



OHS Update

April 2007

>>Your Personal Liability Under OHS Legislation

The recent decision in the case of Inspector Ken Kumar v David Aylmer Ritchie (see separate case study in this Update) provides a perfect example of the need for managers and directors to take their OHS obligations seriously.

In the case mentioned above, Owen Container Services Australia Pty Ltd was found to have contravened the OHS Act following a fatal injury to a worker. In addition, the company's CEO (Mr Ritchie) and the Australian Divisional General Manager were both held personally liable.

The decision serves as a warning to all directors and managers, including CEO's of multi-national companies, that regardless of the degree of their involvement in the day-to-day OHS work practices of a company, they may be found guilty of offences committed by their company.

Even though Mr Ritchie was based in New Zealand and devoted very little time to the company's Australian operations, he was found to have been in a position of influence over the company's practices by the very nature of his role.

In addition, the case highlights the importance of directors or managers ensuring that they exercise all due diligence attempting to prevent a contravention of the OHS Act by a company.

Effectively, a company's breach of the Act automatically means that all directors and managers of the company are also presumed guilty of breaching the Act unless they can establish that they have exercised all due diligence.

Due diligence with respect to a breach of the OHS Act includes:

1. Ensuring that there are systems in place for complying with the law
2. Reviewing OHS issues in board and executive meetings
3. Acting properly when becoming aware of a safety issue or problem
4. Issuing written instructions to correct contravention and following-up
5. Keeping documentation on file to demonstrate involvement in OHS issues
6. Taking appropriate steps after an incident or injury in terms of reporting and corrective procedures.

Coleman & Greig regularly conducts training programs for directors and managers to assist them in understanding their OHS obligations. For further information contact:

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>>Case Study: Judge Highlights Contradictory OHS Defences by Group CEO

A recent case study highlights the flaws in a relatively common practice: when charged under OHS legislation some directors choose to argue two defences that fundamentally contradict each other. Read on for an example of this practice and how a judge highlighted the problems with the director's argument!

An employee of Owen Container Services Australia Pty Limited (OCSA) was fatally injured when he was cleaning out an empty tank using a highly volatile cleaning agent. The tank exploded, catapulting the employee seven metres through the air.

The Charges

OCSA was charged with a breach of the OHS Act, as was the group's CEO and director (Mr Ritchie) and the divisional General Manager.

WorkCover alleged that both the company and the individuals involved failed to:

Provide a safe system of work (i.e. failed to ensure that the chemical wasn't used in confined spaces at temperatures above its flash point, used in a sufficiently oxygen depleted atmosphere, and with employees not located near the hatchment tank);

Ensure the plant was safe (so that the wash baying tanks were earthed);

Provide adequate information, instruction, training and supervision; and

Provide or ensure the use of safe footwear.

The company pleaded guilty, as did the Divisional General Manager. The company was fined \$160,000.00 and the General Manager \$18,500.00. Mr Ritchie however defended his charge seeking to rely upon the defences available in the Act.

Under the OHS Act, the relevant section (s.26(1)) which applies to directors and managers outlines two defences to breaches of the legislation, namely:

(1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or person satisfies the court 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.

Mr Ritchie worked and lived in New Zealand where he managed 80 Owens sites and 1600 workers. In defending the claim, Mr Ritchie argued that in his role he did not have day to day involvement with the operations of all of the Owens Group companies and that this was managed by the General Manager of each division.

He argued that he was far too remote to be able to effectively influence the conduct of the corporation in relation to OHS. He said he spent less than one day a month devoted to Owen's Container division and only about 1/3 of that time was spent on its Australian operations.

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>>Case Study: Judge Highlights Contradictory OHS Defences by Group CEO (cont.)

Mr Ritchie claimed that directors of small companies with hands on roles could exercise real and practical influence over a corporation but some directors, especially those with nominal or non-executive roles, would have no real practical influence. He argued that he could meet this defence because he was at the top of the management structure and his capacity to control employees and work on site wasn't realistic and didn't reflect his role within the company.

Mr Ritchie also argued the second defence, i.e. that he had used all due diligence to prevent the contravention, as an alternative if the first defence failed.

The Finding

The Court rejected both of Mr Ritchie's defences.

The Court found that there was no preliminary test of "hands on involvement" or participation in safety matters to delineate the class of director or person involved in the management of the corporation that is caught by section 26 of the Act.

The Court also noted that the section does not operate this way. It operates so that each director of the corporation is taken to have contravened the same provision as the corporation, unless he or she is able to prove otherwise using the respective defences.

The Judge held that the all directors, by the very nature of their roles, were capable of influencing the actions of the corporation. It was noted that the system setup or overseen by the CEO had no record of the qualifications

of the General Manager or Human Resources Manager in relation to occupational health and safety. The Court accepted WorkCover's submission that due diligence would have to involve a proper audit and risk assessment of the facility, proper training in OHS of all employees, a proper audit process or supervision and checking to ensure that the system was working. A proper system would have resulted, at the very least, in the CEO knowing that people in OHS positions were trained, and monthly safety audits were undertaken and that risks assessments had been carried out.

Interestingly the Judge was critical of the common approach by directors defending OHS charges, which was to plead both defences - the second as an alternative if the first failed.

The Court held that the elements of the two defences point in quite different directions. That is, it would be very difficult for a defendant to prove that he was not in a position to influence the conduct of the company with regard to OHS while at the same time showing that he had, by all due diligence, acted to prevent the company's contravention.

In this case, the Court held that Mr Ritchie's ignorance of the nature of the wash operation, the chemicals used, and the need to earth the wash facility meant that it was quite impossible to find that the he had used all due diligence.

For more information on this case, or to discuss an OHS defence contact:

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