

# Industrial Manslaughter

Updated June 2021

## Unsafe work practices persist

The Work-Related Traumatic Injury Fatalities data collection, compiled by Safe Work Australia, found that in the preceding year, 2020, 183 Australian workers were killed at work. Out of the total 183 fatalities recorded, 26 were from the construction industry.

In 2016 a crane driver operating at the University of Canberra Hospital construction site was charged over the death of his colleague. The ACT Supreme Court recently found that the offender “operated the crane in excess of its rated capacity, with insufficient planning, at night with reduced visibility, and on uneven terrain”.

<sup>1</sup>Though the offender was initially charged and prosecuted with manslaughter, the charge was abandoned in place of the work health and safety category 1 offence, which carries a maximum penalty of up to five years imprisonment and/or a \$300,000 fine. The Court found that there was a “relatively high degree or recklessness” having regard to the fact that he failed to “undertake a risk assessment”, that he knew “several people were in the vicinity” as well as the fact that though he “felt disquiet about the operation... he permitted others to pressure him into performing the lift.”<sup>2</sup> These considerations resulted in the offender’s sentence of 12 months imprisonment. The site’s principal contractor, Multiplex, and the offender’s employer, RAR Cranes, were also held liable.

Despite the Prosecution opting to charge the defendant with a serious offence under the work health and safety laws, many campaigners believe that “introducing industrial manslaughter laws is one of the key changes needed to reduce the number of people who die at work every year”.<sup>3</sup>

In 2019, Australia’s first Industrial Manslaughter case was decided in Brisbane. Brisbane Auto Recycling Pty Ltd was alleged to have committed the offence, in accordance with s 34C of the *Work Health and Safety Act 2011* (Qld), when a worker was killed after being struck by a reversing forklift at a wrecking yard. The Queensland District Court recently held that the conduct of Brisbane Auto Recycling Pty Ltd caused the death “because it failed to control the interaction of mobile plant and workers at the workplace, failed to effectively separate pedestrian workers and mobile plant, and failed to effectively supervise operators of moving plant and workers”.<sup>4</sup> Brisbane Auto Recycling Pty Ltd was fined \$3 million and the two directors who held an equal shareholding and supervised work activities at the workplace were sentenced to 10 months imprisonment.<sup>5</sup>

## Executive Summary

There have been continuing calls for the enactment of ‘Industrial Manslaughter Laws’. They were enacted in the Australian Capital Territory (‘ACT’) in 2003, and proposals have gained traction in other States and territories, namely: Queensland who have implemented the laws in their *Work Health and Safety Act (2011)* effective from the 23 Oct. 2017 and Victoria who have passed a bill to be implemented in their *Occupational Health and Safety Act (2004)* by 1 July 2020 at the latest.

In light of the most recent Work-Related Traumatic Injury Fatalities data and Marie Boland’s national review of the model WHS laws, NSW have introduced new offences and harsher penalties under the *Work Health and*

---

<sup>1</sup> *R v Watts* [2020] ACTSC 921, [22] (Murrell CJ).

<sup>2</sup> *Ibid* [91] (Murrell CJ).

<sup>3</sup> Australian Men’s Health Forum, “*Worked to Death: Every 2 Days an Australian Man Dies at Work*” <<https://www.amhf.org.au/worked-to-death-every-2-days-an-australian-man-dies-at-work>> accessed 26 April 2021.

<sup>4</sup> *R v Brisbane Recycling Pty Ltd* (2020) 296 IR 327, [129] (A J Rafter SC J).

<sup>5</sup> *Ibid* [136] (A J Rafter SC J).

*Safety Amendment (Review) Act 2020 No. 10*. Whilst NSW has dismissed proposals for industrial manslaughter laws, the amended *Work Health Safety Act 2011* (NSW) explicitly states that workplace deaths may be prosecuted as manslaughter under the *Crimes Act 1900* (NSW). In the second reading speech, the Hon. Scott Farlow stated that the inclusion of this note will alert ‘duty holders to the existing manslaughter provision’ which will in turn ‘increase their vigilance and the deterrent power of this most serious offence’.<sup>6</sup>

In addition there is the NSW case of “*Hetherington*” to drive directors to comply with the duties of **due diligence** outlined in section 27 of the *Work Health & Safety Act 2011*. This case has outlined **four** clear elements and obligations for company directors, as well as clear directions for compliance. These elements are examined in detail under the ‘NSW’ heading and in the schedule to this newsletter.

## Industrial Manslaughter Laws

This newsletter covers the so called industrial manslaughter offence. Given the impacts of a worksite injury or death on liabilities for company’s officers the following explains the issues and concepts of ‘senior officers’.

## Australian Capital Territory (ACT)

The ACT was the first territory to introduce an industrial manslaughter regime. The offence was introduced by the *Crime (Industrial manslaughter) Act (2003)* (ACT), which amended the *Crime Act 1900* (ACT), effective from 1 March 2004.

Two offences are listed, reliant on whether a senior officer or an employer is charged. For the finding of guilt, the prosecution must prove the following elements:

1. A worker **dies** in the course of **employment** or when **providing services** in relation to an employer; or is **injured** during the course of employment or providing services in relation to an employer and **later dies**
2. The employer or senior officers **conduct causes** the **death** of the work, and
3. The employer or senior officer is **reckless** about **causing serious harm** to the worker or any other worker of the employer by the conduct; or is **negligent** about causing the death of the worker or any other worker of the employer by the conduct.

“Serious harm” is defined as harm (including the cumulative effect of more than one harm) that:

- Endangers, or is likely to endanger, human life, or
- Is, or likely to be significant and longstanding.

It is noted even to date, that no prosecutions have been made under this offence.

## Queensland (QLD)

The Amendments to the *Work Health and Safety Act*<sup>7</sup> (*Work health and Safety and other Legislation Amendment Act 2018*) which took effect on 23 October 2017, creates two new offences: a senior officer offence and a corporate offence, where conduct negligently causes the death of a worker. These are namely:

- S 34C creates a new offence for industrial manslaughter by a person conducting business of undertakings; and
- S 34 D creates a new offence for industrial manslaughter by a senior officer of a person conducting a business or undertaking.

The elements include:

---

<sup>6</sup> New South Wales, *Parliamentary Debates*, Legislate Council, 4 June 2020 (‘Second Reading Speech’).

<sup>7</sup>*Work Health and Safety Act 2011* (WHS Act) (QLD).

1. The **death** of a worker in the **course of work** or is injured in the course of carrying out work and **later dies**.
2. The person conducting business or undertaking (“PCBU”) or **senior officer causes the death**, and
3. The PCBU or senior officer is **negligent** about the causing the death of the worker by the conduct (applying the “criminal negligence” standard).

It is noted that a ‘senior officer’ is distinct from an ‘officer’ as defined in the WHS Act to whom the current due diligence obligations apply. In the Committer Report<sup>8</sup> officers and senior officers were deliberated:-

*...‘officer’ definition in the WHS Act relates to a **class of duty holder of which a specific work health and safety duty relates...** anyone captured by the definition of officer has a duty to exercise due diligence to ensure that a person conducting a business or undertaking complied with their duty or obligation.*

*Conversely, a ‘senior officer’ may commit industrial manslaughter irrelevant of whether they have a safety duty under the WHS Act and whether they have failed that duty...*

*...the term ‘senior officer’ for the industrial manslaughter offence is also intended to **capture individuals of the highest levels in an organisation, those who can decide and influence safety management and culture at their workplace.***

As detailed in the introductory section of this newsletter, last year the District Court of Queensland presided over Australia’s first Industrial Manslaughter case.

## Victoria (VIC)

Similar to the QLD industrial manslaughter laws, the *Workplace Safety Legislation Amendment (Workplace Manslaughter and other matters) Bill 2019* was passed on the 26<sup>th</sup> of November. The 2019 amendment inserts a new criminal offence of workplace manslaughter into s 39G of the *Occupational Health and Safety Act 2004* (Vic). This took effect on 1 July 2020.

The elements of this amendment are as follows:

1. The **company** or **officers** conduct is criminally **negligent**
2. The conduct constitutes a **breach** of an **existing duty** under the OHS Act, and
3. The conduct “**causes**” the **death** of a person at or near a workplace.

In plain terms, the elements are satisfied if it involves a **great falling short of the care** that would have been taken by a **reasonable person** in the circumstances in which the conduct was engaged in, and **involves a high risk** of death, or serious injury or serious illness. This is also intended to include occupational diseases which would be deemed a serious illness.

Qld’s definition of officers are analogous to the definitions of officers outlined in Victoria’s bill. In ordinary terms, officers are person(s) who participate in the making of decisions that affect a substantial part of the organisations business. Furthermore, they are person(s) who have the capacity to affect significantly the organisations financial standing. Ultimately, these are the trustee of a trust, partners of a partnership or joint venture, and most importantly directors and secretaries of companies. Directors/shadow directors aptly fall within the criteria for those liable to these new Industrial manslaughter laws.

## New South Wales (NSW)

---

<sup>8</sup> Parliamentary Committee, Queensland Parliament, Work health and Safety and Other Legislation Amendment Bill 2017 (2017).

Under Division 5 of the recently amended WHS Act, it is easier to prosecute the ‘most serious work health and safety offence – the Category 1 offence.’<sup>9</sup> The Category 1 offence is committed ‘when a person who owes a work health and safety duty recklessly exposes a person to whom that duty is owed to a risk of death or serious injury or illness’.<sup>10</sup> Under this increased penalty an individual who commits a Category 1 offence is liable to up to 5 years imprisonment and/or an increased fine of \$346,500, whilst a corporation who commits this offence is liable to a fine of \$3,463,000. In response to Boland’s review, which identified the difficulties in establishing the ‘recklessness’ requirement of the Category 1 offence, ‘gross negligence’ has now been added in as a fault element. In the second reading speech, the Hon. Scott Farlow identified that a death is not required for prosecution of a Category 1 offence and that ‘regulators will be able to prosecute grossly negligent duty-holders who expose workers to a risk of death or serious injury or illness whether or not a worker is killed’.<sup>11</sup>

Also, in August 2019, Safe Work NSW updated the NSW Code of Practice in accordance with section 274 of the *Work Health and Safety Act 2011*. The Code assists duty holders to achieve compliance with the health and safety duties in the *Work Health and Safety Act 2011* and the *Work Health and Safety Regulation 2017*. Though the Code has no legal force, it is admissible in court proceedings as evidence of what is known about a ‘hazard, risk, risk assessment or risk control’ and Court’s may rely on this in ‘determining what is reasonably practicable in the circumstances to which the code of practice relates’.<sup>12</sup> In the prominent case of **Hetherington**, which will be expanded on further below, the Court found that in determining whether an officer has exercised the required “due diligence” includes taking reasonable steps “to acquire and keep up-to-date knowledge of work health and safety matters”.<sup>13</sup> Relevantly, the Court acknowledged that compliance with due diligence includes compliance with “safety standards established, by formal and informal review and auditing”.<sup>14</sup> Therefore, the Code is likely to be influential in court proceedings of whether due diligence has been exercised and thus, whether the alleged offence has been committed.

In the aforementioned case<sup>15</sup>, the NSW common law elements to prosecute a director of a company has been deliberated. This is relative to a breach of duty under s27 of the WHS Act. In this case, the Judge has clearly outlined the elements and obligations of ‘due diligence’, pivotal for clarity and directions for directors and officers necessitating compliance:

1. Element 1: The defendant is an **officer/director** of said company;
2. Element 2: The company **owes a health and safety duty** to the plaintiff;
3. Element 3: The defendant **failed** to exercise **due diligence** to ensure that the company complied with its duty; and
4. Element 4: The defendant’s failure **exposed** the plaintiff to a **risk of death or serious injury**.

The decision is significant as it reinforces that an officer can only be prosecuted for a breach of due diligence.

A non-exhaustive list for the compliance with the due diligence obligations is as follows:

- Ensuring system of compliance<sup>16</sup>
- Beyond a ‘paper system’ and ‘properly enforced’<sup>17</sup>

---

<sup>9</sup> Second Reading Speech (n 4).

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Code of Practice: Managing the Work Environment and Facilities*, August 2019.

<sup>13</sup> *SafeWork NSW v Neville George Hetherington* [2019] NSWDC 11.

<sup>14</sup> *WorkCover Authority v Daly Smith Corporation* [2004] NSWIRComm 349, [152] (Staunton J).

<sup>15</sup> *SafeWork NSW v Neville George Hetherington* [2019] NSWDC 11

<sup>16</sup> *Inspector Kumar v Ritchie* [2006] NSWIRComm 323 at [153]

<sup>17</sup> *Ibid.*

- A system to **identify** and **manage** the **risk to safety** of employers at worksite. It involves ensuring that employees are properly skilled to perform the work and that they complied with safety standards established by formal and informal review and auditing<sup>18</sup>.
- For directors to address safety matters at board meetings, to require managers to report on safety matters and to monitor safety as an issue<sup>19</sup>.

Ultimately, the exercise of due diligence and what are reasonable steps will be determined to some extent by the officer's place in the corporate structure and their ability to control the objectives outlined in section 27(5)(a)-(f) WHS Act 2011. In part 4 of the schedule below, the relevant extracts of *SafeWork NSW v Neville George Hetherington* [2019] NSWDC 11 can be found.

Interestingly, currently before the NSW is the *Work Health and Safety Amendment (Industrial Manslaughter) Bill 2021* which intends to amend the *Work Health and Safety Act 2011* to create an offence of industrial manslaughter.<sup>20</sup> It remains to be seen whether this Bill will be assented, or whether the NSW Parliament considers the current regime to be sufficient.

## Conclusion

The spate of industrial fatalities and workplace incidents have naturally caused legislators to implement direct legislation to target deficits within the workplace. The first prosecution under these provisions have been undertaken in Queensland against Brisbane Auto Recycling Pty Ltd for industrial manslaughter (October 2019)<sup>21</sup>. Pioneering the implementation of these new laws, the charges were mentioned in the Holland Park magistrates' Court on 1 Nov 2019.

The reality is that each employee has an entitlement to return home at the end of each work day, healthy and not having been threatened by or having suffered an injury or death. As a society it's intolerable that injury or death is a result of employment. Continuation of industrial injury and death will in a likelihood result in the conviction of a company's executives.

With recent legislative changes beginning in NSW and soon to be discussed, debated and likely implemented nationally, it remains to be seen how these changes will impact and rectify these problems faced by the construction industry.

---

<sup>18</sup> *WorkCover Authority v Daly Smith Corporation* [2004] NSWIRComm 349 at 152.

<sup>19</sup> *Inspector Aldred v Herbert* [2007] NSWIRComm 170 at [25].

<sup>20</sup> *Work Health and Safety Amendment (Industrial Manslaughter) Bill 2021*.

<sup>21</sup> <http://statements.qld.gov.au/Statement/2019/10/25/first-prosecution-under-queenslands-pioneering-industrial-manslaughter-laws>

# Schedule

## 1. Australian Capital Territory (ACT)

### CRIMES ACT 1900 (ACT) - SECT 49D

#### Industrial manslaughter—senior officer offence

A senior officer of an employer commits an offence if—

- (a) a worker of the employer—
  - (i) dies in the course of employment by, or providing services to, or in relation to, the employer; or
  - (ii) is injured in the course of employment by, or providing services to, or in relation to, the employer and later dies; and
- (b) the senior officer's conduct causes the death of the worker; and
- (c) the senior officer is—
  - (i) reckless about causing serious harm to the worker, or any other worker of the employer, by the conduct; or
  - (ii) negligent about causing the death of the worker, or any other worker of the employer, by the conduct.

Maximum penalty: 2 000 penalty units, imprisonment for 20 years or both.

*Note* The general offence of manslaughter in s 15 applies to everyone, including workers.

## 2. Queensland (QLD)

### Part 2A INDUSTRIAL MANSLAUGHTER

34A Definitions for part

(1) In this part –

*Conduct* means an act or omission to perform an act.

*Executive officer*, of a corporation, means a person who is concerned with, or takes part in, the corporations management, whether or not the person is a director or the person's position is given the name of executive officer

*Senior officer*, of a person conducting a business or undertaking, means –

- (a) If the person is a corporation – and executive officer of the corporation; or
  - (b) Otherwise – the holder of an executive position (however described) in relation to the person who makes, or takes part in making, decisions affecting all, or a substantial part, of the person's function.
- (2) For this part, a person's conduct *causes* death if it substantially contributes to the death.
- (3) For this part, a reference to a worker carrying out work for a business or undertaking includes a reference to a worker who is at a workplace to carry out work for the business or undertaking, including during a work break.

*Note* –

In relation to the numbering of this part, see the note to section 3

34B Exceptions

- (1) A volunteer does not commit an offence under this part.
- (2) Despite section 34(2), a senior officer of an unincorporated association (other than a volunteer) may commit an offence under this part.
- (3) The Criminal Code, section 23 does not apply to an offence under this part.

34C Industrial manslaughter – person conducting business or undertaking

- (1) A person conducting a business or undertaking commits an offence if –
  - (a) A worker –
    - (i) Dies in the course of carrying our work for the business or undertaking; or
    - (ii) Is injured in the course of carrying out work for the business or undertaking and later dies; and
  - (b) The person's conduct causes the death of the worker; and

(c) The person is negligent about causing the death of the worker by the conduct.

Maximum Penalty –

(a) For an individual – 20 years imprisonment; or

(b) For a body corporate – 100,000 penalty units.

Note –

See section 244 or 251 in relation to imputing to a body corporate or public authority particular conduct of employees, agents or officers of the body corporate or public authority.

(2) An offence against subsection (1) is a crime.

#### 34D Industrial manslaughter – senior officer

(1) A senior officer of a person who carries out a business or undertaking commits an offence if–

(a) A worker –

(i) Dies in the course of carrying out work for the business or undertaking; or

(ii) Is injured in the course of carrying out work for the business or undertaking and later dies; and

(b) The senior officer's conduct causes the death of the worker; and

(c) The senior officer is negligent about causing the death of the worker by the conduct.

Maximum penalty – 20 years imprisonment.

(2) An offence against subsection (1) is a crime.

### 3. Victoria (VIC)

#### Division 2 - Offences

##### 39G Workplace manslaughter

(1) A person who is not a volunteer must not engage in conduct that –

(a) is negligent; and

(b) constitutes a breach of an applicable duty that the person owes to another person; and

(c) causes the death of that other person.

Penalty: Imprisonment for 20 years for a natural person;

100 000 penalty units for a body corporate.

(2) A person who is an officer of an applicable entity, and who is not a volunteer, must not engage in conduct that –

(a) is negligent; and

(b) constitutes a breach of an applicable duty that the entity owes to another person; and

(c) causes the death of that other person.

Penalty: Imprisonment for 20 years.

(3) An entity is an *applicable entity* for the purposes of subsection (2) –

(a) if it is –

(i) a body corporate; or

(ii) an unincorporated body or association; or

(iii) a partnership; and

(b) whether or not it represents the Crown.

(4) An offence against subsection (1) or (2) is an indictable offence.

#### Note

Unlike other indictable offences in this Act, these offences cannot be heard and determined summarily, as section 28 of the **Criminal Procedure Act 2009** does not apply to them."

### 4. New South Wales (NSW)

#### WHS Act 2011 (NSW) (Division 5)

Division 5 Offences and penalties Note.



This Division sets out offences, and penalties for the offences, in relation to the health and safety duties imposed by Divisions 2, 3 and 4 of Part 2. In certain circumstances, the death of a person at work may also constitute manslaughter under the Crimes Act 1900 and may be prosecuted under that Act. See section 18 of the Crimes Act 1900, which provides for the offence of manslaughter, and section 24 of that Act, which provides that the offence of manslaughter is punishable by imprisonment for 25 years.

### **WHS Act 2011 (NSW) (section 31)**

#### 31 Reckless conduct—Category 1

- (1) A person commits a Category 1 offence if—
- (a) the person has a health and safety duty, and the person, without reasonable excuse, engages in conduct that exposes an individual to whom **that** duty is owed to a risk of death or serious injury or illness, and
  - (b) the person—
    - (i) engages in the conduct with gross negligence, or
    - (ii) is reckless as to the risk to an individual of death or serious injury or illness.

Maximum penalty—

- (a) in the case of an offence committed by an individual (other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking)—3,465 penalty units or 5 years imprisonment or both, or
  - (b) in the case of an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—6,925 penalty units or 5 years imprisonment or both, or
  - (c) in the case of an offence committed by a body corporate—34,630 penalty units.
- (2) The prosecution bears the burden of proving that the conduct was engaged in without reasonable excuse.

### **WHS Act 2011(NSW) (section 27)**

#### 27 Duty of officers

- (5) In this section, *due diligence* includes taking reasonable steps:
- (a) to acquire and keep up-to-date knowledge of work health and safety matters; and
  - (b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations; and
  - (c) to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and
  - (d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and
  - (e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act; and
  - (f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).



Examples: For the purposes of paragraph (e), the duties or obligations under this Act of a person conducting a business or undertaking may include:

- (a) reporting notifiable incidents;
- (b) consulting with workers;
- (c) ensuring compliance with notices issued under this Act;
- (d) ensuring the provision of training and instruction to workers about work health and safety;
- (e) ensuring that health and safety representatives receive their entitlements to training.

## *Safework NSW v Neville George Hetherington [2019] NSWDC 11*

### *Scope of section 27 of the Act*

[34] Section 27 of the Act relevantly provides:

(1) If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation.

...

(4) An officer of a person conducting a business or undertaking may be convicted or found guilty of an offence under this Act relating to a duty under this section whether or not the person conducting the business or undertaking has been convicted or found guilty of an offence under this Act relating to the duty or obligation.

(5) In this section,

"due diligence" includes taking reasonable steps:

- (a) to acquire and keep up-to-date knowledge of work health and safety matters, and
- (b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations, and
- (c) to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking, and
- (d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information, and
- (e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act, and

For the purposes of paragraph (e), the duties or obligations under this Act of a person conducting a business or undertaking may include:

- reporting notifiable incidents,
  - consulting with workers,
  - ensuring compliance with notices issued under this Act,
  - ensuring the provision of training and instruction to workers about work health and safety,
  - ensuring that health and safety representatives receive their entitlements to training.
- (f) to verify the provision and use of the resources and processes referred to in paragraphs (c)-(e).

[35] A breach of the duty imposed by section 27 of the Act, is punishable as an offence under section 32 of the Act if the breach exposes an individual to a risk of death or serious injury.

[36] The elements of the offence alleged to have been committed by the defendant are:

**Element A** The defendant was an officer of HPS.

**Element B** HPS owed a health and safety duty to Mr Wilkinson.

**Element C** The defendant failed to exercise due diligence to ensure that HPS complied with its duty.

**Element D** The defendant's failure exposed Mr Wilkinson to a risk of death or serious injury.

[37] The scope of the duty imposed by section 27 of the Act has not been authoritatively determined. The following matters appear to be non-controversial.

[38] First, the section 27 duty is radically different to its predecessor section 26 *Occupational Health and Safety Act 2000*, which deemed a director on proof of a contravention by the company. [1] The first report of the Stewart-Crompton Panel (the First Report) described section 27 as requiring an officer to be proactive to ensure compliance by the company, making the officer liable for their own acts or omissions. The approach was intended to require proactive steps by the officer for compliance by the company, with the duties of care placed on the company. [2]

[39] In *McKie v Al-Hassani* [2015] ACTIC 1 Chief Industrial Magistrate cited with approval the following relevant passage from Barry Sherriff and Michael Tooma, (*Understanding the Model Work Health and Safety Act*) (Wolters Kluher):

The approach taken by the model WHS Act, however, emphasises the corporate governance responsibilities of officers. The personal liability in that context reflects culpability of company officers in failing to meet the corporate governance responsibilities by preventing corporate misconduct. Consistent with this rationale, officers under the model laws will have a duty to ensure due diligence. Thus, their attributed liability is transformed into a positive duty to ensure compliance through sound corporate governance.

[40] Second, 'due diligence' is defined to include taking reasonable steps to achieve the objectives set out in section 27(5)(a)-(f), but the definition of due diligence is not closed. 'Due diligence' in the context of the *Corporations Act 2001 (Cth)* has been defined as a minimum standard of behaviour involving a system which provides against contravention of relevant regulatory provisions and adequate supervision ensuring that the system is properly carried out: *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 ALR 531.

[41] In *Inspector Kumar v Ritchie* [2006] NSWIRComm 323 at [153] Haylen J considered that the due diligence defence provided for by section 26 *Occupational Health and Safety Act 2000* required a systematic approach designed to achieve compliance with the regulatory scheme and to prevent contravention of it, that the system was appropriate and not a paper system designed to pay lip service to the Act and that the system was properly enforced to achieve compliance with the Act.

[42] In *WorkCover Authority v Daly Smith Corporation* [2004] NSWIRComm 349 at [152] Staunton J described the due diligence defence as requiring that the person had put in place a system to identify and manage the risk to safety at the employer's worksite. It involved ensuring that the

workers had the skills to perform the work and ensuring that they complied with the safety standards established, by formal and informal review and auditing.

[43] In *Inspector Aldred v Herbert* [2007] NSWIRComm 170 at [25] Backman J held that it was sufficient due diligence for directors to address safety matters at board meetings, to require managers to report on safety matters and to monitor safety as an issue.

[44] In *Inspector Hayes v Santos and Lorenzo* [2009] NSWIRComm 163 at [188] Boland P was not satisfied that the due diligence defence was established because there was no review or auditing process to ensure that the supervisors and managers were acting in compliance with the written policies.

[45] Third, the exercise of due diligence and what are reasonable steps will be determined to some extent by the officer's place in the corporate structure and their ability to control the objectives outlined in section 27(5)(a)-(f).