



## Report

# The CAMAC Report on Personal Liability for Corporate Fault — A Critique from the OHS perspective

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The Federal Government's Corporations and Markets Advisory Committee (CAMAC) released its report on *Personal Liability for Corporate Fault*<sup>1</sup> in September 2006. The report covers a wide range of personal liability issues affecting company officers. But a comment in this *Journal* seems appropriate, given that the report, if adopted, would have a significant impact on personal liability in the workplace safety area.

In particular, although the report does not explicitly highlight this, it seems that a major focus of concern is s 26 of the Occupational Health and Safety Act 2000 (NSW) (the OHS Act 2000). Section 26 imposes personal criminal liability on a company officer where the company has contravened the OHS Act 2000, unless the officer can show that they were not in a position to influence the company's behaviour, or that they exercised 'due diligence' to prevent the contravention. The model of personal liability represented by s 26 attracts much of the criticism expressed in the report, and the report specifically recommends that the states change their laws away from the s 26 model. I have previously suggested here that s 26, while in need of some 'fine-tuning', is working reasonably well.<sup>2</sup> This Note, then, offers a brief and fairly quick response to this report from the perspective of its effect on provisions such as s 26.

A dilemma facing those critiquing the personal liability provisions in OHS legislation is that in recent years there have been some significant successful prosecutions. Probably the most controversial was the conviction of managers involved in the Gretley mine disaster in 1996.<sup>3</sup> But there have also been other convictions of managers in recent years, both within and outside the mining

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1 Corporations and Markets Advisory Committee (CAMAC), *Personal Liability for Corporate Fault*, Sydney, 2006.

2 See N Foster, 'Personal Liability of Company Officers for Corporate Occupational Health and Safety Breaches: Section 26 of the Occupational Health and Safety Act 2000 (NSW)' (2005) 18 *AJLL* 107, esp at 134–5.

3 *McMartin v Newcastle Wallsend Coal Co Pty* [2004] NSWIRComm 202; for the sentencing see [2005] NSWIRComm 31; an appeal to the Full Bench upheld the convictions of two of the officers, but overturned the conviction of a third, the mine surveyor: see [2006] NSWIRComm 339. See below for further comment on this, and also N Foster 'The Gretley Appeal to the Full Bench of the Industrial Court of NSW' (2006) 5(4) *Regulation at Work* at 12–18, at <<http://ohs.anu.edu.au/publications/index.php>> (accessed 16 February 2006).

area.<sup>4</sup> Indeed, it seems entirely possible that it is the successful use of the provisions that is leading to a fairly vehement call for them now to be radically reformed or repealed.<sup>5</sup> In a slightly different but related context the comment has been made that looking to business leaders to support proposals to make businesses more accountable would be like 'expecting turkeys to welcome Christmas'.<sup>6</sup>

With respect, the membership of the Advisory Committee for the preparation of this report must be said, on the surface at least, to be weighted in favour of those opposed to extending personal liability. Most of the members seem to be either company officers or lawyers acting for companies, with the exception of one corporate law academic and a representative of ASIC.<sup>7</sup> While of course this is the right composition for a body designed to make recommendations to allow the company law system operate more smoothly (ie, for discussion of 'internal' corporate law issues), it seems odd to say the least that in an inquiry like this (which dealt with the 'external' question of how and whether companies could be encouraged to comply with the law in non-corporate law areas) no representatives from the external areas were invited to join the committee. While public submissions were received, there were no representatives on the committee from unions, environmental groups, consumers, or government officers concerned with OHS, the environment or fair trading.<sup>8</sup>

In general the report gives the strong impression, for the important nature of the recommendations it makes, of being 'under-researched'. For example, it does not mention, let alone attempt to evaluate, a large body of literature which suggests that personal liability of company officers is a significant 'driver' for company behaviour.<sup>9</sup>

While of course the committee may mainly be concerned with the negative effects of personal liability, a balanced appraisal of the area would seem to

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4 *Department of Mineral Resources v Berrima Coal Pty Ltd* [2001] NSWIRComm 130 (director found guilty but no conviction recorded); *Morrison v Powercoal Pty Ltd* [2004] NSWIRComm 297 (director found guilty but on sentencing no conviction recorded: see [2005] NSWIRComm 61); *Morrison v Ross*; *Morrison v Glennies Creek Coal Management Pty Ltd* [2006] NSWIRComm 205 (director convicted and fined \$16,000); *Campbell v Hitchcock* [2004] NSWIRComm 87; for the sentencing see [2005] NSWIRComm 34 (director of trucking firm where drivers encouraged to drive long hours; director fined \$42,000).

5 See, eg, K Phillips, 'The Politics of a Tragedy: The Gretley Mine Disaster and the dangerous state of work safety laws in New South Wales', Occasional Paper, Work Reform Unit, Institute of Public Affairs, October, 2006. The paper makes some legitimate criticisms of prosecutorial decisions, but uses these to draw over-broad conclusions that 'the design of NSW OHS legislation is deeply flawed'.

6 J Eaglesham, 'Making an offence out of a disaster: Corporate Killing', *Financial Times* (UK), 18 June 2001, p 13.

7 See CAMAC, above n 1, at [1.6.1].

8 There were apparently a couple of other legal academics on the 'legal committee' but the report does not indicate whether they were consulted on the policy issues or simply gave technical advice.

9 Much of this is helpfully summarised in: N Gunningham, 'CEO and Supervisor Drivers: Review of Literature and Current Practice', National Occupational Health and Safety Commission, Sydney, 1999; see esp pp 39–40 for discussion of the value of personal managerial liability. See also N Gunningham and R Johnstone, *Regulating Workplace Safety: System and Sanctions*, Oxford University Press, Oxford, 1999, pp 217–23.

require some acknowledgement of the important social goals that may be achieved by different forms of personal liability. Brief mention is made at the outset of 'policy goals' in other areas, and 'the interest in achieving effective compliance', but immediately the focus is turned to the interest of company officers.<sup>10</sup>

The committee seem to have what they consider are a couple of 'knock-out' arguments which are recycled and repeated throughout, but which when analysed are very weak. In responding to these the example of s 26 of the OHS Act 2000 will be used, as it seems likely that from the committee's point of view this provision represents a 'worst-case' scenario. In other words, if the criticisms of the report are not valid in relation to s 26, they are unlikely to be valid in relation to more 'liberal' provisions.

One of the criticisms offered is that personal liability provisions 'unfairly discriminate against corporate personnel compared with the way in which other people are treated under the law'.<sup>11</sup> When analysed (and this fairly bald assertion is not taken a great deal further)<sup>12</sup> what the report means is that people charged with murder, rape and theft are given the benefit of a presumption of innocence and the burden of proof being on the prosecution, whereas provisions like s 26 'reverse the onus'. What the report fails to mention is officers charged under s 26 will face nowhere near the same level of penalty as murderers, rapists and thieves. Indeed, it is only in very rare cases that s 26 offenders will even be *possibly* liable for jail — only, under OHS Act 2000 s 12(c), for second offenders, and even then only a *maximum* of two years. In fact, there seem to be no recorded cases where an individual has been imprisoned for a second offence under the OHS Act 2000 or its predecessor.

Nor does the committee pause to acknowledge that provisions reversing the onus of proof are by no means unique to the law on personal liability of directors, or indeed to the OHS Act 2000. A number of provisions aimed at important public safety values in the area of motor traffic, drug trafficking, the environment, public health and workplace safety have for many years included a reversal of the usual onus of proof. Such provisions, where offences are defined so as not to require proof of a 'guilty mind' (*mens rea*) have been upheld by the High Court of Australia,<sup>13</sup> and specifically held not to be in breach of human rights obligations by the English Court of Appeal.<sup>14</sup>

In fact, at some points the report is very misleading as to the state of the current law. In para 1.5.1 (in a summary, but of course many of the readers of the report will rely on this for their knowledge of the report's findings) it states:

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10 See CAMAC, above n 1, at [1.1].

11 Ibid, at [1.5.1], [3.4].

12 See *ibid*, p 31.

13 *He Kaw The v R* (1985) 157 CLR 523; 60 ALR 449.

14 *Davies v Health and Safety Executive* [2002] EWCA Crim 2949, rejecting the proposition that the reversal of onus provision in UK safety law was in breach of the European Convention on Human Rights Art 6(2). For discussion of these issues see Foster, above n 2, at 127–8. The report shows no indication that the committee was aware of this material.

Under some of the broad-brush liability provisions summarised in Chapter 2, corporate personnel may be deemed liable, and *subject to penalties*, for corporate conduct that they could not reasonably have influenced or prevented.<sup>15</sup>

If this is meant to refer to provisions like s 26 (and it seems to be)<sup>16</sup> it is demonstrably false. Under that provision an officer who can show that they 'could not reasonably have influenced [the conduct of the corporation] or prevented [the conduct]' will certainly be able to establish a defence under s 26, either of 'unable to influence' under s 26(1)(a), or 'due diligence' under s 26(1)(b). By using the phrase 'subject to penalties' the sentence in the report shows that it is not just referring to the initial *prima facie* deeming effect, but to the final outcome of a prosecution. And at that point it is wrong.<sup>17</sup>

After very briefly outlining the case in favour of some personal liability at para 3.1.2, the report gives a long list of the arguments against. We are told, for example, in para 3.3, that 'accessorial' rather than 'deemed' liability is best because members of the board are not 'sufficiently close' to the actual offence, and hence 'it seems very likely that another individual, such as a company executive or manager, is more likely to be responsible for the action or omission and is likely to fall within the scope of accessorial liability'.<sup>18</sup> This sounds very much like an argument for 'scapegoating' someone in middle management for implementing board policy.

We are told again on p 30 that 'reversing the onus' is 'inherently unfair and unreasonable' and is contrary to the International Covenant on Civil and Political Rights. The English Court of Appeal in the *Davies* decision noted previously makes it quite clear that a reversal can be justified given the importance of the social issues concerned and the inherent difficulties for prosecutors.<sup>19</sup>

Again the 'straw man' is put up that people convicted under provisions like s 26 'could not reasonably have influenced or prevented the relevant conduct'.<sup>20</sup> No attempt is made to explain why the 'due diligence' defence does not provide an answer. Perhaps the real complaint comes out near the bottom of p 31, at the second last dot point, where we are told that incidents may occur 'despite their best efforts'.<sup>21</sup> In the end 'trying hard' is not an excuse in any area of law. The law must encourage a certain minimum level of competence in people who enjoy the status and income of being company officers.

On p 32, at the first dot point, the well-rehearsed argument appears that personal liability operates as a disincentive to people taking on company

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15 CAMAC, above n 1, p 9 (emphasis added).

16 See, eg, *ibid*, p 21.

17 Similarly misleading are statements from some previous reports of other bodies highlighted on the opening pages of the report; for example, the material from CLERP Paper No 3 on p 2 of the report, which refers to directors risking personal liability 'irrespective of the directors' culpability . . . even where they have taken all reasonable steps to prevent such breaches'. No personal liability provisions in Australia ignore personal culpability; s 26, as noted, contains specific defences referring to 'due diligence' which take such culpability into account.

18 CAMAC, above n 1, pp 26–7.

19 Above n 14.

20 CAMAC, above n 1, p 31.

21 *Ibid*, p 31.

management roles.<sup>22</sup> This has been repeated regularly over the years, but does not seem to have been supported by actual evidence.

The failure of this report to conduct research on this question seems particularly pointed, given that the Parliamentary Secretary's charge to the committee included 'whether this potential liability would result in a disincentive for persons to accept or continue to hold directorships'.<sup>23</sup> But rather than seeking such evidence the committee seems to have made up its mind from the start.

There is an urgent need for evidence-based decision-making in this area, and for further serious research on matters that impact on a decision to be involved in management. It seems clear, for example, that in many small companies the owners of the business will have no choice but to take on a managerial role, so that personal liability is unlikely to affect decision-making in these companies. And even if becoming a board member may lead to risks, there are many countervailing benefits which in fact may prove more attractive.

In a working paper available on the website of the National Research Centre for OHS Regulation, Andrew Hopkins reports the preliminary findings of an informal survey of mine managers and directors seeking to assess the impact of the Gretley prosecutions.<sup>24</sup> His survey suggests that 'fears expressed by industry spokespeople that the prosecutions have caused an exodus from statutory positions are overstated'.<sup>25</sup>

In the report we are told on p 32, at the second dot point, that directors may find 'the large evidential burden of establishing a defence on the balance of probabilities costly'.<sup>26</sup> The comment is curious, because it slides between two senses of the word 'burden'. If 'burden' is being used to refer to the legal duty to present a case, then a burden which is *merely* 'on the balance of probabilities' is actually a *light* burden given the other option, which is the criminal 'beyond reasonable doubt' standard. But it seems the report wants to use the word 'burden' in the more popular sense of 'difficulty' and to refer to the cost of legal proceedings generally. It can be conceded that no-one wants to be charged with a crime. But in most cases the company concerned will be paying legal fees.

On p 32 we are told that provisions such as s 26 'seem to contemplate a small or family-based company with tightly held ownership and control'.<sup>27</sup> As a statement about the motivation for parliament to include the provision in the legislation, this seems both unsupported by any evidence, and in fact wrong. As the research noted previously shows,<sup>28</sup> this is *in fact* until recently the type of director who was prosecuted. But the policy reasons for a provision such as

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<sup>22</sup> Ibid, p 32; see also p 34.

<sup>23</sup> Ibid, p 7.

<sup>24</sup> A Hopkins, 'The Impact of the Gretley Prosecution', Working Paper No 49, National Research Centre for OHS Regulation, Australian National University, August 2006, p 10, at <<http://ohs.anu.edu.au/publications/pdf/wp%2049%20-%20Hopkins.pdf>> (accessed 26 October 2006). The paper represents a part of a forthcoming book-length study of a number of aspects of the Gretley disaster.

<sup>25</sup> Ibid, p 10.

<sup>26</sup> CAMAC, above n 1, p 32.

<sup>27</sup> Ibid, p 32.

<sup>28</sup> Foster, above n 2, at 113–17.

s 26 support its serious application in the case of larger companies, and if the reaction of the business community to the Gretley case is anything to go by, it is very effective in such a case in focusing attention on relevant issues. Simply asserting that it is 'unreasonable' that directors of larger companies be made accountable does not make it so.

Two of the points made in the report are persuasive, however. In the second-last dot point on p 32 the report says that punishing a director alone may not deter the company. This is true, which is why there should be the option to do both.<sup>29</sup>

And in the final dot point on that page the report notes that it is unfortunate that liability may be held to extend to 'technical specialists' who are not properly to be seen as part of management, with reference to *McMartin* (the Gretley case).<sup>30</sup> The report's criticism of this aspect of the *McMartin* decision in so far as it refers to the conviction of the mine surveyor is correct,<sup>31</sup> and was demonstrated to be so in the recent appeal to the Full Bench of the Industrial Court.<sup>32</sup> The Full Bench overturned the conviction of the mine surveyor on the grounds that he was not really 'concerned in management'.<sup>33</sup>

But the fact a particular s 26 decision might be overturned does not remove the need for the provision.<sup>34</sup>

Finally, brief mention should be made of some other aspects of the report. Chapter 4 seems to suggest a 'designated officer' approach (though meant to be in specific limited areas), raising the spectre of what has been described as 'the vice-president responsible for going to jail'.<sup>35</sup> Chapter 5 suggests an alternative model (spelled out in para 5.2.7) which in the end does not substantially differ from the current s 26 except that the prosecution would need to prove beyond reasonable doubt the officer's 'knowledge' or 'recklessness' or 'negligence'. This model will, however, cast a heavy burden on a prosecutor to somehow get evidence of what role was played by an individual company officer. And the question in the end is whether the reasons offered by the report justify an amendment to a provision which does indeed seem to be working reasonably well.

There is, finally, an interesting 'sting in the tail' of the whole report, an apparently innocuous suggestion in the very last sentence, on p 64: 'Consideration might also be given to a possible provision, in Commonwealth

29 See Gunningham and Johnstone, above n 9, p 218: 'We are not here arguing that OHS agencies should focus on either corporations or individual corporate officers at the exclusion of the other . . . Rather, our argument is that an effective OHS prosecution strategy should ensure a mix of prosecutions.'

30 Above n 3.

31 See Foster, above n 2, at 123, where the same point was made.

32 Above n 3.

33 Ibid, [2006] NSWIRComm 339 at [517]: the surveyor's 'role was not managerial but rather was more akin to that of an advisor or consultant to mine management in relation to surveying.'

34 In the coal mining area, see the more recent decision of *Morrison v Ross* [2006] NSWIRComm 205, where s 26 was used in what seems an entirely appropriate way to convict a mine manager where the manager was aware of lax procedures in issuing permits to undertake dangerous electrical work.

35 C M V Clarkson, 'Kicking Corporate Bodies and Damning Their Souls' (1996) 59 *Mod L Rev* 557 at 562.

legislation, covering the field of personal liability for corporate fault on a generic basis'. This *could* be read as simply a proposal to introduce such a provision for the purposes of Commonwealth legislation. But it could also be read as a proposal to use the Commonwealth's corporations power (the breadth of which was affirmed, of course, in the Work Choices litigation)<sup>36</sup> to destroy all state provisions about liability of company officers and directors by an over-riding sledge-hammer provision saying that the states *cannot* determine corporate officer liability as they choose. It is the use of the phrase 'covering the field', conveying a deliberate intention to invoke s 109 of the Constitution, which suggests that CAMAC has this broader interpretation in mind.

It may in fact be seriously doubted whether, even given that the corporations power extends to regulating the internal employment affairs of a company, its Constitutional reach extends to over-riding state laws on other topics which specify which elements of a company will be liable under those other laws.

And such a suggestion by a group like CAMAC is ironic, of course. If the current Commonwealth Government favoured a high degree of personal liability for company officers, it is hard to imagine a suggestion that the Commonwealth should over-ride more liberal state laws as meeting anything but indignation. It may indeed be a suggestion that backfires on the sector if it is taken up in the future. Once the Commonwealth moves into this area the spectre of a federal Labor government serious about protection of workers might be on the horizon.

In the end the CAMAC Report has predictably produced recommendations that personal liability provisions in a range of state and federal laws should be curtailed. The opportunity to conduct serious research on a range of issues, such as the actual impact on decisions to take part in senior management, seems not to have been taken up. No attempt has been made to assess the result of the committee's recommendations on the enforcement of the wide range of socially important legislation which would be adversely affected. If some attempt is to be made to provide more uniformity of personal liability provisions, it can only be hoped that the states will not accept this report as justifying a 'race to the bottom' by watering down important provisions of the criminal law currently starting now to have some serious impact.

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<sup>36</sup> *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* (2006) 231 ALR 1; for detailed commentary see A Stewart and G Williams, *Work Choices: What the High Court Said*, Federation Press, Sydney, 2007.