Duties of directors and officers under the HSE Act 1992

In this edition of *The Legal Lounge* I outline the statutory duties and obligations that apply to directors and officers of corporate entities under the Health and Safety in Employment Act 1992, and the potential relevance and implications for aviation industry participants of pending prosecutions against directors and officers for alleged breaches of this Act.

HSE Act 1992 – broad framework

The object of the Health and Safety in Employment Act 1992 (HSE Act) is to *"promote the prevention of harm to all persons at work and other persons in, or in the vicinity of, a place of work"*. The HSE Act imposes various responsibilities across employers, principals, contractors and employees within a workplace, to take *"all practicable steps"* to provide a safe work place, and to ensure that their own actions do not cause harm within a workplace.

The November 2012 edition of *The Legal Lounge* summarised some of the statutory duties and obligations of employers as they would apply within the aviation context, and the outcome of a prosecution against Safe Air Limited following the tragic death of an engineer at one of its maintenance facilities. The March 2013 edition of *The Legal Lounge* summarised the findings of the Pike River Royal Commission relating to the failure of the company to enforce its health and safety obligations as an employer and principal of its employees and contractors, leading up to the disaster at the coal mine. These articles can be viewed at www.amclegal.co.nz /Articles / Workplace Health and Safety Issues.

Applicability of HSE Act to directors and officers

The HSE Act does not create a primary statutory duty on directors or individual officers of corporate entities in the same way that it does for employers and principals. However, s56 of the HSE Act creates a "secondary offence" provision that can be enforced against directors and officers of corporate entities, where the entity itself is found to have breached its statutory duties and obligations as an employer or principal.

Section 56(1) stipulates that directors, officers or agents who have *"directed, authorised, assented to, acquiesced in, or participated in",* the failure of a body corporate to comply with the Act, is party to and guilty of the failure of the corporate entity. This means that individual officers and directors can be held to be personally liable and subject to conviction and penalties of up to $250,000 for breaches of the HSE Act, in addition to orders for reparation, if they are considered to have contributed to the offending of the primary entity.

Section 56(2) extends this offence provision to directors, officers, agents or senior managers of Crown organisations. Thus, for example, if the CAA was prosecuted for breaching its obligations to its employees or contractors under the HSE, the Chief Executive, members of the Board and even senior managers could be held personally responsible for any such breaches.

It should be noted that this provision can be enforced whether or not the entity itself is prosecuted under the HSE Act. Thus, for instance, if a corporate entity went into liquidation following a serious workplace accident and was not itself prosecuted, this would not prevent a government agency from prosecuting a director or officer for any alleged breaches of the HSE under s56.

It would however first be necessary for the prosecution to establish to the satisfaction of the Court, that the corporate entity had breached one or more obligations under the HSE, before liability could attach to any individual under s56 of the HSE Act.

Pending prosecutions against companies, and their directors or officers

Pike River Coal and Peter Whittall

Following the various inquiries and reports into the Pike River Coal Mine tragedy, both the company Pike River Coal Ltd (in receivership) and Peter Whittall, the former CEO of Pike River Coal, were charged with breaches of the HSE Act.

Pike River Coal did not contest, and was eventually found guilty and convicted and sentenced in absentee, of nine charges under the HSE Act. This included four charges of failing to take "all practicable steps" to ensure the safety of its employees, four identical charges of failing in its duties as a principal to its contractors, subcontractors and their employees, and one charge of failing to ensure that no action or inaction of any of its employees harmed another person. The company was ordered to pay reparation of $110,000 per victim and fines of over $700,000, representing a total award of more than $4million. Whether the company will pay anything like this amount, given its financial status and the limited funds available, remains to be seen, but the level of the fine is significant and sets an important precedent for future health and safety prosecutions.

Mr Whittall is also facing 12 charges. Eight charges are laid under s56, that as an officer of the company he *"acquiesced or participated in"* the failures of Pike River Coal as an employer (x4), and as a principal (x4) in respect of its employees, contractors and subcontractors. The remaining four charges are laid against him in his capacity as an employee, for failing to ensure that no action or inaction of his harmed another person in the workplace. As the charges against the company have been established, the first eight charges against Mr Whittall will turn on whether the Court is satisfied that he *"acquiesced or participated in"* the failures of Pike River Coal to ensure the safety of their employees and contractors in the mine.

While none of the directors of Pike River Coal were personally charged in this case, clearly there is capacity under s56 for directors to be held personally liable for lapses in health and safety standards that may have contributed to workplace tragedies. In light of the damning findings of the Pike River Royal Commission, including a lack of proper oversight and governance by the Board of health and safety management, and the level of risk present at the mine, it is curious as to why the former Department of Labour did not consider that there was sufficient evidence to bring a prosecution against any of the directors under s56 of the HSE Act. It remains to be seen whether the prosecution against Mr Whittall as an officer of the company will succeed.

Easy Rider and Gloria Davis

Another pending case that is shortly due to go to trial should be of particular interest to the aviation industry. It concerns the *Easy Rider* tragedy, in which a fishing vessel carrying nine persons sank in the Foveaux Strait on 15 March 2012, resulting in the loss of eight lives, including the skipper.

AZ1 Enterprises Ltd, the owner and operator of the vessel, is being prosecuted under the Maritime Transport Act 1994 for operating the ship knowing that a maritime document was required to be held and was not held (this related to the lack of a skipper's certificate being held by the skipper);

and causing or permitting the ship to be operated in a manner causing unnecessary danger or risk to the persons on board. Both offences have equivalent provisions in the Civil Aviation Act 1990 and carry a maximum fine of $100,000.

AZ1 Enterprises Ltd is also facing three charges under the HSE Act; one each that it failed as an employer, and as a principal, to take all practicable steps to ensure the safety of its employees and its contractors while on board the ship; and one that it failed to take all practicable steps to ensure that no action or inaction of any employee while at work harmed another person on board the ship. Each of these charges carries a maximum fine of up to $250,000.

Ms Gloria Davis, the wife of the deceased skipper, was a director of AZ1 Enterprises Ltd. In her capacity as a director of the company, she is facing identical charges under the Maritime Transport Act (these charges have been laid jointly under the MTA and s66 of the Crimes Act which relates to being a party to a crime); and under s56 of the HSE Act, that as a director, she *"acquiesced or participated in"* the failure of the company to meet its health and safety obligations.

Comment

These cases, in particular the *Easy Rider* case as it relates to the prosecution of Ms Davis, could set an important precedent within both the maritime and aviation sectors, as to the potential secondary liability of company directors for breaches of industry specific laws, and health and safety law obligations, in the event of a serious accident or incident. I have not been able to find any comparable cases that would shed any light on how the court might view the culpability and potential liability of a director under the maritime or civil aviation legislation for the actions or inactions of the corporate entity as the owner or operator of the operation concerned.

In the next edition of the *Legal Lounge* I will cover some previous cases concerning prosecutions of directors for health and safety law breaches in both New Zealand and Australia. However, once again, I have not found anything that closely relates to the type of scenario that occurred in the *Easy Rider* tragedy. All participants, especially those holding positions as directors of aviation organisations, should be watching the outcome of this case with great interest.

As I will discuss in a future edition of *The Legal Lounge,* significant changes are also going to be enacted to New Zealand's workplace health and safety laws in the next two years. These changes will more than likely increase both the range and level of offences and penalties against employers, officers and directors of companies, and may also see the introduction of a corporate manslaughter charge.

As I indicated in my previous article, if you are a "silent" or inactive director of a company which engages in commercial activities, or even if you are involved but only on an 'administrative level', now would be a good time to review the appropriateness of continuing to fulfil this position.

Angela Beazer is a lawyer and Director of AMC Legal Services Ltd, a law firm specialising in aviation and public law matters. Previous articles from *The Legal Lounge* series may be viewed at www.amclegal.co.nz