid the harm that did take place, and the harm was foreseeable.<sup>61</sup>

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

“Whoever physically maltreats or harms the health of another person, shall be punished with imprisonment for not more than five years or a fine”.<sup>62</sup>

There is also an offence of Serious Bodily Injury.

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

The bodily injury offences above can only be prosecuted following a petition of the injured party or when there is sufficient public interest.<sup>63</sup>

## **ENFORCEMENT OF OFFENCES**

Enforcement of the Occupational Safety Act and associated ordinances is undertaken by Labour Inspectorates which are based in each of the sixteen ‘Landers’ of Germany.<sup>64</sup> Insurance Fund Inspectors enforce the accident prevention regulations.

Enforcement by the Labour Inspectorate takes place in the following manner. If an inspector identifies a breach of the law, the inspector will ask the legal representative of the company about the nature of the violation. If it appears that he/she or another person to whom the responsibility has been delegated is not co-operating, or if perhaps the violation is serious, the inspector will impose an order in the name of the person whom the inspector considers responsible. If the employer/responsible person does not agree with the order, the inspector can ask another inspector who has had no dealings with the matter to assess whether the ordinance is appropriate. Alternatively, if changes are not made, the inspector can impose an administrative fine upon the company, legal representative or other appropriate person. There is a right of appeal to the district court.<sup>65</sup>

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<sup>61</sup> Heuvels K and Pfeil J (2005b).

<sup>62</sup> section 223

<sup>63</sup> Section 230 of Penal Code.

<sup>64</sup> Article 83 of the Basic Law (Grundgesetz). They coordinate their work as much as possible with the insurance funds inspectors (see below).

<sup>65</sup> The court can allow a decision without oral presentations or announce judgment in a public trial. (Duve 2005)

As soon as an inspector considers that a penal offence may have been committed, the inspector must report this to the police/prosecutor who will investigate and take action.<sup>66</sup> Whilst the inspector has discretion over when to impose an administrative fine' the prosecutor has no discretion over the investigation and prosecution of a penal offence. If there is sufficient evidence a prosecution must take place.

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

“as the last resort in a sequence of graduated measures available to the inspectors. These methods must be threatened beforehand ... If the Government office for workplace health and safety concludes that the public interest requires the prosecution of a violation of obligations to protect health and safety at work, it fines the employer under section 25”.<sup>67</sup>

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

### **Levels of enforcement**

In 2003, the Labour Inspectorate imposed 1,292 administrative fines on responsible persons and others, and reported 106 cases to the police. The inspectors of the occupational accident insurance funds issued a further 1,810 cases. There are no statistics on the extent to which these proceedings ultimately resulted in fines being confirmed or penalties imposed.

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

The Ministry of Economics and Labour considers that their system of duties and accountability works well. Company directors are considered to have real incentives to comply with the legislation that explains the low level of penal cases. One regulator interviewed stated that:

“I think it is good to have health and safety duties upon individuals in the company because it stresses the need for health and safety in a better way if they know that they are responsible.”<sup>68</sup>

## **FRANCE<sup>69</sup>**

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<sup>66</sup> “If in the framework of supervisory activities by the authorities responsible for the protection of workplace safety and health any leads arise concerning prosecutable acts on the part of the employer, a responsible person, or an employee, such authorities must inform the police and/or district attorney, who then begins investigative proceedings.”  
Duve (2005)

<sup>67</sup> Duve (2005)

<sup>68</sup> Koll (2005)

<sup>69</sup> Interviews and correspondence with the following people have provided some of the background research for this section: Odile Lautard (Ministry of Labour); Sara Delon-Bouquer (Lawyer at the Paris Bar at Dechert Price and

## FORMS OF COMPANY AND COMPANY ORGANISATION

There are two main types of company in France<sup>70</sup>. Limited liability companies (SARLs)<sup>71</sup>, a common structure for small and medium companies, do not have directors<sup>72</sup> but instead the company's shareholders appoint one or more legal managers<sup>73</sup> to run it. A legal manager – and there are not usually more than two – is “invested with the most extensive powers to act on behalf of the company in all circumstances”<sup>74</sup>.

Public limited companies (SA)<sup>75</sup> have two different forms. The most common arrangement is through the formation of a single board of directors<sup>76</sup> comprising of at least three directors<sup>77</sup> elected by the shareholders<sup>78</sup>. Directors cannot become employees.<sup>79</sup> The board of directors is given the responsibility to determine “the broad lines of the company's business activities and ensures their implementation... [I]t deals with all matters relating to the conduct of the company's business and decides all pertinent issues through its deliberations.”<sup>80</sup>

The board of directors must elect a chairman of the board of directors<sup>81</sup> and, either he or she, or another board member called a general manager<sup>82</sup>, is given the responsibility for the “general management of the company”.<sup>83</sup> The person appointed as general manager will be “invested with the most extensive powers to act on behalf of the company in all circumstances.”<sup>84</sup> A chairman of the board of directors can also act as the managing director.<sup>85</sup> The board can also appoint up to five ‘assistant general managers’.<sup>86</sup>

The second option by which an SA can operate is through a ‘management board’<sup>87</sup> that operates under the supervision of a supervisory board.<sup>88</sup> This management board is not a board of directors. The board consists of up to five shareholders or employees who are appointed by a

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*Rhoads, France) Francois Meisart (Lawyer of the Paris Bar); Florence Theodose/Jacques Isnard/Thomas Bartoil (CMS LLP).*

<sup>70</sup> *These are detailed in the Commercial Code.*

<sup>71</sup> *Des sociétés à responsabilité limitée (SARL).*

<sup>72</sup> *Administrateurs*

<sup>73</sup> *Gérants*

<sup>74</sup> *Article L223-18 of the Commercial Code*

<sup>75</sup> *Des sociétés anonymes*

<sup>76</sup> *conseil d'administration*

<sup>77</sup> *Paras 225-17 to 225-56 of the Commercial Code*

<sup>78</sup> *Each of them must have shares in the company – the level of which must be set out in the Memorandum of Association.*

<sup>79</sup> *Though an employee can become a director as long as he or she has been employed for more than two years. No more than one third of directors can hold an employment contract with the company. (L-225-22 of the Commercial Code). Employee-shareholders can be elected to the Board if more than 3% of the shares are owned by employees and an employee-shareholder can be elected if the Memorandum of Association allows it (L-225-23 and 27 of the Commercial Code).*

<sup>80</sup> *L225-35 of the Commercial Code*

<sup>81</sup> *Known as the président du conseil d'administration (L225-47 of the Commercial Code)*

<sup>82</sup> *Known as the directeur général (L-225-51-1 of the Commercial Code). This person may or may not be a member of the Board, and may or may not be employed.*

<sup>83</sup> *L225-47 of the Commercial Code*

<sup>84</sup> *L225-56 of the Commercial Code*

<sup>85</sup> *Then he or she is known as the Président directeur general.*

<sup>86</sup> *Directeurs généraux délégués. See L225-53 of the Commercial Code.*

<sup>87</sup> *Known as un directoire.*

<sup>88</sup> *Known as conseil de surveillance. See L225*

supervisory board.<sup>89</sup> One of the members of the management board is appointed as chairman. If the management board is one person, that person is known as the ‘Sole General Manager’.<sup>90</sup>

The management board is given “the widest powers to act on the company’s behalf in any circumstances.”<sup>91</sup> The chair of the management board or the sole General Manager (whichever is the case) shall represent the company in dealings with third parties<sup>92</sup> – though the Memorandum of Association may allow the supervisory board to appoint other members of the management board to be a general manager<sup>93</sup> with the same power of representation.

It is important to note that directors are not particularly powerful people in French companies. The key people in an SA are either the chairman of the board or, if one is appointed general manager; they are equivalent in power to the legal manager in the SARL. A person in one of these positions is known as Head of the Enterprise).<sup>94</sup>

## ORGANISATION OF OHS DUTIES

The main health and safety obligations are set out in the Labour Code.<sup>95</sup> Some duties are imposed upon ‘the employer’<sup>96</sup> which, if it is an incorporated business, is represented by the legal entity of a company – an SA or SARL. The main duties are however not imposed upon a legal entity but instead upon a natural person called the ‘head of establishment’.<sup>97</sup> This person becomes “personally responsible for always ensuring the strict and permanent application of the statutory provisions aimed at guaranteeing the safety of his workforce ...”.<sup>98</sup>

### Nature of Duties

The duties that are placed on the head of the establishment are extensive and are the same kind of duties that are imposed upon the ‘employer’ in Britain. The Labour Code requires the head of the establishment to “take the necessary action in order to ensure the safety and protection of the physical and mental health of the people working in the respective establishment, including temporary workers”.<sup>99</sup> It goes onto say that in doing so he or she should adopt the following general preventative principles:

- a) Avoid risks;
- b) Assess the risks that cannot be avoided;
- c) Tackle risks at source;
- d) Adapt work to the respective person, in particular as regards workplace design, the choice of equipment and working and production methods, with a view in particular

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<sup>89</sup> It should consist of at least three people appointed by the shareholders. It has the responsibility to monitor ‘management of the company’ by the management board, shares, the employment conditions

<sup>90</sup> known as the *directeur général unique*. The members of the management board can be dismissed by the general meeting or, if the Memorandum of Association so provide, by the supervisory board.

<sup>91</sup> L-225-64 of the Commercial Code

<sup>92</sup> L-225-66 of the Commercial Code

<sup>93</sup> Known as *directeur général*

<sup>94</sup> *Chef d’entreprise*

<sup>95</sup> This code contains all the occupational health and safety obligations. See <http://www.legifrance.gouv.fr/>. There is no English translation available.

<sup>96</sup> *l’employeur*

<sup>97</sup> *Chef d’établissement*

<sup>98</sup> *Cass. Crim, May 30 2000, Appeal No. 99-87.578, Ruling no. 3612.* (“*de veiller personnellement et a tous moments a la stricte et constante application des dispositions reglementaires destinees a assurer la securite de son personnel ..*”

<sup>99</sup> L-230-2 para 1

- to limiting monotonous and rhythmical work and reducing the impact of these on health;
- e) Take account of changes in the state of technology;
  - f) Replace what is dangerous with something that is not dangerous or less dangerous;
  - g) Plan for prevention by incorporating technology, working structures, working conditions, labour relations and the influence of environmental factors, in particular as regards the risks associated with harassment in the workplace as defined in Article L. 122-49, into a coherent whole;
  - h) Implement collective protective measures by giving these priority over individual protective measures;
  - i) Give workers appropriate instructions.”<sup>100</sup>

It goes onto say that:

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

- (e) Assess the health and safety risks to workers including in the choice of manufacturing procedures, equipment, chemical substances or preparations, in the planning or redesign of workplaces or facilities and in the definition of workplaces;
- (f) Following this analysis and, as required, the preventative measures and the working and production methods implemented by the respective employer must guarantee a better level of health and safety protection for workers and be included in all the activities of the respective establishment and at all managerial levels;
- (g) When a head of an establishment entrusts tasks to a worker, he/she must take into consideration the skills of the party concerned and implement the necessary precautions in terms of health and safety;
- (h) Consult workers or their representatives on the planned introduction and actual introduction of new technology referred to in Article L. 432-2, as regards their consequences in terms of health and safety.”<sup>101</sup>

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

The head of the establishment will either be the legal manager of an SARL, or the chairman of the board or general manager of an SA, unless the company has a number of different sites/factories/workplaces, in which case the head of the establishment will be a senior manager<sup>102</sup> at each particular workplace.

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

However, if the senior manager in charge of a particular workplace does not have sufficient technical ability, power to manage staff or financial autonomy, then he or she will not be

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<sup>100</sup> L-230-2 para 2

<sup>101</sup> L-230-2 para III

<sup>102</sup> This person is often known as a *directeur*.

considered the head of the establishment and the responsibility will remain with the head of the enterprise.

## Delegation

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

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

- **Competence:** responsibility cannot be delegated to just anyone, it must be delegated to someone within the company who is in actual “possession of the necessary competence, authority and means”<sup>103</sup> to ensure that the statutory obligations are observed. The courts have held that responsibility could not be validly delegated to:
  - a site manager, responsible for over 100 workers, who had received no health and safety training and whose level of salary indicated that “he did not have the necessary sufficient status and authority to be able to effectively ensure that the statutory provisions were respected;”<sup>104</sup>
  - a health and safety officer who had no power of authority over employees;<sup>105</sup>
  - a manager who was not in control of the payment of the invoices concerning the purchase of safety equipment, even though he or she had the authority to order the equipment;<sup>106</sup>
  - a manager who could not make decisions regarding who should be employed under him or her, even though he or she played a part in the pre-selection process.<sup>107</sup>
- **Specificity:** the delegation must be specific to the person. So a delegation which had been typed on a “standard document that was never adapted to the competencies, authority and profile” of the particular person was not considered appropriate;<sup>108</sup>
- **Clarity:** the delegation must be unambiguous;<sup>109</sup>
- **Proof:** there must be proof of delegation – though it need not be in writing;<sup>110</sup>
- **Autonomy:** the person to whom powers have been delegated must have autonomy in his or her decision-making powers – and any interference on the part of the head of the establishment will bring the delegation to an end. As it was stated in one case:

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<sup>103</sup> Cass Crim 11 March 1993 (4 judgments): Appeal no 90-84.931: Appeal No. 99-87.578, Ruling no. 3612: Appeal no 91-80.958..

<sup>104</sup> Cass Crim, 9 Nov 1988

<sup>105</sup> Cass. Crim 11 Dec 1996

<sup>106</sup> Cass. Crim 25 Jan 2000

<sup>107</sup> Cass. Crim 25 Jan 2000

<sup>108</sup> Cass Crim, 9 Nov 1988

<sup>109</sup> Cass. Crim., 30 May 2000, 2<sup>nd</sup> Judgment.

<sup>110</sup> Cass. Crim. 39 May 2000, 2<sup>nd</sup> Judgment

“An employee who has been delegated powers in occupational safety matters cannot be blamed for an error in his organisation and monitoring mission that has been entrusted to him, when the head of the establishment or one of his hierarchical superiors interferes in the carrying out of the tasks relating to that missions by removing the independent initiative inherent to any effective delegation.”<sup>111</sup>

It is permissible for sub-delegation to take place – but the same principles above of competence, authority, and resources would need to apply.<sup>112</sup>

## OFFENCES AND PENALTIES

The Labour Code states that the heads of establishment, senior managers, legal managers or their delegates<sup>113</sup> can be prosecuted, if by their “personal fault” they have violated any of the safety obligations set out in the Code.<sup>114</sup> In effect this means that either those designated as heads of establishment or those to whom responsibilities have been delegated can be prosecuted.

It should be noted that although the section states that there should be some “personal fault” on the part of the head of the establishment or his/her delegates, French judges have interpreted this broadly and the head of the establishment can be held liable for failing to personally ensure that rules are being complied with. His or her absence from the premises at the time of the incident is not considered a valid excuse as the courts have ruled that he should have delegated supervision in his or her absence.<sup>115</sup>

Those convicted can be sentenced to a fine of 3,750 Euro, which can be multiplied by the number of employees affected by the breach.<sup>116</sup> If the offence is repeated, the convicted the sanction will be doubled.<sup>117</sup>

In addition, the head of the establishment and any other individuals can be prosecuted for a number of offences under the penal code, which are specifically linked to “breach of an obligation of safety”.<sup>118</sup> The offence of ‘manslaughter’ is defined as:

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

In the event of a deliberate violation of an obligation of safety or prudence imposed by statute or Regulations, the penalty is increased to five years’ imprisonment and to a fine of 75,000 Euro.”<sup>119</sup>

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<sup>111</sup> Cass. Soc 21 Nov 2000, Appel No 98-45420

<sup>112</sup> A sub-delegation to a ‘team leader’ who was not informed the sub-delegation or who was not granted appropriate authority, was not considered valid. Cass. Crim., 28 Jan. 1997.

<sup>113</sup> Les chefs d’établissement, directeurs, gérants ou préposés.

<sup>114</sup> Art. L. 263-1 In relation to civil liability, the Chef d’établissement is held responsible for any violations on the part of “directeurs, gérants ou préposés”.

<sup>115</sup> See Cass. Crim, December 8 1987, no 87-83.595. Correspondence with Delon Bouquet (2005). Paris. Other people can also be prosecuted for breaching other. See L.231-6, L231-7, L232-2, L233-5-1, L233-5-3 and L 233-7

<sup>116</sup> Art. L. 263-2: “The fine shall be applicable as many times as there are employees in the company who are affected by the breach or breaches noted in the official report ...”.

<sup>117</sup> L-263-2-3 of the Labour Code

<sup>118</sup> An English version is at: [http://www.legifrance.gouv.fr/html/codes\\_traduits/code\\_penal\\_soman.htm](http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_soman.htm).

<sup>119</sup> 221-6 of the Criminal Code

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

“Causing a total incapacity to work in excess of three months to another person through clumsiness, negligence, carelessness, recklessness or violation of a safety or prudence obligation imposed by statutes or regulations is punished by two years’ imprisonment and a fine of 30,000 Euro”.<sup>120</sup>

“In the event of a deliberate violation of a safety or prudence obligation imposed by statute or regulation the penalty to be imposed is increased to three years’ imprisonment and to a fine of 45,000 Euro”.<sup>121</sup>

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

“The direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the manifestly deliberate violation of a specific obligation of safety or prudence imposed by any statute or regulation is punished by one year’s imprisonment and a fine of 15,000 Euro”.<sup>122</sup>

## **ENFORCEMENT**

Enforcement of the Labour Code is undertaken by inspectors employed by the Ministry of Labour.<sup>123</sup>

If during the course of an inspection, an inspector finds “a dangerous situation resulting from non-compliance with the provisions in Article 230-2”, the Ministry may:

“give heads of establishments formal notice to take any necessary action to remedy this. This formal notice shall be given in writing and shall be signed and dated. It shall stipulate a deadline for completion taking account of any inherent difficulties. If, at the end of this period, the labour inspector notes that the dangerous situation has not been remedied, he may send an official report to the respective head of establishment, who shall then be subject to a penalty for a summary offence.”<sup>124</sup>

It is common in practice to require the changes to be made within one month. Recommendation does not itself have the power of law, but if it is not complied with, the inspector can then initiate proceedings. However, if the inspector considers the violation serious enough, proceedings can be initiated without having issued a recommendation.<sup>125</sup>

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<sup>120</sup> 222-19 of the Criminal Code. It should be noted that companies may be convicted of these two penal offences. See Article 221-7 and 222-21 of the Criminal Code. Companies cannot be convicted of breaches of the Labour Code.

<sup>121</sup> In addition, article 222-20 of the Criminal Code states that: “Causing a total incapacity to work of three months or less to another person by a deliberate violation of a safety or prudence obligation imposed by Statutes or Regulations, is punished by one year’s imprisonment and a fine of 15,000 Euro”. And Article 223-1 states that: “The direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the manifestly deliberate violation of a specific obligation of safety or prudence imposed by any statute or regulation is punished by one year’s imprisonment and a fine of 15,000 Euro”

<sup>122</sup> 223-1 of the Criminal Code

<sup>123</sup> This section is primarily based on interview with Department of Labour in France.

<sup>124</sup> L230-5 of the Labour Code

<sup>125</sup> Another option is for an inspector to order that a workplace be closed down. In order to do this the inspector needs to obtain an order from a judge. This power is rarely used.

Proceedings are initiated by the inspector sending a report, called ‘minutes’, to the prosecutor<sup>126</sup>. This will contain the details of the violation, the inspector’s assessment, and any relevant employee comments.<sup>127</sup> The minutes will also contain information provided by the company, including the names of the head of the enterprise and that of any other person to whom safety responsibilities may have been delegated.<sup>128</sup> The inspector himself or herself will not investigate who is actually responsible for the violation – that is to say, whether the head of the establishment is the head of the enterprise or another individual.

The prosecutor will then look at the ‘minute’ and then decide whether or not to prosecute and, if so, send it to a judge of the tribunal.<sup>129</sup> It is then for the investigation judge to decide, on the basis of calling evidence, who should be held accountable – using the principles stated above.

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

### **Level of Enforcement**

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

## **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

It has not yet been possible to obtain reflections on the perceived effectiveness of the French system of duties and accountabilities<sup>130</sup>.

## **ITALY<sup>131</sup>**

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

There are two main forms of company - the limited liability company known as an SrL<sup>132</sup> and a public limited company known as a SpA<sup>133</sup>. Both kinds of Companies in Italy are managed either by a sole director<sup>134</sup> or a board of directors<sup>135</sup>. If there is a board it must appoint a chairman who is considered to be the legal representative of the company, though this person does not

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<sup>126</sup> *It is unusual for inspectors to initiate prosecution in this matter – however, an inspector ‘will not hesitate to do so if he sees workers at risk’.* (Lautard (2005.)

<sup>127</sup> *It will not contain witness statements as such.*

<sup>128</sup> *The inspector will have written to the company to obtain these details.*

<sup>129</sup> *There is no need to provide reasons for decisions not to prosecute.*

<sup>130</sup> *See final version of report.*

<sup>131</sup> *Interviews and correspondence with the following people have assisted with the writing of this section: Dr Raffaella Guariniello (a prosecutor, Procura della Repubblica, Tribunale di Torino) and Giulio Andrea Tozzi, (Inspector from the Occupational Health and Safety Prevention Unit in Genoa), and Professor Gisella De Simone (University of Genoa).*

<sup>132</sup> *Società a responsabilità Limitata*

<sup>133</sup> *Società per Azioni*

<sup>134</sup> *Amministratore Unico*

<sup>135</sup> *Consiglio di Amministrazione*

necessarily have executive powers for the management of the company. The board of directors may delegate some of its powers to one of its members who becomes known as a managing director<sup>136</sup> or to an executive committee<sup>137</sup> composed of some of its members. In addition the board may appoint general managers<sup>138</sup> who are employees of the companies, but can also be members of the board.

## ORGANISATION OF OHS DUTIES

In Italy, the foundation of modern occupational health and safety law is the Italian constitution. This states that “health is a fundamental individual right and a social interest”<sup>139</sup> and that private economic enterprise “shall not be exercised contrary to the social good or in such a way to cause harm to safety, freedom and human dignity”.<sup>140</sup> This sets a high standard below which legislative obligations toward the safety of workers and others should not fall: there are no qualifications to the need to ensure safety.

The Civil Code – which sets out how companies should be established and organised - imposes a more specific obligation upon the entrepreneur<sup>141</sup>:

“the entrepreneur shall, in carrying out his business, adopt the measures which, in accordance with the particular nature of the work, experience and technology, are required for protecting the physical integrity and personality of the persons employed.”<sup>142</sup>

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

It is in these decrees – the most important one being decree 626/94 which transposed into Italian law the European Commission Framework Directive and other specific directives<sup>143</sup> – that set out more detailed and specific obligations are imposed upon ‘employers’. Decree 626/94 is the principle source of health and safety obligations in Italy.<sup>144</sup>

### Legislative Decree 626/94

Though this decree does impose duties upon senior managers<sup>145</sup> supervisors<sup>146</sup> and workers<sup>147</sup>, the principal duties are imposed upon the employer.<sup>148</sup> In most jurisdictions, when a business is

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<sup>136</sup> *Amministratore delegato*

<sup>137</sup> *comitato esecutivo*

<sup>138</sup> *Direttori Generali*

<sup>139</sup> *Article 32*

<sup>140</sup> *Article 41*

<sup>141</sup> “*L'imprenditore*”. An entrepreneur is a person who engages professionally in an economic (business) activity for the purpose of production or exchange of goods or services. This term is wider than just ‘employer’.

<sup>142</sup> *Article 2087 (unofficial translation)*

<sup>143</sup> *Directives on work equipment, work sites, visual display units, manual handling, personal protective equipment, explosive atmospheres, carcinogens, mutagens and biological and chemical agents.*

<sup>144</sup> *Other decrees include: DPR 303/56 (on occupational Hygiene as modified by DLgs 626). DPR 547/55 (on accident prevention as modified by DLgs 626); DPR 164/56 (construction safety); DLgs 277/91 (on noise and asbestos) DLgs 494/96 (mobile sites) DLgs 493/1996 (OHS signals). The old presidential decrees (DPR) and the new legislative decrees (DLgs) are the same.*

<sup>145</sup> *dirigente*. In a large company, a person with particular technical expertise or a person in charge of a number of departments could be a dirigente, for example.

<sup>146</sup> *Preposto*. This person would be responsible for making sure workers abide by certain company rules. For example, ensuring that workers under him are wearing their personal protective equipment (Art 4(5)(d)), A failure to

incorporated, it is the legal entity of the company which is the employer. However in Italy, the 'employer' will never be a company but rather a natural person within it. The term 'employer' has a very specific definition and is:<sup>149</sup>

“the party who holds labour relations with the worker or, at any rate, the party who (depending on the type of company and the way in which it is organised) has responsibility for the actual company or the productive unit ..., as the party in whom powers to make decisions and expenditure are invested.”<sup>150</sup>

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

“plant or structure, endowed with financial and technical/functional autonomy, and having for its aim the production of goods and services”.<sup>151</sup>

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

Where a company has a number of productive units, a key question is whether the person deemed to be the employer is located at the company or at the productive unit (workplace) level – since the definition allows for both circumstances. This appears to depend upon the level of financial/technical autonomy that the workplace in question has from the rest of the company: the greater the autonomy of the 'productive unit' the more appropriate it would be for the employer to be located at that level. However it has been held that the unit must at least have its own separate budget that it manages. In fact, it is argued by some prosecutors that in order for the employer to be a person within the productive unit rather than at company level, the units must have 'full autonomy' as otherwise the natural person within the unit cannot be said to be a person within the company with full decision or expenditure making powers.<sup>152</sup> Finding the person deemed to be 'employer' is often difficult in large companies.<sup>153</sup>

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

The situation in relation to public bodies is different. The decree states that the term employer:

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*do so can result in prosecution (Article 91) Although Article 4 of the Decree – an important article - is titled 'Obligations of the employer, manager and supervisor', as though these duties were imposed equally upon all of them, it is clear from the article itself that these the employer.<sup>146</sup> Duties are also imposed upon: designers, manufacturers, suppliers and installers, and upon the physician dealing with health surveillance.*

<sup>147</sup> *Lavoratori. See Article 4 of the decree. Section 6 also imposes on, designers, manufacturers, installers of work equipments. Duties are also imposed on medical doctors in charge of health surveillance.*

<sup>148</sup> *Datore di Lavoro*

<sup>149</sup> *Article 4 of Title 1*

<sup>150</sup> *Article 2(b) of Title 1 of Legislative Decree 626/94*

<sup>151</sup> *Article 2, (1) (i)*

<sup>152</sup> *Guariniello (2005)*

<sup>153</sup> *Tozzi (2005)*

“refers to the executive with managerial powers or an official not categorised as an executive, but purely in cases where the latter is attached to a department with autonomous management.”<sup>154</sup>

This definition does not require the employer to have financial or decision-making powers – but instead to have day to day management responsibilities for the running of the operation. It appears to have been drafted to ensure that the most senior officials of public bodies would not be deemed employers: however, in practice, the courts have only rarely considered that the ‘executive with managerial powers’ is not the person with decision-making and budgetary powers.<sup>155</sup>

In small or medium sized companies it is usually very straightforward to find out which is the person considered to be the ‘employer’ – it will almost always be the director or general manager. Where it is a large company with a number of different productive units, the inspector will have to decide on the level of autonomy of each unit. When the unit is largely autonomous, the employer will be the most senior person of that productive unit. This, of course, could be a director or general manager if one of them is based in that productive unit, but would be more likely to be a senior manager.<sup>156</sup>

### Delegating Responsibility

However, even assuming that a director or a general manager is considered to be an ‘employer’, it is still possible for him or her, if he or she so wishes, to delegate most of his or her responsibilities to senior managers (or indeed others) lower down in the management chain. However, the delegation by the employer is subject to a number of quite stringent conditions:<sup>157</sup>

- **Necessity:** The delegation must be necessary. “The transfer of functions must be justified on the basis of the company’s organisational needs”.<sup>158</sup> Delegation must not be used “in order to effect a sliding of responsibility downwards to the medium-low cadres of the organisation.... [Delegation] must be justified by the actual need for specialisation within the division of tasks and of rationalisation of productive activity”.<sup>159</sup> In relation to this, the size of the company may be a factor, as “prevalent case law tends to limit the possibility of delegation to large size or at least medium companies to that the employer is always held responsible in a family owned business”;<sup>160</sup>
- **Explicit:** the delegation must be explicit and specific and free from any possibility of equivocation. “The existence of the delegation must be judicially proved beyond doubt”<sup>161</sup>;

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<sup>154</sup> Article 2(b) of Title 1 of Legislative Decree 626/94

<sup>155</sup> Guariniello (2005)

<sup>156</sup> Sometimes in large companies with complex structures it can be difficult to find out who is the employer. An inspector will often obtain copies of the company registration documents or the declaration to the Camera di Commercio Industria e Artigianato (CCIA) which will identify all the Board members with their duties. An inspector may also try and find out who signed the risk assessment document – since this is a document that should be signed by the ‘employer’. The documents should always be integrated with investigations into the actual decision making structure. Interview with Mr Tozzi.

<sup>157</sup> Interview with Guariniello (2005) and caselaw

<sup>158</sup> Capone, Ruling No 26122, 15 July 2005, Cour de cassation

<sup>159</sup> Carraturo, Criminal Court of Penal Cassation, Section III – Ruling no. 28126, 23 June 2004

<sup>160</sup> Carraturo, Criminal Court of Penal Cassation, Section III – Ruling no. 28126, 23 June 2004. However some other decisions indicate that size is not such a decisive factor.

<sup>161</sup> Capone, Ruling No 26122, 15 July 2005, Cour de cassation

- **Clarity:** the clarity must set out clearly the obligations - the tasks and powers that are attributed to the person to whom the duties are delegated. The delegate must also fully understand the implications of this delegation;
- **Competence:** responsibility cannot be delegated other than to a person with proven competence. “The delegate must be technically adequate and professionally qualified for the execution of his tasks”.<sup>162</sup> The delegate’s capability can be judged by “a request for intervention or for increased financial means on the delegate’s part to failure to exercise control as to persistence of conditions” that had justified the delegation in the first place”;<sup>163</sup>
- **Autonomy:** this person must have full decision-making and financial autonomy. Delegation must consist of the “actual transfer of decision-making powers onto the delegate with the attribution of complete financial and managing autonomy.”<sup>164</sup> If an employer does not give enough money to the person to spend on safety, then the delegation will not be considered valid;<sup>165</sup>
- **No knowledge of infringement:** the employer must not be aware of any infringement on the part of the person to whom delegation has taken place, and if he does he has a responsibility to intervene as otherwise the responsibility will fall back on him or her. There must be “unawareness on the part of the delegating party of any negligence or subsequent inaptitude on the part of the delegate”.<sup>166</sup> In addition, the employer must not in any way induce any infringement or violation by the person to whom delegation has taken place;
- **Supervision:** a system of control should be in place to ensure that the employer can be confident that the person to whom powers have been delegated, is carrying out his responsibilities adequately. Delegation “does not release the employer from the obligation to exercise control and vigilance as to whether the delegate is making actual use of the delegation.”<sup>167</sup> Where an employer has validly “delegated compliance of preventive norms upon others, he or she must exercise vigilance and control as to those norms being applied, complied with and caused to be complied with by the delegate. Specifically, the employer cannot deny liability by pleading ignorance of the failed adoption of safety precautions, since that very ignorance incriminates him or her as he or she has the duty to monitor both the adoption of work instruments implicitly (*ab imis*) endowed with safety precautions or devices, and the behaviour of the delegate who must make sure safety norms are respected. Even more significantly, in this particular case, the magistrates have held to these principles, noting that, owing to his frequentation of the workplace and to the fact that he did in any case exercise a certain control over production, the defendant could not possibly have been unaware of failure to adopt the due safety precautions, bearing in mind, in any case, that such precautions had never been adopted in the first place, which would make such violations and breaches very ‘gross’ indeed”.<sup>168</sup>

The required level of supervision is not spelt out clearly in jurisprudence, but the employer should be receiving reports and other information that can enable him to make a judgment about the

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<sup>162</sup> Capone, Ruling No 26122, 15 July 2005, *Cour de cassation*

<sup>163</sup> Carraturo, *Criminal Court of Penal Cassation, Section III – Ruling no. 28126, 23 June 2004*

<sup>164</sup> Carraturo *Criminal Court of Penal Cassation, Section III – Ruling no. 28126, 23 June 2004; and Marini, Court of Penal Casation, Section III, Ruling no. 12370 of 1 April 2005.*

<sup>165</sup> So if 100 pairs of gloves are required, but there is only money for 50 or only enough money to buy 100 sub-standard gloves, the person responsible may well continue to be the employer.

<sup>166</sup> Marini, *Court of Penal Casation, Section III, Ruling no. 12370 of 1 April 2005*

<sup>167</sup> Capone, *Court of Penal Cassation, Section III, Ruling no. 26122 of 15 July 2005*

<sup>168</sup> Niboil, *Criminal Court of Penal Cassation, Section IV, Ruling no. 24086 of 26 May 2004i*

success of the 'delegate'. If, for example, a violation is detected and the senior manager (to whom responsibilities have been delegated) tells the inspector this is because he or she was not provided a sufficient safety budget, it may not be enough for the employer to say that the manager had not told him or her. There is a responsibility on the employer to be aware of this.<sup>169</sup>

Since the delegation must be explicit, unequivocal and certain, the courts have generally required that the delegation must be in writing. However, there are some judgments where an oral delegation has been considered adequate, proved that there were witnesses.<sup>170</sup>

In a situation where the board of directors has formally entrusted one of its members with the safety responsibilities and given him or her full spending powers and autonomy, criminal responsibility would rest with him or her. The chairman of the board and other directors would only have joint responsibility if "they have maliciously omitted to exercise vigilance or being aware of facts that could prejudice the company or of the delegate's inaptitude, omitted to intervene."<sup>171</sup> However, in other cases, it has been held that whether other board members can remain immune from responsibility depends on the scope of the delegation they have given to the managing director: where for example, decisions had to be made that could only be made by the whole board, the other members of the board could be held responsible.<sup>172</sup>

However, the decree states that the employer can never delegate some obligations.<sup>173</sup> These are the:

- duty to carry out risk assessment;<sup>174</sup>,
- duty to write a risk assessment report;<sup>175</sup>
- duty to certify in writing that a risk evaluation has been carried out and the appropriate preventative measures adopted;<sup>176</sup>
- to update the risk assessment document when changes in the process takes place;<sup>177</sup>
- duty to nominate a manager of the Protection and Prevention Services (RSPP);<sup>178</sup> and
- consulting worker representatives.<sup>179</sup>

It is also the case that certain activities can be delegated whilst others remain in the hands of the employer. So, a director may delegate certain safety responsibilities to a senior manager, and give

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<sup>169</sup> Tozzi (2005)

<sup>170</sup> For example, if a senior manager has acted for a long period as a delegate on safety matters, has accepted these tasks and others recognise him or her to have that role, documents may not be necessary to prove the delegation. (Tozzi)

<sup>171</sup> Marini, Court of Penal Casation, Section III, Ruling no. 12370 of 1 April 2005

<sup>172</sup> Marini, Court of Penal Casation, Section III, Ruling no. 12370 of 1 April 2005

<sup>173</sup> Article 1(4)-ter.

<sup>174</sup> 4.1 "In relation to the type of activity carried out by the company or producer unit, the employer assesses all risks to the health and safety of workers, which includes those relating to groups of workers exposed to specific risks, as well as to the choice of work equipment and substances or chemical preparations used, and the arrangement of workplaces."

<sup>175</sup> Article 4.2: "At the end of the assessment as mentioned in paragraph 1, the employer draws up a document containing: (a) a report on the assessment of risks to health and safety at work, in which the criteria used for the assessment itself are specified; (b) an identification of the measures concerning prevention and protection and the individual protection devices, subsequent to the assessment in section a); (c) the programme of measures deemed opportune to ensure the improvement of security levels over time".

<sup>176</sup> Article 4.11. Applies to companies with ten or less employees and to 'family enterprises'.

<sup>177</sup> Article 4.7

<sup>178</sup> Article 4.4a

<sup>179</sup> Article 4.6

him or her financial and decision-making autonomy in relation to those activities, but retain responsibility for others.

### **Nature of Obligations upon the employer**

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

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

However it is important to note that these duties must be complied with to the ‘maximum level of safety as is technologically possible.’<sup>180</sup>

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<sup>180</sup> This standard is not articulated with specificity in the decree but is founded upon two articles in the decree and is supported by caselaw. Article 3(1)(b) states that one of the overall measures concerning the health and safety of workers are “eliminating risks relating to knowledge acquired on the basis of technical progress and where this is not possible, reducing them to a minimum”. Article 4(5)(b) requires the employer to update “prevention measures relating

## OFFENCES

The employer can be prosecuted for three different categories of violations in the decree.

- The first category concerns violations of duties that only the employer can contravene<sup>181</sup>. Some of these are the non-delegable duties mentioned above: so only the employer can be prosecuted for (a) failing to draw up a report on the assessment of risk and any prevention measures to be taken, and (b) if he fails to appoint a protection and prevention services manager. In addition only employers can be prosecuted for 63(1, 4, 5) 69 (5a), 78(3, 5) and 86 (2-ter). Conviction for these offences can result in imprisonment of between three to six months or with a fine of 1,549 – 4,131 Euro.
- The second category of offences can be committed by both the employer and the senior manager – though the senior manager will only be prosecuted for these offences if the employer has delegated these responsibilities to him or her. Conviction for one category of these offences can result in the same level of sentence as above; in the next category conviction can result in imprisonment of between two to four months or with a fine of one to five million Lira; and in the final category, with just a fine of between 258 and 1,032 Euro.
- In addition there is a category or violation that can result in either the employer or the manager having to pay an administrative fine to the inspector of between 516 to 3,098 Euro.

In other legislative decrees, more severe sanctions exist. For example in DLg 277/91, failures relating to asbestos risks can result in fines of between 5164 to 25,822 Euros or 3-6 months imprisonment. In DLg 626 allows a person deemed to be a manufacturer to be sentenced to be fined between 7,746-30,986 Euros or to be imprisoned for up to six months.

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

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

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

In the event of the death of more than one person or of the death of one or more persons and personal injury to one or more persons, the punishment applied shall be that which should be inflicted for the most serious violation committed increased by up to one third, but this punishment may not exceed twelve years”<sup>182</sup>.

Negligence is assumed to have taken place when a law or regulation has not been observed.<sup>183</sup> Where there has been an injury rather than a death, there is a separate offence:

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*to organisations and production changes that are important for the purposes of health and safety at work, or in relation to the degree of technical development, prevention and protection”.*

<sup>181</sup> Article 89(1)

<sup>182</sup> Article 589

<sup>183</sup> Article 42 and 43(3)

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

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

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

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

In the case designated in the first paragraph of this article, the offender shall be punished on complaint of the victim.<sup>184</sup>

## ENFORCEMENT

Most enforcement of the legislative decrees is undertaken by over 320 ASLs<sup>185</sup> which are local agencies of the National Health Service and are organised at a regional governmental level.<sup>186</sup> Each ASL covers districts of 100-700,000 inhabitants.<sup>187</sup> Some enforcement responsibilities also remain with the Labour Inspectorate<sup>188</sup>. The ASL inspector is considered to be a judicial police officer<sup>189</sup> which means that they are an official of the judiciary police.

Details of any violation identified by the inspector must be sent to the prosecutor for prosecution. However, prosecution can be deferred by the inspector issuing a prescription<sup>190</sup> which is a document that sets out “specific measures” that should be adopted by the employer “to stop the danger for the health and safety of workers during work”. The inspector should set a time by which the changes should be made, which should be a period “not exceeding the period of time technically necessary.”<sup>191</sup> The ASL must immediately inform the prosecutor that a prescription has been issued and as a result the criminal procedure will be temporarily deferred. The

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<sup>184</sup> article 590. Though if there has been a violation of 2087 of the civil code, prosecution without complaint of the victim is not necessary. There is in addition Article 451 - ‘Negligent omission of precautions or safeguards against industrial accident or disasters’. This states that: “Whoever, through negligence, fails to install, or removes or renders unserviceable the apparatus or other devices designed for extinguishing fires, or for rescue or relief in cases of industrial accident or disaster, shall be punished by imprisonment for up to one year and by a fine of from 40,000 to 200,000 lire.”

<sup>185</sup>  
<sup>186</sup> See Legislative Decree. 833/1978. There are 19 regions and 2 autonomous provinces (Bolzano and Trento)

<sup>187</sup> In each ASL there are medical care, presentation and rehabilitation services. The prevention department is divided into four specialized units, Public Hygiene, Veterinary, Foodstuff Hygiene, Occupational Health and Safety (OHS). OHS personnel is about 0.3 to 1.4% of the overall Health personnel at regional level.

<sup>188</sup> Labour Inspectorate has responsibility for enforcing construction safety, but in co-ordination with ASLs.

<sup>189</sup> Ufficialte di polizia giudiziaria (UPG)

<sup>190</sup> Prescrizione

<sup>191</sup> This must not be more than six months.

prosecution process only comes to an end if the measures are adopted and the employer pays one quarter of the maximum fine available for the offence.<sup>192</sup> Most prescriptions are complied with.<sup>193</sup>

The prosecutions that proceed take place in the ordinary criminal courts<sup>194</sup> and are usually undertaken by a dedicated set of prosecutors who only deal with these kinds of offences.

If a death or injury takes place the prosecutor should receive information from the police.

There are no details published of the number of prosecutions against employers. In one region, however, in 1999, inspectors identified 8,239 infringements – 88% of which were rectified. A total of 4,440,000 Lira was obtained in fines.<sup>195</sup>

## PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE

We have so far not been able to gather any information on this.<sup>196</sup>

## SWEDEN<sup>197</sup>

### FORMS OF COMPANY AND CORPORATE ORGANISATION

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

- Trading or Limited Partnership companies. These are companies which exist as soon as an agreement has been made between two or more parties to carry on business in the form of a company. These companies can have a board, but are usually managed by the partners without the constitution of a special board. Each partner is considered to represent the company.
- Cooperative associations<sup>198</sup>. There must be at least three ‘members’, and the organisation and administration of the association are undertaken by a board of directors. The board can appoint a managing director, which is usually done when the number of employees exceeds 200.
- Limited liability companies<sup>199</sup>: this is the most common form of company in Sweden. There are two types – public and private. They must have a board of at least three members who may appoint a managing director<sup>200</sup> (who may or may not be a board member) to handle the

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<sup>192</sup> *The Head of the PSAL also has the power to prescribe measures that are not completely defined by law (Disposizione) – however the employer then can appeal this to the president of the Regional Government.*

<sup>193</sup> *Tozzi*

<sup>194</sup> *Tribulae, Procura della Repubblica presso il Tribunale*

<sup>195</sup> *Tozzi*

<sup>196</sup> *See final report*

<sup>197</sup> *Interviews and correspondence with the following individuals have provided some of the background research for this section. Ralph Perlman and Maria Steinberg (Work Environment Authority), Jonas Wiberg (tradunion) Philippe De Baets, an academic.*

<sup>198</sup> *Ekonomisk forening*

<sup>199</sup> *Swedish Companies Act 1975*

<sup>200</sup> *Verkstallanda Direktor*

day to day administration of the company.<sup>201</sup> One of the members of the board shall be elected as chairman.<sup>202</sup>

## ORGANISATION OF OHS DUTIES

The Work Environment Act 1977<sup>203</sup>, the Work Environment Ordinance, and the ‘Provisions’<sup>204</sup> - set out the health and safety law in Sweden. This legislation imposes duties upon a number of different actors<sup>205</sup> but the principal obligations are, however, placed upon the ‘employer’ who in relation to an incorporated business, will be the legal entity of the relevant company. The Act itself for example, states:

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

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

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

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

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

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

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

### Duties upon ‘highest manager’

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<sup>201</sup> Para 6, Swedish Companies Act 1975

<sup>202</sup> Para 8, Swedish Companies Act 1975

<sup>203</sup> <http://www.av.se/english/legislation/legislation.shtm>.

<sup>204</sup> Note that ‘provisions’ here means something akin to ‘regulations’ in Britain – they are created by the Work Environment Authority (WEA).

<sup>205</sup> This includes, for example, manufacturers importers, and suppliers.

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

“The employer’s responsibility for the work environment is borne primarily by the highest manager i.e. in a limited company usually by its Managing Director”.<sup>206</sup>

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

The imposition of the duties upon the ‘managing director’ is not something apparent from the Act itself – but instead is a principle developed from the preparatory documents concerned with the enactment of the legislation and subsequently through caselaw.<sup>207</sup>

## Delegation

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

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

“In accordance with expert legal practice, that responsibility can be delegated if there is a clear need for this to happen. Such a need can be that delegation aims to fulfil the employer’s work environment responsibility in a better way by transferring the decision-making responsibility and sufficient decision-making authority to someone who has a more direct responsibility for a workplace.”<sup>208</sup>

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

“Such a person must also have requisite training and competence for the assignments and have a relatively independent position.”<sup>209</sup>

- There must be clarity of delegation:

“A condition for a valid delegation to exist, however, is also that the delegation clearly shows the scope of the responsibility delegated and to whom that responsibility is delegated. The requirement that a delegation must be clear does not, however, mean that a particular legal form has to be established as to how a delegation must be worded to be valid.”<sup>210</sup>

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

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<sup>206</sup> B 3184-03, NJA 2004 s.126. (unofficial translation). In relation to a municipality, the top manager would be the director general, and for a school, the headteacher (Wiberg, 2005(a)).

<sup>207</sup> This principle has developed in this way since Swedish law does not allow companies to be prosecuted.

<sup>208</sup> Case no A: 93-06-03, NJA 1993 S.245 (unofficial translation). This requirement is common to the principle of delegation in France and Italy as well.

<sup>209</sup> *op cit*

<sup>210</sup> *op cit*

“It is the nature of the case that this clarification requirement is invoked with the greatest of emphasis the further down the decision chain the delegation takes place.”<sup>211</sup>

However at the same time ”subordinate post holders may however have a certain responsibility for safety at the workplace even if it is without being expressly delegated if it goes with their work assignments or position”.<sup>212</sup>

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

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

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

The employer shall see to it that those allotted the tasks have sufficient competence for the conduct of a well functioning systematic work environment management”.<sup>213</sup>

Guidance on this states:

“It is incumbent on the employer’s top management to commence the allocation of tasks. Usually the management entrusts tasks to senior executives within the organisation. They in turn can allocate the tasks further if empowered to do so by their respective superiors.”<sup>214</sup>

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

“The Allocation of tasks does not mean that the person incurring tasks will be automatically punished in the event of a work accident or a work-related illness. ... If an accident leads to prosecution and court proceedings, the court’s assessment can to a great extent hinge on whether the accused has sufficient knowledge, powers and resources for his or her tasks”.<sup>215</sup>

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<sup>211</sup> Case no B4771, NJA 2004 s.34 unofficial translation.

<sup>212</sup> *op cit*

<sup>213</sup> Section 6. Statute Book of the Swedish Work Environment Authority, AFS 2003:4.

<sup>214</sup> WEA (2005), ‘Work Environment Responsibility and penal liability - two quite different things’ (draft translation by the WEA).

<sup>215</sup> Also see other guidance given by WEA: “If, on the other hand, the question of penal liability arises, this is apportioned after the event by the courts. .... In such cases the courts often consult the internal division of labour, but if that division has been wrongly affected they can disregard it. Wrongful allocation occurs, for example, if tasks are allocated unaccompanied by the powers and resources that are needed, or again if a task is given to

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

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

A recent case, which focuses on the need for clarity in delegation, is useful in understanding how the courts assess whether or not delegation has taken place in an appropriate manner.<sup>216</sup> It concerned an employee at a parquet factory who in December 1999 trapped and injured her hand whilst cleaning a gluing machine. Another incident, with less serious consequences, had happened six months previously at the same machine in similar circumstances. A person referred to as HN was site manager at the factory, and he had been found guilty in a lower court. The question before the Supreme Court was whether he could appeal.

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

“The first issue of the case is who will be considered to have primarily borne the employer’s work environment responsibility at the parquet factory in Tibro. HN has at the Supreme Court contested that this responsibility was delegated to him by the company management. The report in the case showed that no express delegation order, verbal or written, existed in the company. HN was thus the manager of the factory directly subordinate to Forbo Forshaga’s Managing Director. The latter was, together with the company’s management, stationed at the company’s main office in Gothenburg. Regarding the fact that HN was evidently responsible for the day-to-day management at the parquet factory in Tibro, and that he was the highest salaried manager at the factory, the work environment responsibility at the factory may be considered to have been delegated by the company management to HN on the basis of the latter’s position.”

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

The court ruled that:

“With the lack of any expressly written or verbal delegation order in the company, it must be maintained that uncertainty prevailed as to whether LD had further responsibility for the employer’s work environment assignments than he himself confirmed. Of decisive

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*someone who is not competent to perform it or if sufficient information and instruction are not provided.” Official commentary on Chapter 3 of the Act, p.36.*

<sup>216</sup> B-3184-03, NJA 2004 s.126, Unofficial translation. The case did not deal with the questions of authority, independence and, competence.

significance to the issue of whether delegation with the effect of discharging HN had taken place is then whether it has been clarified in the case that there were shortcomings in the work environment that cannot be attributed to such considerations and measures with regard to the purchasing, installation and maintenance of the work machines for which it may be considered to be apparent that LD was responsible”.

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

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

## **Employees**

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

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

An employee finding that work entails an immediate and serious danger to life or health shall immediately notify the employer or a safety delegate. The employee cannot be held liable for any damage resulting from his non-performance of work pending instructions regarding its resumption.”<sup>217</sup>

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

“If the employer is a juristic person, all workers are deemed to be employees. This also applies to managers and supervisory staff, such as the managing director of a limited company or the chief executive officer in a municipality. Persons employed in their own limited companies also count as employees.”<sup>218</sup>

Managing directors can be prosecuted for breaching this section<sup>219</sup> but it appears that no managing director has been prosecuted in this way.<sup>220</sup>

## **OFFENCES**

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<sup>217</sup> Section 4

<sup>218</sup> WEA (2005a) *ibid*

<sup>219</sup> Perlman, (2005a)

<sup>220</sup> Maria (2005a). *The section was not intended for managing directors but for ordinary employees.*

## Work Environment Act

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

There are certain violations that can result in a prosecution without an injunction or prohibition being imposed – employing a minor, providing the WEA with incorrect information, removing a safety device or rendering it inoperative.<sup>221</sup>

## Penal code offences

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

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

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

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

If the crime is gross, imprisonment for at most four years shall be imposed. ...”<sup>222</sup>

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

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

What is particularly interesting about these offences is that the Penal Code specifically provides another provision that indicates that these offences are appropriate to be applied in a work-related situation. Section 10 of the chapter states:

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

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<sup>221</sup> Chapter 8, section 2

<sup>222</sup> If the crime is not of a serious nature, prosecution will only take place if the injured party reports the crime for prosecution and a prosecution is called for in the public interest (section 12). This is similar to the situation in Germany.

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

## ENFORCEMENT

Responsibility for the enforcement of this legislation is the Work Environment Inspectorate of the Work Environment Authority.<sup>223</sup> If in the course of an inspection or investigation, a WEA identifies breaches of the Act or Provisions (issued under the Act’s authority), the WEA can issue a notice requiring the employer to take certain action within a specified period of time, and to inform it about what improvements have been made.<sup>224</sup> If the employer does not comply with the notice, the WEA can make an order to the company containing binding requirements. This order might be an ‘injunction’ (requiring further measures to be taken) or a ‘prohibition’ (preventing the use of machine or facility unless particular action is taken).<sup>225</sup> When imposing one of these orders, the WEA can set a ‘contingent fine’ – a maximum of 10 million Swedish Crowns - which can be exacted if the injunction/prohibition has not been complied with.<sup>226</sup>

It is only when there has been ‘intentional’ or ‘negligent’<sup>227</sup> non-compliance with an injunction or prohibition that a prosecution against one or more of the employer’s representatives can take place.<sup>228</sup> Companies cannot be prosecuted under Swedish law – and as a result prosecution of a legal representative (a natural person), or a person to whom powers have been delegated, will be prosecuted. Conviction can result in an unlimited fine (linked to the income of the person) or a sentence of imprisonment for not more than one year.<sup>229</sup>

### Who to prosecute?

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

“If the accident leads to prosecution and court proceedings, it can make a big difference to the court’s assessment whether the accused had sufficient competence and sufficient

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<sup>223</sup> *The Work Environment Authority was formed in 2001 by merging the National Board of Occupational Safety and Health, and the Labour Inspectorate.*

<sup>224</sup> *“The requirements contained in an inspection notice are not formally binding, but they do express the supervisory authority’s assessment of what needs to be done to improve the work environment.”*

<sup>225</sup> *Section 7 of Chapter 7. To read the process see p.2 of Work Environment responsibility and penal liability - two quite different things”. This decision can be appealed.*

<sup>226</sup> *This would be instead of a prosecution. The level of the contingent file is gauged according to the cost of carrying out the measures concerned and the amount judged necessary to prevail upon the employer to take them. A County administrative court can, at the request of the WEA, order the employer to pay all or part of the file. No evidence of negligence is required. This is usually imposed upon companies and are larger than any penalty that might be imposed against an individual (see commentary). In 2001, there were 11,519 inspection reports with warning notices, 13 injunctions (with penalties), 274 injunctions with penalty, 111 prohibitions without penalty, 122 prohibitions with penalty. In 2002, contingent fines were actually imposed on 30 occasions.*

<sup>227</sup> *Negligence usually means that one or more persons “have omitted to take the measures which could have prevented the injury”*

<sup>228</sup> *Section 1, chapter 8. Therefore a failure to comply with the employer’s general obligation in Chapter 3, section 2 and 2a of the Work Environment Act and the provision on Systematic Work Environment Management – both set out above - do not have any direct penal criminal consequences.*

<sup>229</sup> *No one has ever been imprisoned for this offence (Steinberg 2005a). In 2002 44 people were convicted of offences. WEA offences are prosecuted in either an administrative court or, if it is a state employer, a public court.*

knowledge, powers and resources for his duties. The court must decide whether the tasks of the accused are matched by sufficient powers, resources and knowledge. In order for punishment to be possible, the accused must also have a position of independence in relation to the employer, there must be a need for allocation of tasks within the organisation and the allocation must be clear. If, on the other hand, only one person is prosecuted and the court finds that person not to have had sufficient knowledge for the duties, an acquittal will follow.”<sup>230</sup>

## **Levels of Enforcement**

In 2002, the WEA report that a total of 44 people were convicted and received either a fine or suspended sentence. These people were in one of the following positions: supervisor, assistant director of training, head of loading staff, head of production department, factory manager, removal worker, group leader, head of high school, proprietor of a firm, machine supervisor, site manager, production supervisor, production manager, safety manager, proxy for a limited company, issuer of testimonial and a managing director.<sup>231</sup>

In 2001 the WEA reported 167 incidents to the police.<sup>232</sup> All these prosecutions take place in the public court.

## **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

We have no information about this at present.

## **CANADIAN STATES**

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

“person occupying the position of director by whatever name called ...”<sup>233</sup>

An “officer” is defined as:

“an individual appointed as an officer under section 121, the chairperson of the board of directors, the president, a vice-president, the secretary, the treasurer, the comptroller, the general counsel, the general manager, a managing director, of a corporation, or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any of those offices.”<sup>234</sup>

It should be noted, however, that action can only be taken against a director if the director is present in the relevant state. Directors who are based outside the state cannot be prosecuted. It is

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<sup>230</sup> WEA (2005) P.7

<sup>231</sup> WEA (2005)

<sup>232</sup> WEA report to Senior Labour Inspectors Committee, 2001

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<sup>234</sup> Section 121 states that “Subject to the articles, the by-laws or any unanimous shareholder agreement, (a) the directors may designate the officers of the corporation, appoint as officers persons of full capacity, specify their duties and delegate to them powers to manage the business and affairs of the corporation, except powers to do anything referred to in subsection 115(3); (b) a director may be appointed to any office of the corporation; and (c) two or more offices of the corporation may be held by the same person.”

also notable that convictions for these offences are not deemed to be ‘criminal’ and will not appear on a defendant’s criminal record.

In addition to the duties imposed by occupational law at a state level, the Canadian Criminal Code imposes duties upon directors and others in relation to safety. This duty cannot, if breached, result in prosecutions for occupational health and safety offences (as set out in state law) but only if they are breaches and constitute an offence under the criminal code

## ONTARIO, CANADA<sup>235</sup>

### FRAMEWORK OF OHS DUTIES

In Ontario, the Occupational Health and Safety Act 1990<sup>236</sup>, imposes duties upon a number of different actors including constructors, licensees, employers, owners, project owners, and suppliers. When these actors are incorporated businesses, the duties will be placed upon the legal entity of the company. The Act also imposes duties on ‘supervisors’ and ‘workers’ – who will all be natural persons. In relation to employers – on whom the main duties are imposed - section 25, for example, states in part that:

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

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<sup>235</sup> Research for this section has been assisted by correspondence with Brian Blumenthal, Crown Counsel to the Ministry of Labour in Ontario.

<sup>236</sup> [http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90o01\\_e.htm](http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90o01_e.htm)

- (h) take every precaution reasonable in the circumstances for the protection of a worker; ...
- (i) prepare and review at least annually a written occupational health and safety policy and develop and maintain a program to implement that policy; ....
- (l) provide to the committee or to a health and safety representative the results of a report respecting occupational health and safety that is in the employer's possession and, if that report is in writing, a copy of the portions of the report that concern occupational health and safety; ....”

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

Section 32 of the Act states

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

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

This duty is placed upon each director and officer of a company.

### **Meaning of ‘Reasonable Care’**

In the case of *R v Bata Industries*<sup>237</sup>, three directors were charged with "failing to take all reasonable care to prevent" a discharge contrary to the *Ontario Water Resources Act* and the *Environmental Protection Act* of Ontario. Bata had stored leaking and foaming waste drums outside on the premises of its shoe manufacturing operations at Batawa, Ontario. The liquid was discharged into the ground and impaired the quality of the groundwater.

The Ontario Court of Appeal ruled that to secure a conviction the Crown must first prove that a discharge of contaminant into the natural environment has occurred, and once this is established the defendant director must show that he or she was duly diligent in preventing the corporation from causing or permitting an unlawful discharge.

The court stated that the following questions should be answered and principles should be applied to determine whether an individual director has discharged his or her personal duty:

- Have the directors created a pollution prevention system?
  - Was there supervision of inspection?
  - Was there improvement in business methods?
  - Did a director exhort those he or she controlled or influenced?
- Did the directors ensure that corporate officers have been instructed to:
  - set up a system to meet the terms and practices of the industry for compliance with environmental laws;
  - report to the directors on the systems operation on a periodic basis; and
  - report to the directors any substantial non-compliance in a timely manner.

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<sup>237</sup> reference?

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

While, in this case the convicted *Bata* directors clearly knew of the discharge, the court's judgment states that if a corporation did not have a functioning pollution prevention system, the directors could be still convicted even if they were not aware of the discharge.

## **OFFENCE**

A failure to comply with section 32 of the Act is an offence and can result in a maximum fine of \$25,000 or imprisonment for of a term of not more than 12 months or to both.

## **ENFORCEMENT**

The Act is enforced by the Ministry of Labour. Prosecutions for this offence do take place – but they are not frequent. It is a summary offence and prosecutions must start within a year – which can limit the possibility of prosecution. The enforcement/prosecution policy which set out criteria for prosecution are not publicly available documents. In addition, although it is known that in 2002 there were 459 convictions, and in 2003 there were a total of 618 prosecutions, there are no details available on numbers of directors/officers convicted.<sup>238</sup>

No guidance specifically directed at how company directors can comply with their obligations has been published.

An issue that is important in deciding whether or not to prosecute is “whether the directors in question has any practical influence on operational matters, not just on policy”. However this is considered by the prosecutor to be very case specific question since management boards of companies do function differently.<sup>239</sup>

## **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

No information has been found to explain the introduction of section 32.

## **BRITISH COLUMBIA, CANADA**

<sup>238</sup> <http://www.labour.gov.on.ca/english/hs/stats/index.html>

<sup>239</sup> Blumental (2005)

## FRAMEWORK OF OHS DUTIES

Division 3 of Part 3 of the Worker Compensation Act<sup>240</sup> sets out health and safety obligations upon different parties. Duties are imposed upon owners, suppliers, workers and supervisors, but the principal duties are imposed upon employers. Section 115, for example, states:

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

It is an offence to contravene this section – though it is a defence for the company to show that it “exercised due diligence to prevent the commission of the offence”.<sup>241</sup>

### Duty on Directors and Company Officers

Section 121 states:

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<sup>240</sup> [http://www.qp.gov.bc.ca/statreg/stat/W/96492\\_00.htm](http://www.qp.gov.bc.ca/statreg/stat/W/96492_00.htm)

<sup>241</sup> section 215

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

This section would not only apply to companies that are employers - but also incorporated businesses that are 'owners' and suppliers.<sup>242</sup>

## OFFENCES

It is an offence for a director to be in contravention of this duty.<sup>243</sup> An individual will be acquitted if he can prove that he "exercised due diligence to prevent the commission of the offence." There appears to be no case law in British Columbia setting out what 'due diligence' means. However, guidance produced by the enforcement body, the Workers Compensation Board states that for an accused to be acquitted, he or she must establish that "on a balance of probabilities all reasonable precautions were taken to comply in the circumstances".<sup>244</sup>

A fine of up to \$500,000 can be imposed - though in the case of a continuing offence, a further fine of not more than \$28,400 for each day during which the offence continues after the first day.<sup>245</sup> In addition - or as an alternative - a term of imprisonment not exceeding six months can be imposed.<sup>246</sup>

It is also possible to prosecute a director through another route. A corporation commits an offence, "an officer, director or agent of the corporation who authorizes, permits or acquiesces in the commission of the offence also commits an offence."<sup>247</sup>

## ENFORCEMENT

This Act is enforced by the Workers Compensation Board. It can impose administrative penalties - rather than prosecute - but these can only be imposed upon 'employers'.<sup>248</sup> These penalties can be imposed when the employer has either failed to take sufficient precautions for the prevention of work-related injuries or illnesses, the employer has not complied with the general duties imposed upon it, or the employer's workplace or working conditions are unsafe.<sup>249</sup>

The policy manual states:

"The Board will not automatically issue an order to officers, directors or agents of a corporation each time an order is written to the corporation. The Board will, however, issue orders to officers, directors or agents where there is evidence that they were responsible for the failure by the corporation. Being "responsible" includes authorizing, permitting or acquiescing in the failure."<sup>250</sup>

There are no publicly available statistics on the numbers of prosecutions under this section. Prosecutions do happen, but they are unusual. One of the reasons for this is that the offence is

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<sup>242</sup> duties are set out in sections 199 and 120,

<sup>243</sup> Section 215

<sup>244</sup> *Effective Health and Safety Programmes. They key to a safe workplace and due diligence*

<sup>245</sup> Section 217

<sup>246</sup> subsequent conviction can result in higher penalties and increased term of imprisonment.

<sup>247</sup> Section 213(2)

<sup>248</sup> section 196

<sup>249</sup> *There is a defence of due diligence.*

<sup>250</sup> *Prevention Manual. D3-121-1, p.61*

summary and must be prosecuted within a six month time period that is not sufficient for many prosecutions to take place under this section.

## **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

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

## **NW TERRITORIES, CANADA**

### **FRAMEWORK OF OHS DUTIES**

The Consolidation of Mine Health and Safety Act 1994 imposes its principal duties upon mine 'owners' (and also upon 'managers', supervisors and workers). When the business is incorporated, the owner of the mine will be the company.

Section 2 for example states:

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

### **Duty on Director/Company Officer**

Section 3 of the Act states:

- “Every director and officer of a corporation that is the owner of a mine shall ensure, to the extent practicable, that the corporation complies with:
- (a) this Act and the regulations; and
  - (b) orders of inspectors and the orders and directives of the chief inspector.”<sup>251</sup>

In addition, the Act specifically requires that where the owner of a mine is a corporation,

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<sup>251</sup> In addition the 'manager' of the mine is under a duty to take "every reasonable measure and precaution to protect the health and safety of employees and other persons at a mine".

”the owner shall designate a senior officer of the corporation “to serve as a liaison between the corporation, the board, and the regulator.

## **.OFFENCE**

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

In addition where a corporation has committed an offence<sup>252</sup>, any ”officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence“ is liable to the same penalty as above.

## **ENFORCEMENT**

The Act is enforced by the Workers Compensation Board – which is responsible for inspection and for investigating deaths and injuries. The WCB initiate prosecutions but the federal prosecution service undertakes the prosecution on behalf of the WCB. It appears that this offence may never have been used against directors.<sup>253</sup>

## **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

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

## **ALBERTA, CANADA**

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

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

Every employer shall ensure, as far as it is reasonably practicable for the employer to do so,

- (a) the health and safety of
  - (i) workers engaged in the work of that employer, and
  - (ii) those workers not engaged in the work of that employer but present at the work site at which that work is being carried out, and
- (b) that the workers engaged in the work of that employer are aware of their responsibilities and duties under this Act, the regulations and the adopted code.

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

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<sup>252</sup> Section 41 states that: “A company commits an offence when there is ”sufficient proof of the offence to establish that it was committed by an employee or agent of the defendant, whether or not the employee or agent is identified or prosecuted for the offence”.

<sup>253</sup> Grundy (2005)

- “(i) a person who is self-employed in an occupation,
- (ii) a person who employs one or more workers,
- (iii) a person designated by an employer as the employer’s representative, or
- (iv) a director or officer of a corporation who oversees the occupational health and safety of the workers employed by the corporation;”<sup>254</sup>

However in the context of incorporated businesses, it appear that the legal entity of the company is also the employer and the duties imposed upon the director or officer of the “who oversee” workplace safety are additional to those imposed upon the company.

It is important to note that the duty is not upon all boardroom directors – only those “directly linked to the setting OHS policy for the company and directing how it runs”.<sup>255</sup>

It appears that a company director would only be caught be this section if they have been assigned health and safety responsibilities by the company itself or have taken on these responsibilities. There is nothing in legislation requiring companies to appoint a director with responsibility for safety.

### **OFFENCE**

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

### **ENFORCEMENT**

Alberta Human Resources and Employment is the body responsible for enforcement of this legislation. Senior company officers have been prosecuted as employer under this section – but it has only been used against small companies. No director has ever received a jail sentence.

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

## **CANADIAN FEDERAL LAW**

### **FRAMEWORK OF OHS DUTIES**

#### **Canada Labour Code**

Canada is a Federal state and each of the ten provincial and three territorial jurisdictions have there own safety legislation. The Canada Labour Code only covers employees of the federal government and Crown agencies and employees of companies or sectors that operate across provincial or international borders.

The Canadian Labour code imposes duties upon employers – which in most cases will be public bodies rather than private companies. The Labour codes does not impose any duties on directors or senior mangers.

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<sup>254</sup> *Section 1(k)*

<sup>255</sup> *Lau (2005)*

## Canada Criminal Code

The Canadian criminal code applies across all of Canada applying at a federal and state level<sup>256</sup>. A recent bill - C-45 (which amends the criminal code) creates the following duty:

“Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.”<sup>257</sup>

A breach of this duty is not in itself a criminal offence – it is a duty that applies only in the context of certain criminal offences in the criminal code: Section 219 of the Code creates an offence of Criminal Negligence

- (1) Every one is criminally negligent who
  - (a) in doing anything, or
  - (b) in omitting to do anything that it is his duty to do,shows wanton or reckless disregard for the lives or safety of other persons.
- (2) For the purposes of this section, "duty" means a duty imposed by law.

Section 220 creates an offence of ‘causing death by criminal negligence’

“Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable

- (a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
- (b) in any other case, to imprisonment for life.

Section 221 creates an offence of Causing bodily harm by criminal negligence

“Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Therefore whenever a death or bodily harm occurs within Canada, or there is evidence of “wanton or reckless disregard of the lives and safety” the duty set out above is potentially engaged<sup>258</sup>. The Government has said the following about this section:

“The Criminal Code imposes various legal duties including the duty to provide the necessities of life for one's child (s. 215) and to use reasonable care and skill when doing any act that may endanger the life of another (s. 216). Moreover, if a person undertakes to do an act, that person is under a duty to perform the act if failing to do so would endanger life (s. 217). Wanton or reckless disregard of a duty which leads to death or injury is grounds for a charge of criminal negligence causing death (s. 220) or criminal negligence causing bodily harm (s. 221). However, the Code makes no explicit provision regarding a duty of a person directing work to ensure safety for the workers carrying out the work or to take reasonable steps to ensure the safety of the public.

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<sup>256</sup>

<sup>257</sup> Article 217.1 of the amended criminal code

<sup>258</sup> What is meant by ‘negligence’ has not been decided conclusively by the Canadian courts – and whether or not it is necessary to have evidence of awareness on the part of the defendant.

In the Government's view, everyone who employs others to perform work or has the power to direct how work should be done should be under a duty to take reasonable steps to ensure safety of the workers and the public. The Government proposes to enshrine that duty in a new section 217.1 of the Code. What is "reasonable" will vary with the nature of the work and the experience of the workers. The courts are well-equipped to consider the evidence and decide on the proven facts whether a person has shown reckless disregard of the duty that led to death or injury.”

### ***Application to directors and senior managers***

This duty is imposed upon any person who “undertakes, or has the authority, to direct how another person does work or performs a task.” Although there is no caselaw on the meaning of these words, it is assumed by regulators and lawyer that, along with others, it will apply to company directors. However whether it applies to all board directors or whether it only applies to those with day to day management responsibilities is unclear<sup>259</sup>. One commentator on the bill states:

“The application of this duty to every one who has the authority to direct how another persons does work or performs a task extends it beyond the individual who directed the work or a task. The phrase, “or has the authority”, is problematic because it does not provide a particular title or level of responsibility within the organisation.”<sup>260</sup>

He goes onto say

“What is clear from the phrase “or has the authority”, in section 217.1 , is that a court would have to specifically and carefully review who has the authority to direct how another person does work or performs tasks in order to establish the application of the new legal duty. Therefore, although this phrase gives some uncertainty as to how high in the organizational hierarchy a person may be who has the authority to direct how another person does work or performs tasks, it nevertheless gives trial courts a degree of flexibility to look at the specific organizational structure, and reporting authority, of each organization that is brought before the courts.”<sup>261</sup>

The duty appears to extend from the most senior organisational decision makers all the way to foreman, lead hands and potentially even co-workers.

### ***Extent of duty***

The duty is to take “reasonable steps” to prevent bodily harm to the person to whom direction is given as to how to do the work or perform the task.

“the term “reasonable steps” is not defined. .... [R]easonable steps, at a minimum, would refer to compliance with applicable OHS statutes and regulations. Reasonable steps may also to refer to industry standards, codes of practice and in some cases best practices.”<sup>262</sup>

## **ENFORCEMENT**

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<sup>259</sup> *Inteview with Yan Lau, Alberta Human Resources and Employment*

<sup>260</sup> *Keith N, (2004) Workplace Health and Safety Crimes, LexisNexis Butterworths, p.69*

<sup>261</sup> *Keith N, op cit*

<sup>262</sup> *Keith N, op cit*

The criminal code is enforced by courts at a state level. It is necessary for safety inspectors working for the different regulatory bodies in the different states to inform the police who will then investigate the offence.

The Bill only comes into effect on 31 March 2004 – and as yet no director or senior manager is known to have been prosecuted for breach of this duty.

## STATE OF QUEENSLAND, AUSTRALIA

### LEGAL FRAMEWORK OF OHS DUTIES

The Workplace Health and Safety Act 1995 imposes duties on a number of 'actors', including employers, persons in control of workplaces, principal contractors, designers, manufacturers and suppliers of plant, erectors and installers of certain plant, manufacturers and suppliers of substances, designers of buildings or other structures to be used as workplaces, persons in control of relevant workplace areas, persons in control of fixtures, fittings or plant included in relevant workplace areas, and owners of specified high risk plant.<sup>263</sup> In relation to employers, for example, the Act imposes the following duty:

- “(1) An employer has an obligation to ensure that none of the employer’s workers are exposed to risks to their health and safety arising out of the conduct of the employer’s business or undertaking.
- (2) An employer has an obligation to ensure the employee is not exposed to risks to their health and safety arising out of the conduct of the employer’s business or undertaking.
- (3) An employer has an obligation to ensure other persons are not exposed to risks to their health and safety arising out of the conduct of the employer’s business or undertaking”.<sup>264</sup>

When these businesses are incorporated, all the above duty holders will be companies. A failure to discharge the obligation by the company under the act is an offence.<sup>265</sup>

#### Duty of ‘executive officers’

The Act goes onto state:

“The executive officers of a corporation must ensure that the corporation complies with this Act”.<sup>266</sup>

An executive officer is defined as:

“a person who is concerned with, or takes part in, the corporation’s management, whether or not the person is a director or the person’s position is given the name of executive officer”.<sup>267</sup>

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<sup>263</sup> Section 23

<sup>264</sup> Section 28

<sup>265</sup> Section 24(1)

<sup>266</sup> Section 167

<sup>267</sup> Schedule 3

## OFFENCES

### Workplace Health and Safety Act 1995

The Act states:

“If a corporation commits an offence against a provision of this Act, each of the corporation’s executive officers also commits an offence, namely, the offence of failing to ensure that the corporation complies with the provision.”<sup>268</sup>

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

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

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

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

Conviction can result in the following sentences:

- if the breach causes multiple deaths - 2,000 penalty units or 3 years imprisonment;
- if the breach causes death or grievous bodily harm - 1,000 penalty units or 2 years imprisonment;
- if the breach causes bodily harm - 750 penalty units or 1 year’s imprisonment;
- if the breach involves exposure to a substance likely to cause death or grievous bodily harm - 750 penalty units or 1 year’s imprisonment; or
- otherwise - 500 penalty units or 6 months imprisonment.<sup>269</sup>

### Penal offences

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

“A person who unlawfully<sup>270</sup> kills another under such circumstances as not to constitute murder is guilty of manslaughter”.<sup>271</sup>

The offence of grievous bodily harm is defined as

“Any person who unlawfully does grievous bodily harm to another is guilty of a crime, and is

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<sup>268</sup> 167(2).

<sup>269</sup> Section 24

<sup>270</sup> The test of unlawfulness is one of 'gross negligence' (Ranieri (2005)).

<sup>271</sup> Section 303

liable to imprisonment for 14 years”.

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

- “(1) Any person who unlawfully does any act, or omits to do any act which it is the person’s duty to do, by which act or omission bodily harm is actually caused to any person, is guilty of a misdemeanour, and is liable to imprisonment for 2 years.  
(2) The offender may be arrested without warrant”.<sup>272</sup>

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

*Duty of persons in charge of dangerous things*

“It is the duty of every person who has in the person’s charge or under the person’s control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty”.<sup>273</sup>

*Duty to do certain acts*

“When a person undertakes to do any act the omission to do which is or may be dangerous to human life or health, it is the person’s duty to do that act: and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty”.<sup>274</sup>

## **ENFORCEMENT**

The duty, along with the offence provision and defence, therefore imposes an enforceable duty upon every executive officer of a company, in relation to those activities of the corporation that he or she is in a position to influence, to exercise reasonable diligence to ensure that the company complies with the Act.

In theory, every executive officer could be prosecuted along with the company, and if the company is convicted, it would be for each executive officer to establish either that he or she was not in a position to influence the company’s conduct, or if he or she was, that he or she exercised reasonable diligence. In practice, however, work-cover only prosecutes those officers “actively involved in the day to day business activities of the company, and in particular that activity or those activities resulting in the breach.”<sup>275</sup>

Prosecutions do take place, but we are awaiting details of the numbers of convictions.

## **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

The apparent reason for the introduction for the section was that “corporations often turn out to be ‘straw men’“. It was felt that such a provision was necessary in order to ensure an effective

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<sup>272</sup> Section 328

<sup>273</sup> Section 289

<sup>274</sup> Section 290

<sup>275</sup> Ranieri (2005)

penalty was exacted on the most appropriate 'person' responsible for a breach.<sup>276</sup>

It should be noted that the duty placed upon executive officers is common in other legislation.<sup>277</sup> An identical provision is contained in the Electrical Safety Act 2002<sup>278</sup>; the Dangerous Goods Safety Management Act 2001<sup>279</sup>; Coal Mining Safety and Health Act 1999<sup>280</sup>; and the Mining and Quarrying Safety and Health Act 1999.<sup>281</sup>

## **JAPAN<sup>282</sup>**

### **FORMS OF COMPANY AND COMPANY MANAGEMENT**

There are two main kinds of companies in Japan; the limited liability corporation<sup>283</sup> and the general corporation<sup>284</sup> - the latter can sell shares on the open market. They must have at least three directors who are responsible for the management of the company.

### **FRAMEWORK OF OHS DUTIES**

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

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

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<sup>276</sup> Ranieri (2005)

<sup>277</sup> The introduction of such a section is now 'virtually de rigeur since 1995', Ranieri (2005)

<sup>278</sup> Section 199. This is the first and only 'stand alone' piece of electrical safety legislation Australia and is administered by the Electrical Safety Office in the Department of Industrial Relations.

<sup>279</sup> Section 173, Administered by the Department of Emergency Services.

<sup>280</sup> Section 262

<sup>281</sup> Section 241; enforced by Department of Natural Resources and Mines.

<sup>282</sup> Fuller details about Japan will be contained in the final report

<sup>283</sup> Yugen Gaisha. This is established by the Yugen Gaisha law.

<sup>284</sup> Kabushiki Kaisha. This is established by the Commercial Code

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

### **Duty on General Manager**

In addition to these duties, Article 10 of the Act requires employers involved in businesses of certain sizes to appoint a General Safety and Health Manager<sup>285</sup> (GSHM) for each workplace. A GSHM must be appointed for the following workplaces:

- those employing 100 or more workers in the following industries: forestry, mining, construction, transportation and cleaning industries
- those employing 300 or more workers in the industries that include Manufacturing, electricity gas, heat supply, waterworks, communications, wholesaling and retailing
- all those with 1000 or more workers<sup>286</sup>

This person appointed should be the “person who exercises overall management over the execution of the undertaking at the workplace concerned”. In a small company this could be the company director, but alternatively will be the senior most manager of the relevant workplace - “the person in charge of the factory”<sup>287</sup>, the plant manager or branch manager, depending on the workplace.

The GSHM has the responsibility of directing the work of “safety officers, health officers or persons in charge of management of technical matters”<sup>288</sup>, and also have “overall management of the following matters

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

The GSHM shall be the chair of the company’s Safety Committee<sup>289</sup> and a Health Committee<sup>290</sup> and in effect is responsible for ensuring that the duties imposed upon the employer are complied with.

### **THE OFFENCE**

If the GSHM “violates” the duties set out in article 10 he or she can be prosecuted with a fine not exceeding 300,000 yen<sup>291</sup>. It is not necessary to show negligence.

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<sup>285</sup> *Soukatsu-anzen-eisei-kanrisha*

<sup>286</sup> *As set out in the 2 & 3 of the Enforcement Order of the Industrial Safety and Health Law. See*

<sup>287</sup> *Goto (2005)*

<sup>288</sup> *The Act requires the appointment, depending on the circumstances, of a number of other individuals to positions; a safety officers, a health officer, a Safety and Health promoter, an industrial physician, an Operations Chief (where there is a particular dangerous hazard) an Overall Safety and Health Controller (where there is a contractor on site), a Master Safety and Health Supervisor, a Site Safety and Health Supervisor, and a Safety and Health controller.(see section 11-16)*

<sup>289</sup> *Article 17*

<sup>290</sup> *Article 18*

<sup>291</sup> *22,000 Euro*

The penal code also contains the offences of manslaughter and grievous Bodily Harm

## **ENFORCEMENT**

The Labour Standards Inspection Agency is responsible for the enforcement of the Occupational Safety and Health law. Prosecution of GSHMs are not common, and the “emphasis in Japan on preventative inspection and fixing the problem” Prosecutions of GSHMs are more likely to take place if he or she has failed to rectify the situation or after a death has taken place. However, it is more likely in Japan for the deceased’s immediate supervisor to be prosecuted than the GHSM.

## **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

The regulator spoken to said that he thought it was a good thing to have a person high up in the company with specific responsibilities.<sup>292</sup>

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<sup>292</sup> Goto (2005)

## Chapter Three

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

Some jurisdictions do not impose duties on directors on the face of the legislation – but do it indirectly through the creation of the offences. By defining particular conduct as criminal, the offences indirectly impose a duty upon the director – as section 37 of the Health and Safety at Work Act 1974 does in the United Kingdom – either not to conduct themselves in a particular way, or to do something positive in order to prevent the commission of the offence.

The jurisdictions that do this are:

- state of Victoria, Australia
- state of Tasmania, Australia

The offences of both these states create duties on directors that are much wider than those imposed by section 37 of the HSAWA 1974 in Britain – and as a result are placed in a separate category

#### STATE OF VICTORIA

##### LEGAL FRAMEWORK OF OHS DUTIES

The Occupational and Safety and Health Act 2004 imposes duties on a number of actors - including employers, those who manage or control workplaces, designers of plant, buildings or structures, and manufacturers/suppliers.<sup>293</sup> An employer, for example,

”must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.”<sup>294</sup>

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

##### THE OFFENCE

Section 144 of the Act states that, if a company commits an offence and the contravention is ”attributable to an officer of the body corporate *failing to take reasonable care*, the officer is guilty of an offence”.<sup>295</sup> The officer will be liable to a fine not exceeding the maximum that a natural person would receive for the breach committed by the corporation.

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

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<sup>293</sup> Sections 21-31

<sup>294</sup> Section 21

<sup>295</sup> Unlike the situation in Tasmania, the offence applies to officers, not just directors, and does not impose any reverse burden of proof.

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

### **Who is an officer**

The definition of an officer is set out in the Corporation Act and includes a director or secretary of a corporation.<sup>296</sup> A note in the Occupational and Safety and Health Act 2004 itself states that an officer of a body corporate:

“includes a person who makes or participates in the making of decisions that affect the whole or a substantial part of the body corporate's business and a person who has the capacity to affect significantly the body corporate's financial standing”.<sup>297</sup>

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

“This means that only persons who have the capacity to make decisions — or to participate in making decisions — that have a real or direct influence on an organisation’s policy and planning or financial standing will be considered ‘officers’. A person who only has responsibility for implementing those decisions is not an officer. Under this definition, ‘officer’ includes all:

- directors of a corporation;
  - members of boards of management of public authorities;
  - partners in a partnership; and
  - office holders of unincorporated bodies and associations.
- Chief Executive Officers are also officers.

The following classes of people are also considered officers for the purposes of the Act:

- those who operate divisions of a corporation who, with the CEO, are part of the executive management committee that makes decisions that directly influence the organisation’s policy and planning or financial standing;
- those who operate a division of a corporation that represents a substantial part of the corporation and who have the authority to make decisions about policy and planning or financial standing of that;
- those who significantly affect the corporation’s financial or business standing but are not directly appointed (e.g. members of a holding corporation who help shape the operation of a subsidiary); and
- shadow directors or de facto directors (in some circumstances, a person may be a “shadow director” who effectively acts as an officer, even though they are not a

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<sup>296</sup> Section 9

<sup>297</sup> Section 144(4), note 1

named office holder. A corporation cannot be appointed a director but may come within the scope of the provision as a shadow director).”

The guidance then goes on to explain who is not an ‘officer’:

“Only persons who can affect a substantial part of a business or significantly affect its financial standing will be considered to be ‘officers’. This means that only persons at the most senior levels of organisations that are genuinely in a position to prevent breaches of Victoria’s OHS laws will be liable for prosecution as an ‘officer’.

The following classes of people are not considered ‘officers’ for the purposes of the Act:

- those who manage branch offices but do not make, or participate in making, decisions that directly influence the organisation’s policy and planning or financial standing (i.e. persons who only implement the decisions of others are not ‘officers’);
- school principals, in either their role as managers of schools or as the executive officers of school councils;
- middle level managers who report to, and implement decisions of, officers (e.g. area managers of retailers);
- forepersons or managers in small businesses who implement decisions made by directors of the organisation.”

## ENFORCEMENT

The indirect effect of this offence appears to be to impose a duty upon ‘officers’ to “take reasonable care” in preventing a company from committing an offence. However the extent of this duty depends upon the circumstances in which prosecution will take place.<sup>298</sup> These are set out in Worksafe guidance.<sup>299</sup> One of the factors that will be taken into account is:

“Did the measures which might reasonably have been taken to avoid the incident fall properly and reasonably within the duties, responsibilities, and scope of the officer’s functions, for example:

- making arrangements for facilitating ongoing training and supervision; and
- creating, monitoring, and maintaining systems for identifying, assessing, and controlling hazards and risks to health and safety?”

This factor seems to make it clear that the duty is not in fact imposed upon all ‘officers’ – but only upon those officers with responsibilities that make it appropriate to hold them responsible. Other factors that the regulator will take into account are:

- Did the officer fail to take obvious steps to prevent the incident?
- What was the degree of culpability involved in the officer’s behaviour?
- Has the officer had previous advice or warnings regarding matters leading to the incident, or should the officer have reasonably known about the advice or warnings?

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<sup>298</sup> See introduction

<sup>299</sup> ‘Liability of organisations, officers, employees, and other duty-holders.’  
[http://www.workcover.vic.gov.au/vwa/home.nsf/pages/prosecutions\\_enforce.](http://www.workcover.vic.gov.au/vwa/home.nsf/pages/prosecutions_enforce)

- Did the officer knowingly compromise safety for personal gain, or for commercial gain of the organisation, without undue pressure from the organisation to do so?
- Was the contravention attributable to another person, and if so, to what extent?
- What could reasonably be expected of the officer, bearing in mind all the relevant circumstances including:
  - the officer's role and knowledge; and
  - the nature and context of the relevant activity being conducted by the organisation?"

Other guidance produced by Worksafe<sup>300</sup> sets out what is required of company officers:

"Officers must use the level of sound judgment, prudent decision-making and taking of action that any reasonable person would use to prevent and reduce hazards and risks to health and safety.

Officers should know what their own and their organisation's OHS obligations are and how they are managed, including:

- appointing a member of the executive with overall responsibility for health and safety;
- defining, documenting and communicating to all levels in the organisation their specific health and safety responsibilities, authority to act and reporting requirements;
- holding managers accountable for their health and safety responsibilities;
- allocating financial and physical resources so that their organisation's health and safety actions comply with the Act;
- employing or engaging sufficient numbers of qualified and competent people to advise on and to implement OHS requirements;
- ensuring that there are procedures in place for the systematic identification of workplace hazards, evaluation of their risk and implementation of controls to manage the risk;
- providing induction programs and training on OHS for all employees including management;
- ensuring there is a system in place for the reporting of hazards and incidents and for a prompt response to investigate and rectify them; and
- understanding their organisation's OHS performance and monitoring it over time."

The guidance gives an example of a situation where a director/senior officer could be held responsible:

"An employee identifies a rusty steam pipe in a production area and lodges a hazard report which is forwarded to senior management of the company. No action is taken to have the pipe repaired or replaced even though funds have been requested for the work by line managers. If the pipe bursts and an employee is injured, a senior manager from that organisation may be held responsible for failing to take reasonable care to prevent this incident."

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<sup>300</sup> 'Information for senior officers of organisations', available at <http://www.workcover.vic.gov.au/vwa/home.nsf/pages/ohsact>.

## PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE

We have no information on this at present.

## STATE OF TASMANIA<sup>301</sup>

### LEGAL FRAMEWORK OF OHS DUTIES

The Workplace Health and Safety Act 1995 imposes duties on a number of parties, including designers, manufacturers, importers, suppliers and installers. The principal duties are those imposed upon employers, which include for example:

- “(1) An employer must, in respect of each employee employed by the employer, ensure so far as is reasonably practicable that the employee is, while at work, safe from injury and risks to health and, in particular, must
- (a) provide and maintain so far as is reasonably practicable
    - (i) a safe working environment; and
    - (ii) safe systems of work; and
    - (iii) plant and substances in a safe condition; and
  - (b) provide facilities of a prescribed kind for the welfare of employees at any workplace that is under the control or management of the employer; and
  - (c) provide any information, instruction, training and supervision reasonably necessary to ensure that each employee is safe from injury and risks to health”.<sup>302</sup>

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

### OFFENCE

However, the Act contains the provision that if the:

”body corporate contravenes or fails to comply with any provision of this Act, each director of the body corporate is taken to have contravened or failed to comply with the same provision ...”.<sup>303</sup>

However, the director will not be considered to have committed the offence if:

- ”(a) the body corporate contravened or failed to comply with that provision without the director's knowledge and that the director was not reasonably able to have acquired that knowledge; or
- (c) the director used all due diligence to prevent the contravention or failure to comply by the body corporate.”

In effect, this imposes a duty upon directors to either take reasonable steps to determine whether

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<sup>301</sup> An interview with the following person has assisted with research of this section. Graeme Williams. Manager of Advocacy and Prosecutions, Worksafe, Tasmania.

<sup>302</sup> Section 9

<sup>303</sup> Section 53

the company is complying with its obligations and to stop any violation taking place, or to use all due diligence in preventing the company committing the offence. This duty is much wider than the section 37 duty in the Health and Safety at Work Act in Britain, which does not impose any obligation upon a director to take steps to find out if the company is committing an offence. Moreover, the offence created here assumes that a director is responsible for the offence, unless he or she can prove otherwise.

No director has ever appealed a conviction, so there is no case law that may assist further with understanding the offence.<sup>304</sup>

## **ENFORCEMENT**

This provision has been used - but since 1996, three directors and one managing director are reported to have been convicted under this provision.<sup>305</sup> In practice this provision is not used frequently as it might be, according to the regulator. Most companies in Tasmania are small and it is considered appropriate in such a situation to simply prosecute the company. There are no guidelines for prosecutors on when to prosecute directors or not so it is difficult to assess what the extent of the duty is in practice.<sup>306</sup>

## **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

In a recent study on criminal liability of corporations the Tasmania Law Reform Institute stated that:

”Of course it is important for senior officers, like all other people, to be able to be held criminally liable for their actions or negligence. Where a particular senior officer is responsible for a death or injury it may be appropriate that they be personally charged with manslaughter or grievous bodily harm. In other instances they may simply have contributed towards their employer committing the crime. The potential to find senior officers criminally liable in such cases may motivate senior officers to work towards compliance by their organisation.”<sup>307</sup>

## **NEW SOUTH WALES**

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

The Occupational Health and Safety Act 2001 imposes duties on a number of actors, including employers, designers, manufacturers, suppliers and controllers of work premises, plant or substances. When these businesses are incorporated, the duty holder will be the legal entity of the company.

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<sup>304</sup> Section 53. It is not necessary to actually prosecute a company. A similar provision exists in section 93 of the Industrial Relations Act 1984. This states that: “Where an offence against this Act is committed by a body corporate, every person concerned in the management of that body corporate shall be deemed also to have committed the offence and may be convicted of the offence, unless he proves that the act or omission constituting the offence took place without his knowledge.”

<sup>305</sup> 43 Companies have been convicted in the same period.

<sup>306</sup> Graeme. Compare this to State of Victoria, which has detailed guidance.

<sup>307</sup> para 5.2.20

## OFFENCE

It is an offence on the part of the company to contravene these duties. The Act also, however, states that ‘each director of the corporation and each person concerned in the management of the corporation’ is taken to have committed the corporate offence unless he can show that

- (a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or
- (b) he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.

A company director can be prosecuted even when a company is not being prosecuted as long as the prosecution can establish the original offence.

### Meaning of ‘concerned in the corporation’s management’:

A case, which is on appeal, has recently considered the meaning of similar words. The judge held the following:

“What would appear to be a common and understandable factor in all the authorities to which I was taken was the person's decision-making powers and/or authority going directly to the management of the corporation. That decision-making role or authority on behalf of the corporation may involve advice given to management encompassing a participation in its decision-making processes and the execution of those decisions going beyond the mere carrying out of directions as an employee. That decision-making role or authority and the responsibilities inherent in them must be such as to affect the corporation as a whole or a substantial part of the corporation. In saying that, it does not mean that the person must be at the highest levels of management. The structure and size of the corporation is relevant as is the role of the person within the corporation relevant to his/her decision-making powers on behalf of the corporation. Critically, in relation to s. 50(1), the person's decision-making powers must be such as to directly influence the corporation in relation to the act or omission that constituted the offence of the corporation. That much, I believe, is self evident given the nature of the defences available in s. 50(1)(a) and (b). In other words, the determination of a person concerned in the management of the corporation in s. 50(1) must be a person who was in a position to influence, by advice or decision making, the conduct of the corporation in relation to its contravention or whose decision making powers within the corporation comprehends activities the consequences of which have a significant bearing on the conduct of the corporation relevant to its contravention.”<sup>308</sup>

### Extent of Duty

This offence imposes a duty on every company director (as well as others involved in the management of the company) to use all due diligence to prevent the company committing an offence unless he was not in a position to influence the conduct of the company. What does 'due diligence' mean? This was discussed in a the case of *Stephen Finlay Martin v Newcastle Wallsend Company Pty Ltd and Others*<sup>309</sup>, which stated:

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<sup>308</sup> para 885, *Stephen Finlay Martin v Newcastle Wallsend Company Pty Ltd and Othes*

<sup>309</sup> 2004 NSWIR Comm 202 (9 August 2004)

- “166 There is no definitive interpretation or construction of the phrase “all due diligence” in the section. ... Our instructing solicitors have drawn attention to the decision in *Universal Telecasters (Qld) Limited v Guthrie* that speaks in terms of “due diligence” as requiring “a proper system to provide against the contravention of the Act” and emphasising “adequate supervision to ensure the system was properly carried out”.
- 167 The decision in *State Pollution Control Commission v Kelly* refers to “due diligence” as contemplating “a mind concentrated on the likely risks. The requirements are not satisfied by precautions merely as a general matter in the business of the corporation, unless designed to prevent the contravention.
- 168 It is apparent that the scope of “due diligence” depends upon the circumstances of each case. It requires a defendant to prove that an adequate system was designed, implemented and supervised: *WorkCover Authority of NSW (Insp. Dowling) v Costa*.
- 169 The concept of “due diligence” is accordingly qualified by the circumstances of a particular matter. It does not, we believe, assist greatly in establishing discernible standards that are readily identifiable and that encourages and obliges managers and directors to attain”.

## ENFORCEMENT

There are no clear criteria concerning when directors or managers will be prosecuted in practice. The prosecution guidance simply says:

“WorkCover’s policy is to actively pursue both corporations and those concerned in the management of those corporations for breaches of the OHS and workers compensation legislation.”<sup>310</sup>

The guidance sets out general considerations that will be taken into account, “in choosing the appropriate defendant in a particular case”. These are:

- a) who is primarily responsible for the alleged offence, that is, who was primarily responsible for the acts or omissions giving rise to the alleged offence or the material circumstances leading to the alleged offence or who formed any relevant intention;
- b) in relation to (a) above, what was the culpability of the proposed defendant;
- c) the effectiveness of any court order that might be made against the proposed defendant.<sup>311</sup>

## PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE

The regulator told us that the reform was:

“Essentially to ensure that directors and managers who run corporations will not be shielded from responsibility by the corporate legal structure.”<sup>312</sup>

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<sup>310</sup> 5.19, *Compliance Policy and Prosecution Guidelines*

<sup>311</sup> para 5.18

<sup>312</sup>

A review of the 2000 Act is taking place and the discussion paper states that “there is growing interest in the liability of directors and managers in relation to actions by corporations and other entities.”

It quotes advice provided by an expert panel that had advised the government on a new offence involving workplace deaths<sup>313</sup> that provides advice in relation to workplace deaths, that suggested the following three principles that should inform any new approach to the liability of directors and managers.

- “1. The conviction of directors and managers without fault is unacceptable.
2. Corporate personnel have and should be accountable for individual responsibilities where personal fault exists.
3. Principles of individual responsibility however, must also allow for:
  - excuse where relevant events occur without an individual’s actual or constructive knowledge of material facts;
  - excuse where relevant events are beyond that individual’s control”.<sup>314</sup>

The discussion document goes onto say:

“The principles need to be flexible enough to address different and sometimes complex circumstances and yet balanced by the need of managers to know what their responsibilities are.

The Panel also recommended the development of a code of practice that identifies the following individual responsibilities of management personnel:

1. the obligations and requirements for an adequate safety management system;
2. the development of a relevant risk assessment plan; and
3. the methodology and strategies required and that should be followed for implementing, overseeing and enforcing compliance with relevant safety management systems.

It was unclear from the consultation following the Panel’s report whether stakeholders supported any such Code operating:

- a) in the same way as other Codes of Practice – as a guidance document whereby evidence of failure to comply with the Code can be used as evidence in a prosecution;
- b) as a defence additional to those in section 26; or
- c) as a threshold to satisfy before being able to rely on the defences provided in section 26.

A working group of employer and union representatives was formed and met to consider the development of a code of practice. However, the working group resolved not to progress the code until the review of the OHS Act 2000 is finalised, as any changes to the OHS Act 2000 may affect the code”.

## Chapter Five

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<sup>313</sup> In 2003 the NSW Government commissioned a panel of eminent legal experts to advise on enhancements to the legislation as they relate to workplace fatalities. Following an extensive public consultation process, the Occupational Health and Safety Amendment (Workplace Deaths) Act 2005 introduced a new offence and increased penalties for reckless conduct causing death in a workplace.

<sup>314</sup> Panel Report, June 2004, p. 57

## NO DUTIES ON DIRECTORS OR SENIOR MANAGERS

The following countries do not impose any health and safety duties upon company directors:

- The Netherlands
- USA<sup>315</sup>

## THE NETHERLANDS<sup>316</sup>

### FORMS OF COMPANY AND CORPORATE ORGANISATION

There are two main kinds of companies in the Netherlands: the private limited company<sup>317</sup> and the public limited company<sup>318</sup> - both of which are managed by a board of directors<sup>319</sup>. In addition, many companies will also have a supervisory board, comprising 'controlling officers' who are responsible for supervising the policy of the board.<sup>320</sup>

### ORGANISATION OF OHS DUTIES

The Working Conditions Act 1998 and the Work Conditions Decree are the main pieces of legislation that set out health and safety obligations in the Netherlands.<sup>321</sup> The principal duties are placed upon an employer – and in relation to a business that is incorporated, the employer will be the legal entity of the company. Article 3, for example, states that

“1. The employer shall conduct a working conditions policy that is as sound as possible and, given the prevailing state of knowledge and professional service shall duly observe the following points:

- a) unless this cannot reasonably be required, the employer shall organise the work in such a way that it does not have any adverse effect on the safety and health of the employee;
- b) unless this cannot reasonably be required, the dangers and risks to the safety or the health of the employer must be prevented or limited in the first instance at their source; to the extent to which such dangers and risks cannot be prevented or limited at source, other appropriate measures shall be taken, whereby measures aimed at collective protection shall be given priority over measures aimed at individual protection; only in cases where the employer cannot reasonably be required to take measures aimed at individual protection, effective and appropriate personal protective equipment shall be made

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<sup>315</sup> This conference paper does not include any material on the USA

<sup>316</sup> Research in this chapter was assisted by interviews with the following people: Nathalie Peeters (Policy Advisor, Enforcement Team, Centre of Expertise, Netherlands Labour Inspectorate) and Ferry van Veghel and Marieke Ten Cate (CMS Derks Star Busmann NV).

<sup>317</sup> Besloten vennootschap (BV)

<sup>318</sup> naamloze vennootschap (NV) In addition, there are cooperative societies (Co-operatieve vereniging).

<sup>319</sup> The Dutch word for director is Directeur – though this should not be confused with the personal title of 'directuer', which is sometimes conferred on managers who are not management board members.

<sup>320</sup> Article 140

<sup>321</sup> There is also the Working Conditions Decree and the Working Conditions Recommendation.

- available to the employee;
- c) the layout of the place of work, the working methods and the work resources used for the work, and the contents of the work, shall be adapted to the personal characteristics of the employees for as far as can reasonably be required;
- d) unvarying, repetitive work carried out within a short period of time and work with a tempo that is controlled in such a way that the employee is prevented from influencing the tempo of the work shall be avoided for as far as reasonably can be required; if work of this nature cannot be avoided or can only be avoided to an insufficient extent, the employer shall regularly alternate this work by other types of work or by breaks;
- e) adequate measures shall be taken to enable the employee, if a situation arises that represents a direct threat to safety or health, to quickly render himself safe or take other appropriate measures to ensure that the harm to health is limited as much as possible.”

Duties are also imposed upon employees. Article 11 states:

“The employee is obliged to take due care in relation to the work and to do his best to ensure his / her own safety and health and that of other persons. In particular, he is obliged to:

- a) use work resources and dangerous substances correctly;
- b) correctly use the personal protection equipment made available to him/her and after its use to store it in the designated place, in so far as it is not stipulated by or pursuant to this Act that employees are not obliged to use personal protection equipment as referred to above;
- c) make no change to or unnecessarily take away safety devices fitted to work resources otherwise installed and to use them correctly;
- d) co-operate with the instruction arranged for him as referred to in article 8;
- e) immediately notify the employer or the person in charge on-site on his/her behalf of any danger to safety or health that comes to his notice;
- f) if necessary, to assist the employer and the employees, and other persons and services referred to in Article 14, in the fulfillment of their obligations and tasks pursuant to this Act.”

Although it is technically possible that duties imposed upon employees could apply to directors employed by the company, the Dutch Labour Inspectorate does not apply the duty on employees in that way. As a result, no safety legislation in the Netherlands imposes direct duties upon any person who could either be a director of the company or a senior manager.

## **OFFENCES**

There are two forms of sanction under this Act – but they can only be imposed upon employers (companies) and employees. A recent amendment to the Act states that:

- “If an act punishable by fine is committed by a legal entity, the fine can be imposed on
1. the legal entity, or
  2. the person who has ordered the behaviour which has resulted in the non-compliance with the obligations arising from this law or the provisions based on them, as well as the person who has actually directed the behaviour in question;

3. the parties referred to under 1 and 2 jointly”.<sup>322</sup>

This offence could possibly result in fines being imposed upon directors or senior managers if they ‘ordered’ or ‘directed’ the conduct, which resulted in the breach by the company. There is no other provision for the prosecution of directors.<sup>323</sup>

There are a number of penal law offences that directors, along with any other individuals, could commit. These are set out below:

“A person who by negligence or carelessness is responsible for the death of another is liable to a term of imprisonment or of detention of not more than nine months or a fine of the fourth category.”<sup>324</sup>

“A person who by negligence or carelessness is responsible for serious bodily harm of another or such bodily harm as causes temporary illness or temporary inability to perform the duties of office or practice a profession is liable to a term of imprisonment or of detention of not more than six months or a fine of the fourth category.”<sup>325</sup>

“Where the serious offences defined in this title are committed in any official or professional capacity, the judge may increase the term of imprisonment by one third, he may order disqualification from practicing the profession in which the serious offence was committed, and he may order publication of the judgment.”<sup>326</sup>

In addition, Article 51 allows directors in certain circumstances to be prosecuted when a company has committed an offence. They can be prosecuted for having ‘ordered the commission of the criminal offence’ or having been ‘in control of such unlawful behaviour’. It appears that a director would be able to be prosecuted for this offence if he or she knew about a dangerous situation but failed to act.

## **ENFORCEMENT**

Directors cannot be prosecuted for an offence under the Working Conditions Act 1998. In addition, there is no record of any director being convicted of such an offence following a work-related death or injury.<sup>327</sup>

## **PERCEIVED BENEFIT OF LEGISLATIVE STRUCTURE**

We have no information on this at present.

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<sup>322</sup> Article 33 a. Amendment took place in June 2005.

<sup>323</sup> There are two kinds of offences under the Act – a criminal and a fineable offence. Only companies can commit criminal offences, and this only when their conduct is “in conflict with this Act or its provisions, if such acts or omissions, of which he could reasonably have been expected to be aware, lead or could be expected to lead, to a threat to life or serious harm to the health of one or more employees”.

<sup>324</sup> Article 307, Penal Code

<sup>325</sup> Article 308, Penal Code

<sup>326</sup> Article 309, Penal Code

<sup>327</sup> Personal Communication (Peeters, 2005)