THE LIABILITY OF DIRECTORS AND OFFICERS UNDER MINING AND PETROLEUM SAFETY LEGISLATION – WHAT ARE THEIR DUTIES, THE POTENTIAL PENALTIES AND WHAT CAN THEY DO TO PROTECT THEMSELVES?

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This paper examines what risks directors and officers now face under mines safety and petroleum safety legislation and considers what protections are available to them for those risks. It does so by examining the possible privilege against self incrimination, the defences to charge, and insurance and company indemnities.

1. INTRODUCTION

The majority of recent research has tended to indicate that the extent of compliance with occupational health and safety legislation is strongly influenced by a reasonable apprehension of inspection, prosecution, conviction and meaningful penalties.[1] The HSE Executive study in the United Kingdom found that enforcement and reputation damages are inter-twined along with a fear of business interruption in encouraging companies to comply with safety legislation. The legislatures in Australia have accepted the research which indicates tougher penalties will lead to compliance and over the past few years have made a number of significant amendments to the mining and petroleum safety legislation in their jurisdictions to impose more liability directly on directors and officers and to substantially increase penalties.

Directors and officers of corporations involved in mining and petroleum have specific safety and health duties under the various state and Commonwealth legislation. Further, where an individual, acting on behalf of the corporation in their actual or apparent authority, contravenes a provision in the Act the body corporate is taken to have contravened that same provision and directors and officers of the corporation can then be made personally liable for the offence under deeming provisions in the statutes.

The possibility of action being taken against a corporation or an individual is not remote. For example, in the recent *Gretley* decision[2] (currently under appeal), two corporations and three individuals[3] were found liable for breaches of the *Occupational Health and Safety Act 1983 (NSW*) and one company director was found to be the "mind of the company" in the recent *Hitchcock* decision[4] (currently under appeal) for a fatigue related death of an employed truck driver.

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1 *Cole Royal Commission Final Report* (2003) Vol 6, p 83. HSE Executive *An evidence based evaluation of how to secure compliance with Health and Safety Law Summary Report*. See in particular p 7. It should also be noted that there is research showing the contrary, but that the Australian legislatures have not accepted that research.

2 *Stephen Finlay Martin v Newcastle Wallsend Coal Company Pty Ltd and Others* [2004] NSW IR Comm 202. This case concerned a number of fatalities at a coal mine where drilling occurred in an area where there was a significant amount of water.

3 Two statutory mine managers and the statutory mine surveyor.

4 *Campbell v Hitchcock* NSW IRC 34/2005 in which a company director (being the heart and mind of the company) was fined $42,000 for allowing a driver to drive whilst in a fatigued state leading to a fatality.

This paper examines what risks directors and officers now face under mines safety and petroleum safety legislation and considers what protections are available to them for those risks. It does so by examining the possible privilege against self incrimination, the defences to charges and insurance and company indemnities.

This paper shows that the best defence to a charge is to show that the company exercised due diligence to protect against the incident. Where this cannot be shown other defences such as an inability to influence, accident, mistake of fact or lack of knowledge might be available to a director or officer. Insurance might also be able to be obtained to protect against some of the lesser charges. Company indemnities might cover directors and officers for lesser offences, but no insurance or company indemnity will protect directors and officers for the more serious offences under mining and petroleum safety legislation which in most states also includes the potential for a jail term to be imposed.

2. IMPUTING LIABILITY ON TO DIRECTORS AND OFFICERS

2.1 Mining safety legislation

Liability is imputed on directors and officers via provisions of the relevant mining safety legislation in each Australian State. The flow chart below entitled "*Contravention by an individual acting on behalf of the corporation in their actual or apparent authority*" indicates how liability is imposed on directors or officers in each Australian State either due to a contravention by the corporation, or by a person acting on behalf of the corporation in New South Wales[5], the Northern Territory[6], Queensland[7], South Australia[8], Tasmania[9], Victoria[10] and Western Australia[11].

2.2 Petroleum safety legislation

Clause 50(2) of Schedule 7 of the *Petroleum (Submerged Lands) Act* 1967 (Cth) ("the P(SL)A") provides that any conduct engaged in on behalf of the body corporate by a director of the corporation within the scope of the actual or apparent authority of the director is deemed to have been engaged by the body corporate as well, unless the body corporate can establish it took reasonable precautions and exercised due diligence to avoid the conduct. There is no provision which then imposes liability onto directors and officers of the corporation. Consequently, director and officers will only be personally liable where they, themselves, engage in conduct in contravention of the P(SL)A.

The Offshore Petroleum (Repeals and Consequential Amendments) Bill 2005 (Cth) seeks to repeal the P(SL)A, which has been re-written and re-named the *Offshore Petroleum Bill* 2006 (Cth). The amendments with respect to the health and safety duties are immaterial to the issues discussed in this paper; they consist of a change in the clause numbering and clearer drafting.

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5 *Mine Health and Safety Act* 2004 (NSW), (NSW MHS Act) and the *Occupational Health and Safety Act* 2000 (NSW), (NSW OHS Act).

6 *Mining Management Act* 2001 (NT), (NT MM Act).

7 *Mining and Quarrying Safety and Health Act* 1999 (QLD), (QLD MQSH Act).

8 *Occupational Health, Safety and Welfare Act* 1986 (SA), (SA OHSW Act).

9 *Workplace Health and Safety Act* 1995 (Tas) (TAS WHS Act)..

10 *Occupational Health and Safety Act* 2004 (Vic), (VIC OHS Act)

11 *Mines Safety and Inspection Act* 1994 (WA), (WA MSI Act).

Under the 1979 Offshore Constitutional Settlement states and territories were required to enact legislation which mirrors the Commonwealth legislation in relation to the exploration and exploitation of petroleum in submerged lands.[12] Each of the states has also enacted additional legislation in relation to exploration and exploitation of on shore petroleum which contains similar safety duties to those contained in the mining legislation.[13] By and large the safety duties under the state and territory acts are similar in substance to duties imposed under the Commonwealth P(SL)A as a result, this paper considers only the provisions in the Commonwealth P(SL)A unless otherwise indicated.

4. PRIVILEGE AGAINST SELF INCRIMINATION

At common law, an individual need not answer any questions asked by any authority, public officer or person. Any compulsion to answer renders the answers subject to the privilege against self-incrimination and they are not admissible in court proceedings.[14]

The privilege against self-incrimination does not apply to corporations.[15] Officers of a corporation are bound to testify against the corporation unless they are able to claim the privilege personally. Oral evidence given by an officer of a corporation is that of the witness, not of the corporation.[16]

This common law privilege applies to accidents that occur in the Northern Territory.[17]

Under the various mining and petroleum safety statutes regulators have been given power to require answers and information including that which may incriminate the individual.[18] Frequently there is a provision that the answers given may not be used in criminal proceedings but for other purposes (e.g. furthering the investigation or accident prevention).[19] However, in South Australia the right to claim self incrimination is completely abolished.[20]

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12 See the *Petroleum (Submerged Lands) Act 1982* (NSW), *Petroleum (Submerged Lands) Act 1981* (NT), *Petroleum (Submerged Lands) Act 1982* (Qld), *Petroleum (Submerged Lands) Act 1982* (SA), *Petroleum (Submerged Lands) Act 1982* (Tas), *Petroleum (Submerged Lands) Act 1982* (Vic), and the *Petroleum (Submerged Lands) Act 1982* (WA).

13 *Petroleum (Onshore Act)* 1991 (NSW), *Petroleum Act* 1984 (NT), *Petroleum and Gas (Production and Safety) Act* 2004 (QLD), *Petroleum Act* 2000 (SA), *Petroleum Act* 1988 (VIC) and *Petroleum Act* 1967 (WA).

14 *Sorby v Cth* (1983) 152 CLR 281 at 294 and 309; *Pyneboard Pty Ltd v Trade Practices Comm* (1983) 152 CLR 328, 346.

15 *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

16 *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; *Smorgon v ANZ Banking Group Ltd* (1976) 134 CLR 475 at 481; *WorkCover Authority (Insp Lane) v Australian Winch & Haulage Co Pty Ltd* (2000) 102 IR 40.

17 Section 62(c) of the NT MM Act requires an answer to be given, but is silent on whether or not the common law privilege of self incrimination is abrogated. For a common law privilege to be abrogated the words of legislation must specifically state that the section is abrogated it appears that the common law privilege against self incrimination still exists in the Northern Territory.

18 See section 96(8) NSW MHS Act, section 62(1) NSW OHS Act, section 37(3) of the TAS WHS Act. section 38 SA OHSW Act section 29(1) of the WA MSI Act and Clause 32(1B) and (1C) of the P(SL)A abrogate the privilege

19 See section 96(9) of the NSW MHS Act section 65 of the NSW OSH Act, section 138(2) of the QLD MQSH Act, section 37(4) of the TAS WHS Act, section 100 VIC OHS Act, section 29(3) of the WA MSI Act and Clause 32(4) and (5) of the P(SL)A.

20 See section 38 of the SA OHSW Act.

GENERAL SAFETY DUTIES

Duty	New South Wales[21]	Northern Territory	Queensland
Provide and maintain workplaces, plant and systems of work that are so far as is practicable safe and without risk to health.	Section 56(a) Sections 8(1)* and 8(2)*	Section 16(1)(b)	Section 38(1)(a)
Make arrangements for ensuring so far as is practicable safety and absence of risks to health in connection with the use, handling, processing, storage and transport and disposal of plant and substances.	Section 8(1)(b)* with respect to use only		Section 39(1)(b) (Duty of Site Senior Executive (SSE), whose duties are imputed onto corporation pursuant to section 240)
Maintain so far as is practicable any workplace under the control and management of the employer in a condition that is safe and without risk to health.	Section 8(1)*	Section 16(1)(b)	Section 38(1)(b)
Where it is not practicable to avoid the presence of hazards at a workplace, provide employees with, or otherwise provide for employees to have, such adequate personal protective clothing and equipment as is practicable to protect them against those hazards, without any cost to the employees.	Section 56(b) Section 22* (Duty is not to charge employees for protective items, rather than a direct duty to provide them)		
Provide such information, instruction, training and supervision to employees as are necessary to enable the employees to perform their work in a manner that is safe and without risks to health and is not adversely affected wholly or in part as a result of the work that has been or is being undertaken or any hazard that arises from or is increased by the work.	Section 8(1)(d)*	Section 33	Section 39(1)(f) (Duty of the SSE)
Ensure all workers have the necessary skills, competence and resources to undertake the work safely	Section 26 (operator's duty)	Section 16(2)(a) and (b)	Section 39(1)(e) (Duty of the SSE).
Employ or engage persons who, being suitably qualified in relation to OHS, are able to provide advice to the employer in relation to the health and safety of the employees of the employer.	In order to meet duties under under section 8*	In order to meet duties under section 16	In order to meet duties under section 38.
Monitor conditions at any workplace under its control and management.	Sections 8(1)* and 8(2)*		
Provide information to its employees, in such languages as are appropriate, with respect to health and safety at the workplace, including the names of persons to whom an employee may make an inquiry or complaint in relation to health and safety			

[21] Those items indicated with a * mean the duty is found in the NSW OHS Act.

South Australia	Tasmania	Victoria	Western Australia	Petroleum
Section 19(1)	Section 9(1) and 9(3)	Sections 21(1), 21(2)(a) and 23.	Section 9(1)(a)	Schedule 7 Clauses 5(1) and 5(2)(a)
Section 19(1)(a)(iii)	Section 9(1)(a)(iii)	Section 21(2)(b)	Sections 9(1)(e)(i) and 9(1)(e)(ii).	Schedule 7 Clause 5(2)(b)
Sections 19(1)(a) and (b).	Section 9(1)(a), 9(1)(b) and 9(4)	Section 21(2)(c)	Section 9(1)	Schedule 7 Clause 5(2)
		Section 20(1)(b) prescribes it is necessary to meet the obligations under section 21.	Section 9(1)(d).	
Sections 19(1)(c); 19(3)(d), (e), (f) and (g)	Section 9(1)(c); 9(2)(d), (e), (f) and (g)	Section 21(2)(e)	Sections 9(1)(b) and 12(2)	Schedule 7 Clause 5(2)(e)
Duty should be met by complying with sections 19(3)(d), (e), (f) and (g)	Duty should be met by complying with sections 9(2)(d), (e), (f) and (g)	Duty should be met by complying with section 21(2)(e)	Duty should be met by complying with sections 9(1)(b) and 12(2)	
In order to meet duties under section 19	In order to meet duties under section 9	In order to meet duties under section 21.	In order to meet duties under section 9	In order to meet duties under Schedule 7 Clause 5
Section 19(3)(h)	Section 9(2)(h)	Section 22(1)(b)	Section 12	Schedule 7 Clause 5
Section 19(3)(c)	Section 9(2)(c)	Section 22(1)(c) and in order to meet duties under section 21	In order to meet duties under section 9	

GENERAL SAFETY DUTIES

Duty	New South Wales	Northern Territory	Queensland
Prepare a safety management plan	Section 27 and 28	Section 16(2)(c) and may be required to meet obligations under section 33	Section 38(1)(d) (ensure SSE complies with their duty under section 39(1)(c))
Develop, implement and maintain a safety management structure			Section 39(1)(d) (Duty of the SSE)
Audit and review safety management plan			Sections 38(1)(e) and Section 56(2) (Duty of the SSE)
Ensure compliance with the safety management plan	Section 29 and 40	Sections 16(2)(c), (d) and (e).	Sections 38(1)(f) and 39(1)(c) (Duty of SSE)
Communicate the mine safety management plan to all workers, including contractors	Sections 32(a) and 32(c).		
Prepare an emergency plan for use in "emergency" situations and not carry out work at the mine unless a plan is in place	Sections 42 and 43.		

In some states there is a requirement that the regulator warn individuals of their right to claim self incrimination prior to taking a statement.[22] If the warning is not given setting out the full terms of the statutory protection then the answer cannot be admitted in a prosecution against the individual but it can be admitted in a prosecution against a corporation.[23]

Answers to the regulators questions may be used without limit against the corporation and may be used within the limits of the privilege claimed against the officer personally.[24]

Various preconditions and factors must be satisfied before "evidential immunity" will be conferred. They are as follows:

(a) The claim of self-incrimination or liability to a penalty must be made by the examinee and *not* at the behest of their legal representative.

(b) The claim must be made before making the oral statement. An examinee cannot invoke the privilege upon reflection, after volunteering an answer.[25]

(c) The statement must be such that it "might in fact" tend to incriminate the examinee or expose him or her to a civil penalty. To satisfy this test, the statement may either be:

22 See section 65(2) of the NSW OHS Act, section 100 VIC OHS Act and section 37(4)(b) of the TAS WHS Act.

23 *WorkCover Authority of New South Wales v Seccombe & Ors* (1998) 101 A Crim R 303.

24 *WorkCover Authority (Insp Lane) v Australian Winch & Haulage Co Pty Ltd* (2000) 102 IR 40, *Dougherty v Ling* [2001] TASSC 63.

25 Cf *R V Owen* [1951] VLR 393; *Mcclelland Pope & Langley Ltd v Howard* [1968] 1 All ER 569.

South Australia	Tasmania	Victoria	Western Australia	Petroleum
Section 20.				*Petroleum (Submerged Lands) (Management) Safety on Offshore Facilities) Regulations Petroleum 1996* (WA); Regulation 9; offence provision Regulation 48
				Petroleum (Submerged Lands) (Management) Safety on Offshore Facilities) Regulations Petroleum 1996 (WA); Regulation 10
				Petroleum (Submerged Lands) (Management) Safety on Offshore Facilities) Regulations Petroleum 1996 (WA); Regulation 10
				Petroleum (Submerged Lands) (Management) Safety on Offshore Facilities) Regulations Petroleum 1996 (WA); Regulation 52
Section 20(b)				
				Petroleum (Submerged Lands) (Management) Safety on Offshore Facilities) Regulations Petroleum 1996 (WA); Regulation 9

(i) directly incriminatory; or

(ii) form a link in a chain which may lead to incrimination or the discovery of real evidence of an incriminating character.[26]

In cases of dispute as to whether the statement is incriminating, a claimant must establish, by adducing evidence if necessary, in later judicial proceedings that the apprehended risk or danger of incrimination or exposure to a civil penalty was real and appreciable, not imaginary, remote, speculative or insubstantial.[27]

(d) It is not open to an examinee to make a blanket claim of self-incrimination at the beginning or during the examination.

(e) Subject to any discretion which may be exercised by an inspector, an examinee must identify each question he or she claims may expose him or her to potential criminal liability or a civil penalty.[28]

(f) Although examinees may have discretion when and how often to invoke the immunity, they are not entitled, in respect of each question put to them, to have an adjournment for the purpose of consulting their legal advisers as to whether they should make the claim.[29] Although some regulators such Western Australia do usually allow this.

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26 *Sorby V Commonwealth* (1983) 152 CLR 281 At 310; *Price V Mccabe* (1984) 55 ALR 319, 325.

27 *Price V Mccabe* (1984) 55 ALR 319 At 324; *Trade Practices Commission V Arnotts Ltd* (1990) ATPR 41-010, 51 190-1.

28 *Re Mining Houses of Australia Ltd* (1981) 6 ACLR 226 At 227; *C V National Crime Authority* (1987) 78 ALR 338.

29 *Re Robert Sterling Pty Ltd* (1979) ACLR 385.

(g) The claim must relate to *self*-incrimination. An examinee is not entitled to claim privilege where the only possible incrimination is of others.[30]

(h) The immunity protects only the examinee and not other persons who may be incriminated in consequence of the statement. That statement and all information derived, directly or indirectly, is available against other persons, subject to the ordinary rules of evidence.[31]

There is no set form as to how the claim may be made. An inspector may accept a shortened version of the claim, or alternatively require a statement in full.[32]

5. DEFENCES

5.1 Due diligence.

In each Australian State there is the defence of due diligence. This stems from the fact that the provisions only require that the duty be maintained to a level that is "*reasonably practicable*"[33].

This means that an allegation of guilt can be defended by evidence that the director/officer did all things "*reasonably practicable*" to provide, for example, a safe working environment; or showing that the director (or other officer) had no knowledge of the contravention, and had no reasonable means of obtaining such knowledge, or in some cases, that the director was not in a position to influence the conduct of the company or showing the offence was not committed with the director's (or other officer's) "*consent or connivance*".

Justice Gauldron considered the meaning of "*reasonably practicable*" in *Slivak v Lurgi (Australia) Pty Limited*[34] in relation to the SA OHSW ACT and noted three general propositions:

(a) "reasonably practicable" is not as broad as "physically possible" or "feasible";
(b) what is "reasonably practicable" is judged on the basis of what is known at the relevant time; and
(c) to determine what is "reasonably practicable" it is necessary to balance the likelihood of the risk occurring against the costs, time and trouble necessary to avert the risk.

Deciding what is **"***reasonably practicable***"** is a matter of balancing costs[35] and consequences. Justice Steytler of the West Australian Supreme Court when considering what was reasonably practicable under the WA MSI Act said in *Hamersley Iron Pty Ltd v Robertson*[36] that the Court will look at:

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30 *Rochfort V TPC* (1982) 153 CLR 134.
31 *R v Hauser* (1982) 6 A Crim R 68.
32 *Comptroller General of Customs v Disciplinary Appeal Committee* (1992) 107 ALR 480.
33 Note in Western Australia the duty is actually phrased to "*as far as is practicable*", but that term in the definitions section of the WA MSI Act is defined as being "*reasonably practicable*".
34 (2001) 205 CLR 304.
35 While cost is a factor it is not an excuse for failing to provide appropriate safeguards, particularly where there is a risk of serious or frequent, but less severe injury. For example, a machine with exposed mechanical gears which gives rise to potential hazards for hand, fingers or clothing getting caught should have a guard installed as the industry has shown they can be easily guarded without adversely effecting the operation of the equipment and as a result failure to provide safeguards would be likely to be a breach of obligations.
36 BC9805219, 2 October 1998.

> the facts of each case as practical people would look, not with the benefit of hindsight, nor the wisdom of Solomon, remembering one of the chief responsibilities of all employers is the safety of those who work for them. Such a responsibility can only be discharged by taking an active, imaginative and flexible approach to potential dangers in the knowledge that human frailty is an ever present reality.[37]

This requires an Employer to:

> Weigh the chances of spontaneous stupidity, or a fall, or the like, against the practicability of guarding the machine so as to maintain its function whilst preventing the human factor from resulting in injury.[38]

Duty holders are not required to ensure that adverse outcomes or events never happen. They are required to take practicable steps to provide and maintain a working environment that is safe where workers can work without risk to their health. To ensure this, directors and officers would generally have to show they have, they have done a reasonable number of the following things:

- a safety management system ("SMS") which complies with AS/NZS4801;
- properly skilled and resourced personnel are accountable for each of the key elements of the SMS;
- sufficient financial and human resources are allocated to maintaining the SMS;
- senior managers and employees are properly trained and instructed in the SMS;
- the corporation, through its corporate officers and management structure, actively and effectively promote and enforce compliance with the SMS;
- the SMS requires periodic reporting on it effectiveness (including identification of any deficiencies in the SMS, non-compliances), reports on notices issued by authorities and audits designed to identify safety problems rather than confirm compliance,
- the SMS provides a mechanism for and encourages accurate reporting of hazards, accidents, dangerous occurrences and potential risks;
- any substantial non-compliances with the SMS are remedied when they are reported;
- the SMS provides for reporting to the regulators in compliance with statutory duties;
- the company has a culture of being safety conscious - demonstrated by among other things a corporate safety policy and goal;
- there is a system to bring to management's attention any notifications from the regulators;
- there are processes in place to monitor legislative changes and for updating information of industry standards, hazards and control measures, risks and control measures;
- there are specific measures in place for confirming compliance with technical requirements of legislation for instance monthly Lost Time Injury reports and the like;
- managers are aware of the standards of their industry and how other industries deal with specific risks; and
- documented analysis of the risks of operations on the site including a consideration of the possible gravity of the risk, possible consequences, the costs of eliminating the risk and any decisions made about how to manage the risk.

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37 At p 16.
38 At p 16.

Ultimately, whether a director or officer has acted with due diligence is a factual question about how their obligations should have been discharged in the relevant context. What is clear is that the standard expected is extraordinarily high. By putting in place procedures to ensure that the things listed above occur, a director and officer will be complying with current industry best practice and can reasonably expect a Court to conclude they have acted with due diligence.

5.2 Honest and reasonable mistake of fact.

In New South Wales, South Australia and Victoria which are common law criminal jurisdictions, the High Court in *He Kaw Teh*[39] (1985) 157 CLR 523 has endorsed the *Proudman v Dayman*[40] defence of reasonable mistaken belief of fact. Their Honours found that an honest and reasonable mistake of fact will be a ground of exculpation in cases in which guilty knowledge is not required as an element of an offence. Provided there is evidence which raises the question, the jury cannot convict unless they are satisfied that the accused did not act under an honest and reasonable mistake. Their Honours referred to *R v Tolson* (1889) 23 QBD 168 where it was held by Cave J that *"[a]t common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence"*.

The common law has held that there are three types of statutory offences.

- Offences where the statute provides (either expressly or implicitly) that an element of the offence is the relevant guilty knowledge or intention. The prosecution must prove this element in order to prove a charge of the commission of the offence;
- Offences of which guilty knowledge or intention is not an element but which are nevertheless not committed if the defendant exercises an honest and reasonable but mistaken belief as to the facts, which if true would render the act innocent; and
- Offences which are committed by merely infringing the statute, irrespective or knowledge or intention. Offences of this third group can not be defended by a claim of honest and reasonable but mistaken belief.

In order to determine whether the defence will be available it is necessary to construe the statutory provisions outlining the directors/officers' duties to determine to which category of offences they belong. Some guidance may be found from King CJ in *Davis v Bates*[41] who noted that the

> trend of the authorities is towards recognizing reasonable mistake of fact as a defence in the case of all statutory offences except that limited class of regulatory offences, usually relating to public health or safety, in respect of which, from the subject matter of the offence or the context in which the provision creating it is found, it is clear that the legislature intends to penalize the offending conduct irrespective of the subjective guilt of the offence.

The defence has not been pleaded in relation to any occupational safety legislation in New South Wales, South Australia and Victoria. However, the following New South Wales case is useful in determining whether offences under the acts will be one to which honest and reasonable mistake of fact is available. In *Llandilo Staircases Pty Ltd v WorkCover Authority of New South Wales*

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39 (1985) 157 CLR 523.
40 (1941) 67 CLR 536.
41 43 SASR 149.

(Inspector Parsons)[42] the Full Bench of the IR Commission approved the reasoning of the Chief Industrial Magistrate in *WorkCover* Authority *of New South Wales (Inspector Fester) v Lantry*[43] who noted that where an offence did not contain a provision for imprisonment it was more likely to be a regulatory offence (as opposed to an offence of a truly criminal nature). Where offences are of a regulatory nature the presumption is that the defence of honest and reasonable mistake of fact will not be available; that is, the offence is one of the first 2 categories of statutory offences.

In order to determine whether honest and reasonable mistake can be pleaded to any particular charge, an analysis will have to be made of the legislative intent to decide whether the offence is more regulatory in nature than truly criminal. Such an analysis of each section is beyond the scope of this paper, but in general it appears where there is no potential penalty of imprisonment that the defence may not be available in common law jurisdictions.

In the Northern Territory,[44] Queensland,[45] Tasmania,[46] Western Australia[47] and the Commonwealth[48] there are statutory provisions permitting a defence of honest and reasonable mistake to be raised where a director or office has made a mistake as to the fact, but not as to the law. The effect of this defence is to limit the guilt of the person to that which it would be if the facts were as they believed them to be. Note, however, that the use of this defence is specifically excluded from use for offences under the Qld MQSH Act.[49]

This defence has been considered in Western Australia in *McKenzie v GJ Coles and Co*[50] in the context of a prosecution under the *Health Act* (WA) (1911). In that case, the Court found the defence was available in Western Australia, but that a policy, of inspecting for and removing dented cans, which was not properly applied was not a foundation for an honest and reasonable belief that the can of carrots which contained impurities was not impure. This case is indicative of the fact that it will not be sufficient to rely on the engagement of a competent contractor or

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42 (2001) 104 IR 204.

43 Unreported, 94/1163 , 9 December 1994.

44 Section 32 of the Northern Territory Criminal Code *"A person who does, makes or causes an act, omission or event under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for it to any greater extent than if the real state of things had been such as he believed to exist*".

45 Section 24 of the Queensland Criminal Code *"A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist."*

46 Tasmanian Criminal Code a defence of mistake of fact may exist. Section 14 provides *"Whether criminal responsibility is entailed by an act or omission done or made under an honest and reasonable, but mistaken, belief in the existence of any state of facts the existence of which would excuse such act or omission, is a question of law, to be determined on the construction of the statute constituting the offence"*.

47 Section 24 of the Western Australian Criminal Code: *"A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist"*.

48 Section 9.1 and 9.2 a person is not criminally responsible where, at the time of the physical element of the offence, they are under a mistaken but reasonable belief as to the facts and had the facts existed as the person believed the conduct would not have constituted the offence or the mistaken belief negates any fault element applying to the physical element (where such a fault element exist in the offence).

49 See section 45 QLD MQSH Act.

50 1983] 32 A Crim R 377.

subcontractor with an excellent safety record to establish the defence. The employer/principal would need to establish that it also exercised due diligence in its supervision of the relevant contractor to ensure that they continued to do everything possible to ensure the safety of the site. Hence, in practice this defence is probably not that different from the defence of showing that the director used reasonable due diligence to prevent against the occurrence.

5.3 No knowledge of contravention

In the Northern Territory[51], Tasmania[52], Victoria[53] and Western Australia[54], the defence of having no knowledge of the commission of the offence may be available to directors or officers who had no actual, imputed or constructive knowledge of the Company's contravention. Blind or wilful ignorance of the offence or the circumstances that gave rise to the offence will not be sufficient to establish this defence.

To raise this defence proof that the director or officer was not present at any meeting when the matter was discussed and could not reasonably have been expected to review the minutes of the meeting or the like will need to be established.

5.4 Involuntary Act

In the common law jurisdictions of New South Wales, South Australia and Victoria a person will not be criminally responsible for an act unless it is voluntary.[55] An involuntary act can include an act by accident. The common law jurisdictions outline this limit on criminal responsibility into terms of voluntariness; as such where a director has intends to breach a safety duty, or neglected to attend to a safety duty liability will be imposed.

In terms of a defence of necessity against a statutory offence the issue is one of statutory construction such that where the statute creates an offence only where the offender has acted without reasonable excuse or without lawful excuse, then the offender may have a defence (similar to necessity) where a reasonable or lawful excuse exists. The legislation in New South Wales, South Australia and Victoria all require the duties to be maintained "as far as is reasonably practicable". As such, rather than a direct defence of necessity, a defence, as outlined above, of doing everything that was reasonably practicable will be available.

In the Northern Territory, Queensland and Western Australia a director/officer will not be criminally responsible for events which occur by accident.[56] This must be distinguished from those events which are due to the director/officer's negligence or due to a breach of duty. This defence will not stand where the incident is a result of a breach of a safety duty, even if, in layman's terms, it could be described as an "accident". Additionally, a director/officer will not be criminally responsible where their act or omission is made under circumstances of sudden or extraordinary emergency and an ordinary person, of ordinary self control, could not be expected to do

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51 See section 74 NT MM Act.
52 See section 53 TAS WHS Act.
53 See section 144 VIC OHS Act.
54 See section 99 WA MSI Act.
55 *Ryan v R* (1967) 121 CLR 205.
56 Criminal Code of Northern Territory, s31; Criminal Code of Queensland, s23; Criminal Code of Western Australia, s23.

otherwise.[57] This defence may be available where an incident has occurred, causing, for example injury and wide spread destruction, and in the course of attempting to limit the harm other incidental safety duties are momentarily breached. It is unlikely to cover the breach of the original duty causing the main incident.

In Tasmania a director/officer will not be criminally liable for an act which occurs by chance.[58] However this must be distinguished from an act that occurs due to the negligence of the director/officer, or due to a breach of a safety duty.

5.5 Position to influence conduct

In each Australian State a director or officer who was not in a position to influence the conduct of a Company will not be guilty of an offence. In order to demonstrate that they are not in a position to influence the conduct of the Company a director or officer would have to establish that their role did not involve any of the following:

- any element of decision making powers affecting the corporate enterprise as a whole;
- any decision making powers relating to the act or omissions comprising the offence in question; or
- any role involving the provision of advice to decision makers, where that advice is a decisive factor in either of the above decisions.[59]

5.6 Consent or connivance

In the Northern Territory[60] and Western Australia[61] it is also a defence for a director or officer to show that they did not consent to or connive in the offence.

5.7 Did not have knowledge of the risks

In New South Wales, the Northern Territory, South Australia[62] and Western Australia it will be a defence to an offence involving "*reckless conduct*" or "*gross negligence*" (as the case may be) to prove that the director or officer did not have knowledge of the risks. This is because specific knowledge of the risk is an element of the offence of "*reckless conduct*" or "*gross negligence*" which requires knowledge and action or lack there of in disregard of that risk. It should be noted that this is unlikely to result in a complete defence, but it may result in a conviction for a lesser level of offence.

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57 Criminal Code of Northern Territory s33; Criminal Code of Queensland, s25; Criminal Code of Western Australia, 25.

58 Criminal Code of Tasmania, s13(1).

59 See *Powercoal Pty Ltd v Industrial Relations Commission of NSW* BC 200507643.

60 See section 74 NT MM Act.

61 See sections 99 and 99A WA MSI Act.

62 See section 59 SA OHSW Act.

5.8 Compliance with guidelines

In the Northern Territory[63] and Queensland[64] it is a defence to a prosecution to prove that the act was done in accordance with a guideline in force at the time or that the act was in compliance with a code, standard, practice or methodology that was in force at the time and that the act done was reasonable.

5.9 Body corporate would not be found guilty

In the Northern Territory a director or officer will not be found guilty of an offence (under Part 3 Division 2 or 3 of the NT MM Act) if the body corporate would not also be found to be guilty as it would have been able to establish a good defence to the charge.[65]

5.10 West Australian Residential Premises

In Western Australia[66] a director will also have a defence to an offence in relation to maintaining safe residential premises if it can be established that the death or serious harm would not have occurred if the employee had taken reasonable care to ensure his/her own safety on the premises.

5.11 Other possible defences through the criminal law

Under the Commonwealth petroleum legislation a director/officer will not be criminally liable for conduct in response to a sudden or extraordinary emergency.[67] This only applies where the director/officer reasonably believes that:

- circumstances of sudden or extraordinary emergency exist;
- committing the offence is the only reasonable way to deal with the emergency; and
- the conduct was a reasonable response to the emergency.

This defence may be available where an incident has occurred, causing, for example injury and wide spread destruction, and in the course of attempting to limit the harm other incidental safety duties are momentarily breached. It is unlikely to cover the breach of the original duty causing the main incident.

5.12 Limitation periods

A director/officer will have a defence against prosecution for offences against any of the Acts were the statutory limitation period has passed. The following limitation periods apply:

- New South Wales[68] proceedings for an offence against the NSW OHS Act must be commenced within 2 years of the offence occurring (or in some cases within 6 months of WorkCover becoming aware of the incident, which ever is the longer).

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63 See section 80 NT MM Act.
64 See section 45 Qld MQSH Act.
65 See section 74 NT MM Act.
66 See section 15D(2) WA MSI Act.
67 See schedule 7 clause 52 of the P(SL)A and the section 10.3 of the *Criminal Code* (Cth).
68 Section 107 NSW OHS Act.

- Northern Territory[69] proceedings for an offence against the NT MM Act must be commenced within 1 year of the Chief Executive Officer of the agency administering the Act first becoming aware of the commission of the offence.
- Queensland[70] proceedings for an offence against the QLD MQSH Act must be commenced within 1 year after the commission of the offence, or 6 months after the offence comes to the complainant's knowledge, which ever is the longer, but not more than 3 years after the commission of the offence.
- South Australian[71] proceedings for an offence against the SA OHSW Act must be commenced within 2 years of the commission of the offence. Directors and officers should also note that under the South Australian legislation there is provision for the Director of Public Prosecutions to extend the limitation period in a particular case if they are satisfied that the prosecution could not reasonably be commenced within the relevant period.
- Tasmanian[72] proceedings for an offence against the TAS WHS Act must be commenced within 1 year of the Inspector becoming aware of the act or omission constituting the offence.
- Victorian[73] proceedings for an offence against the VIC OHS Act must be commenced within 2 years of the offence being committed or the Authority becoming aware of the offence. Directors and officers should also note that under the Victorian legislation there is provision for proceedings to be commenced at any time with the written authorisation of the Director of Public Prosecutions.
- In Western Australia[74] a prosecution for an offence against the WA MSI Act must be commenced within 3 years after the offence was committed.
- Under the Commonwealth petroleum legislation proceedings for an offence against the P(SL)A can be brought at any time.

6. PENALTIES[75]

[Refer to table on pages 80–83].

69 Section 77 NT MM Act.
70 Section 236 QLD MQSH Act.
71 Section 58 SA OHSW Act.
72 Section 55 TAS WHS Act.
73 Section 132 VIC OHS Act.
74 Section 97 WA MSI Act.
75 The Commonwealth, New South Wales, the Northern Territory, Queensland, Tasmania and Victoria operate on penalty units. These are subject to change, thereby changing the monetary penalty. The amount of the penalty units are set out in the following legislation: Section 4AA of the *Crimes Act* 1914 (Cth) (currently $110), section 17 of the *Crimes (Sentencing Procedures) Act* 1999 (NSW) (currently $110), section 3 of the *Penalty Units Act* 1999 (NT) (currently $110), section 5 of the *Penalties and Sentences Act* 1992 (Qld) (currently $75), section 4 of the *Penalty Units and Other Penalties Act* 1987 (Tas) (currently $100) and section 5 of the *Monetary Units Act* 2004 (Vic) (currently $104.81).

GENERAL SAFETY DUTIES

Penalties	New South Wales	Northern Territory	Queensland
Safe workplace without risk to health	Section 8 NSW OHS AE section 56 NSW MHS Act	Section 16[76]	Sections 38 and 39[77]
CORPORATION (first offence)	15,000 penalty units currently equal to $1,650,000[85] (where there is *reckless conduc*t causing death). 5,000 penalty units currently equal to $550,000[86] (50 penalty units currently equal to $5,500[87] under the NSW MHS Act) (where the conduct does not involve *reckless conduct* and/or no death occurs)	1,250 - 12,500 penalty units currently equal to $137,500-$1,375,000 (intentional act causing death). 500 to 5,000 penalty units currently equal to $55,000-$550,000 (unintentional act causing death or intentional act causing serious injury. 250 to 2,500 penalty units currently equal to $27,50 - $275,000 (intentional act causing serious injury. < 250 penalty units currently equal to < $27,500 (act causing adverse effect or unacceptable risk to health and safety).	800 penalty units currently equal to $60,000 (act causing death or grievous bodily harm). 500 penalty units currently equal to $37,500 (act causes exposure to substance likely to cause death or grievous bodily harm). 500 penalty units currently equal to $37,500 (act causing bodily harm). 400 penalty units currently equal to $30,000 (otherwise).
CORPORATION (subsequent offence)	15,000 penalty units currently equal to $1,650,000[88] (where there is *reckless conduct*[89] causing death). 7,500 penalty units currently equal to $825,000[90] (75 penalty units currently equal to $8,250[91] under the NSW MHS Act) (where the conduct does not involve *reckless conduct* and/or no death occurs).	1,250 to 12,500 penalty units currently equal to $137,500-$1,375,000 (intentional act causing death). 500 to 5,000 penalty units currently equal to $55,000-$550,000 (unintentional act causing death or intentional act causing serious injury. 250 to 2,500 penalty units currently equal to $27,500-$275,000 (intentional act causing serious injury. <250 penalty units currently equal to <$27,500 (act causing adverse effect or unacceptable risk to health and safety).	800 penalty units currently equal to $60,000 (act causing death or grievous bodily harm). 500 penalty units currently equal to $37,500 (act causes exposure to substance likely to cause death or grievous bodily harm). 500 penalty units currently equal to $37,500 (act causing bodily harm). 400 penalty units currently equal to $30,000 (otherwise).

[76] The penalty provision is found at section 23 of the NT MM Act.
[77] The penalty provision is found at section 31of the Qld MQSH Act.
[78] The penalty provision is contained within section 19 of the SA OHSW Act; the definition of a Division 1 and 2 fine can be found at section 4(5) of the SA OHSW Act.
[79] The penalty provision is contained within section 9 of the TAS WHS Act.
[80] The penalty provision is contained within section 21 of the Vic OHS Act.
[81] The penalty for breaches of section 9 of the WA MSI Act are contained in section 9A of the WA MSI Act; the penalty levels are defined in section 4A of the WA MSI Act.
[82] The penalty for breaches of section 12 of the WA MSI Act are contained in section 12A of the WA MSI Act; the penalty levels are defined in section 4A of the WA MSI Act.

South Australia	Tasmania	Victoria	Western Australia	Petroleum
Section 19[78]	Section 9[79]	Section 21[80]	Sections 9,[81] 12[82] and 15D(2)[83]	Schedule 7 Clause 5[84]
$100,000. $200,000 (where the offender knew that the contravention was likely to endanger the health or safety of another and was recklessly indifferent as to whether the health and safety of another was so endangered).	1,500 penalty units currently equal to $150,000.	9,000 penalty units currently equal to $943,290.	$500,000 (in a situation *of gross negligence*). $400,000 (no *gross negligence* but contravention causes death or serious harm to an employee). $200,000 (all other contraventions).	1,000 penalty units currently equal to $110,000.
$200,000. $400,000 (where the offender knew that the contravention was likely to endanger the health or safety of another and was recklessly indifferent as to whether the health and safety of another was so endangered).	1,500 penalty units currently equal to $150,000.	9,000 penalty units currently equal to $943,290.	$625,000 (if in a situation of *gross negligence*. $500,000 (no *gross negligence* but contravention causes death or serious harm to an employee). $250,000 (all other contraventions).	1,000 penalty units currently equal to $110,000.

[83] The penalty for breaches of section 15D(2) of the WA MSI Act are contained in section 15E of the WA MSI Act; the penalty levels are defined in section 4A of the WA MSI Act.

[84] The penalty provision is contained within Schedule 7 Clause 5 of the P(SL)A.

[85] Section 32 A of the NSW OHS Act.

[86] Section 12(b) of the NSW OHS Act.

[87] Section 57(b) of the NSW MHS Act.

[88] Section 32A of the NSW OHS Act.

[89] According To The Hon K A Hickey MP "Reckless Conduct"is heedless or careless conduct where the person can foresee some probable or possible harmful consequence but nevertheless decides to continue with those actions with an indifference to or disregard of, the consequences: see The Legislative Assembly *Hansard*, 27 May 2005.

Penalties	New South Wales	Northern Territory	Queensland
INDIVIDUAL (first offence)	1,500 penalty units currently equal to $165,000[92] and/or 5 years imprisonment (where there is *reckless conduct* causing death) **Note:** this penalty will not be imposed where the director/ officer is *deemed* liable through section 26 (NSW OHS Act); only where they have committed the offence as an individual. 500 penalty units currently equal to $55,000[93] (50 penalty units currently equal to $5,500[94] under the NSWMHS Act) (where the conduct does not involve *reckless conduct* and/or no death occurs)	250 to 2,500 penalty units currently equal to $27,500-$275,000 or a maximum of 5 years imprisonment (intentional act causing death where liability is not deemed). 100 to 1,000 penalty units currently equal to $11,000-$110,000 (unintentional act ausing death or intentional cact causing serious injury. 50 to 500 penalty units currently equal to $5,500- $55,000 (intentional act causing serious injury. <50 penalty units currently equal to < $5,500 (act causing adverse effect or unacceptable risk to health and safety).	800 penalty units currently equal to $60,000 and/or 2 years imprisonment (act ausing death or grievous bodily harm). 500 penalty units currentlly equal to $37,500 and/or 1 year's imprisonment (act causes exposure to substance likely to cause death or grievous bodily harm). 500 penalty units currently equal to $37,500 and/or 1 year's imprisonment (act causing bodily harm). 400 penalty units currently equal to $30,000 (otherwise).
INDIVIDUAL (subsequent offence)	1,500 penalty units currently equal to $165,000[95] and/or 5 years imprisonment (where there is *reckless conduct* causing death) **Note:** this penalty will not be imposed where the director/ officer is *deemed* liable through s26 (NSW OHS Act); only where they have committed the offence as an individual. 750 penalty units currently equal to $82,500[96] and/or 2 years imprisonment (75 penalty units currently equal to $8,250[97] under the NSW MHS Act) (where the conduct does not involve *reckless conduct* and/or no death occurs)	250 to 2,500 penalty units currently equal to $27,500-$275,000 or a maximum of 5 years imprisonment (intentional act causing death where liability is not deemed). 100 to 1,000 penalty units currently equal to $11,000-$110,000 (unintentional act causing death or intentional act causing serious injury. 50 to 500 penalty units currently equal to $5,500-$55,000 (intentional act causing serious injury. <50 penalty units currently equal to < $5,500 (act causing adverse effect or unacceptable risk to health and safety).	800 penalty units currently equal to $60,000 and/or 2 years imprisonment (act causing death or grievous bodily harm). 500 penalty units currently equal to $37,500 and/or 1 year's imprisonment (act causes exposure to sobstance likely to cause deathor grievous bodily harm). 500 penalty units currently equal to $37,500 and/or 1 year's imprisonment (act causing bodily harm). 400 penalty units currently equal to $30,000 (otherwise).

There are no cases as yet which determine factually what types of actions will amount to "reckless conduct". In a criminal law context, an accused was found to have engaged in "reckless conduct" when the accused lost control of her vehicle at speed, crashed headlong into the oncoming car causing the death of both occupants of the oncoming car: see RV Frazer (2001) 34 MVR 315; [2001] VSCA 101. In another case an accused had been drinking and had a blood alcohol level of over 0.2. He rode an unregistered motorcycle with a friend as a passenger. The motorcycle was involved in a collision killing the passenger and injuring the driver of the car involved: see RV Johnston 30/8/1996 Vic CA 20/96, BC 9604215. It seems likely that what will amount to "reckless conduct" in New South Wales will be similar to what will amount to "gross negligence" in Western Australia, but this remains to be seen.

South Australia	Tasmania	Victoria	Western Australia	Petroleum
$100,000. $200,000 and/or 5 years imprisonment (where the offender knew that the contravention was likely to endanger the health or safety of another and was recklessly indifferent as to whether the health and safety of another was so endangered).	500 penalty units currently equal to $50,000.	1,800 penalty units currently equal to $83,848 (or 5 years imprisonment or both where the offender, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of serious injury).	$250,000 and 2 years imprisonment (in situation of *gross negligence*). $200,000 (no *gross negligence* but contravention causes death or serious harm to an employee). $100,000 (all other contraventions).	1,000 penalty units currently equal to $110,000.
$200,000. $400,000 and/or 5 years imprisonment (where the offender knew that the contravention was likely to endanger the health or safety of another and was recklessly indifferent as to whether the health and safety of another was so endangered).	500 penalty units currently equal to $50,000.	1,800 penalty units currently equal to $83,848, (or 5 years imprisonment or both where the offender, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of serious injury).	$312,500 and 2 years imprisonment (in situation of *gross negligence*). $250,000 (no *gross negligence* but contravention causes death or serious harm to an employee). $125,000 (all other contraventions).	1,000 penalty units currently equal to $110,000.

[90] Section 12(a) of the NSW OHS Act.
[91] Section 57(a) of the NSW MHS Act.
[92] Section 32 A of the NSW OHS Act.
[93] Section 12(d) of the NSW OHS Act.
[94] Section 57(b) of the NSW MHS Act.
[95] Section 32A of the NSW OHS Act.
[96] Section 12(c) of the NSW OHS Act.
[97] Section 57(a) of the NSW MHA Act.

7. WHAT INSURANCE CAN YOU OBTAIN TO PROTECT YOU AGAINST ANY PROSECUTION?

Given the risk of a conviction, the potential size of the penalties and the fact that some of the offences are strict liability offences, the question then arises whether it is possible for directors and officers to obtain insurance to protect themselves against the potential penalties that might be imposed.

Traditionally, it has been considered that a contract to indemnify for a penalty[98] would be illegal on the grounds that it is contrary to public policy.[99] The reason for this is that it is considered contrary to public policy to allow people to enforce rights they obtain as a result of a crime:

> It is clear that no person can obtain or enforce any rights resulting to him from his own crime, neither can his representatives claiming under him obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence.[100]

A contract of insurance may be unenforceable in circumstances which would conflict with the maxim *ex turpi non causa oritur actio*: no action may arise from a wrongful cause. CCH *Australian and New Zealand Insurance Commentary* states:

> where a claim is made under a contract of insurance, the insured may not be entitled to indemnity if the loss results from his or her own illegal act or occurs while he or she is engaged in an illegal act.[101]

As society has prescribed more and more matters to be crimes, so too has it developed law in relation to how far it is contrary to a public policy to protect against such risks. The test for whether an insurance contract is illegal on the grounds of public policy is:

> whether the act of the [insured] is of such an anti-social character that the interests of the public require that the courts should for their protection decline to enforce the contract.[102]

In *Fire and All Risks Insurance Co*, it was held that the insurer was liable to indemnify an insured for damages payable to a third party injured in a motor vehicle accident with the insured, notwithstanding that the insured was committing a traffic offence at the time of the accident.

The factors that will be looked at in determining whether a contract of insurance is void on the grounds of public policy are:

- the gravity of the illegal or criminal act in question;
- the possibility that allowing insurance would encourage the doing of the acts; and
- the need for the courts to deter the acts.[103]

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98 That is, the imposition of a monetary liability as a punitive rather than compensatory measure.

99 See M Waller and L Courtice "*Insuring against environmental risks in Australia and recent developments*" (1998) 8 APLR 172 at 175-176. See also M Clarke "*Insurance of Wilful Misconduct: the court as keeper of the public conscience*" (1996) 7 ILJ 173.

100 Per Sir Samuel Evans P in the case of *The Estate of Crippen* (1911) 108, 112.

101 [18-485].

102 *Fire and All Risks Insurance Co Ltd v Powell* (1966) VR 513, per O'Bryan and Pape JJ, 523.

Where the criminal act causing loss is intentional, the insured will not be entitled to recover under an insurance policy for damage flowing from that act. [104]

Where the criminal act of the insured is unintentional, the position is less clear. A contract insuring the insured against civil liability incurred because of the same act that constituted an unintentional offence will be enforceable. [105]

It is unclear whether this exemption for unintentional criminal acts would extend to statutory/criminal fines arising from the offence itself. In the 2005 edition of *The Law of Liability Insurance* the following passage describes the position well:

> It is probably contrary to public policy to indemnify an insured against a fine or penalty where there is fault, since it is clearly intended to constitute a punishment upon and a deterrent to any offender. If the legislature, the primary arbiter of public policy, provides that an act or activity should be visited with a penalty, then the purpose behind that action should not be frustrated by insurance. This should have full operation where the insured's contravention of the legislation is wilful or reckless.[106]

On the current authorities, the appropriate course in determining the legality of such insurance which seeks to cover a person for liability as a result of breach of legislation including mining and petroleum safety legislation is to apply the "public policy" test to the specific circumstances to decide whether the conduct proscribed by the Act and regulations is of such a serious and "antisocial" nature that it would be contrary to public policy to allow it to be insured against.

7.1 Will directors and officers insurance respond to prosecutions?

What is actually covered under a directors and officers' insurance policy is a matter that can be negotiated between an insurer and an insured. A directors and officers insurance policy might be able to be purchased which covers the cost of defence of criminal proceedings and actions under various statutes. However, it is typical for insurers to write their directors and officers' policies with exclusions for dishonesty[107] and claims arising from breaches of mining and petroleum safety regulations.[108]

If a policy is purchased that does cover a director or officer for breaches of mining safety and petroleum legislation in each State an argument would arise in relation to whether the provision of insurance for the breach is contrary to public policy.

7.2 Will statutory liability insurance respond to prosecutions?

Insurance known as "statutory liability insurance" is currently available for penalties imposed by statute, including for fines under mining and petroleum safety legislation. [109]

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103 ibid, supra.

104 *Burrows v Rhodes* (1899) 1 QB 816; *Hardy v Motor Insurers' Bureau* (1964) 2 QB 745.

105 *Fire and All Risks Insurance Co Ltd v Powell* (1966) VR 513 per O'Bryan and Pape JJ, 523, supra.

106 *The Law of Liability Insurance*, 2nd edn, [2-291].

107 Per Aon as referenced in *Australian Government Corporation and Markets Advisory Committee - Insurance cover for Directors and Corporate Officers* 22 July 2004, 8 and Mandi Katz Solicitor at Aon in Lexis Nexis Law Practice Management Newsletter.

108 Per Australian Institute of Company Directors – *Guide to directors and officers liability insurance.*

109 This insurance is currently offered by Specialist Underwriting/Lumley General Insurance Limited and QBE Insurance. In their marketing materials both these companies indicate that these types of polices will respond to mining and petroleum safety breaches. One of the examples given by Lumley of a type

Since the introduction of this insurance there has been debate about whether statutory liability insurance is contrary to public policy. Those who argue such policies are contrary to public policy say it goes against the basis of the criminal justice system[110] or it is *"morally repugnant and totally against the concept of people being held accountable for breaches of the law as well as significantly undermining the punishment and deterrent effect of statutory criminal prosecutions"*[111]. It is also argued that the reason for the low take up of statutory liability insurance in Australia is the potential to damage a company's reputation if it is discovered that it is insured for breaches of mining and petroleum legislation.[112] Those who argue such polices are not contrary to public policy say as directors and officers can be liable even when innocent due to strict liability offences, the public policy argument has no place.[113]

Statutory liability insurance policies generally exclude any liability for statutory breaches that result from a wilful, intentional, or deliberate act, gross negligence or recklessness, dishonesty, fraud or malice. Hence, the market appears to recognise the legal limitations on cover for statutory penalties imposed upon individuals for inherently "anti social" conduct.

The table below entitled "*Insurance Coverage for Mining and Petroleum Safety Penalties*: outlines the likely position, without knowledge of specific facts giving rise to the offence, with respect to which offences may be able to be covered by directors and officers insurance. Given the scope of what is currently being offered under statutory liability insurance the position would seem to be the same with respect to both statutory liability insurance and directors and officers insurance.

7.3 Is there any other insurance which might be relevant in relation to prosecutions?

Relevantly, legal costs insurance might be able to be purchased to cover the legal cost of defending any mining and petroleum safety prosecution, but not the fine.

8. WHAT ABOUT COMPANY INDEMNITIES?

A question also arises as to whether a company can provide an indemnity to its directors and officers for mining or petroleum safety prosecutions.

Companies are restricted by the *Corporations Law* in relation to the matters that they can indemnify against. Further, the value of any company indemnity will depend upon the solvency of the company providing the indemnity.

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of claim that the policy would have responded to if the party charged had taken out the policy is the decision of *Leighton Contractors Pty Ltd v Ridge* SCWA 980650. 80% of the claims paid to date on these types of policies according to an article in Thomson CPD *The Risk Report* Issue 181, April 20 2004 have been for occupational and health and safety breaches. Note that statutory liability insurance in New Zealand does not cover this risk – this may be an indication of the potential for this cover to change in Australia.

110 Brian Robson, Chairman Victorian Environmental Protection Authority Tompson CPD *The Risk Report* Issue 76, 18 November 1999, 2.

111 Kevin Knight, Chairman The Risk Management Institution of Australasia Tompson CPD *The Risk Report* Issue 181, 29 April 2004.

112 This argument is not a strong one as a similar argument could be made that having public liability insurance might suggest that a company is not intending to do all that it can to protect against the risks to people entering their property. Regardless of the risk of this perception public liability insurance is commonplace.

113 David O'Brien, QBE's Group Professional Liability Division, Tompson CPD *The Risk Report* Issue 182, 13 May 2004.

Jurisdiction	Covered by insurance	Not covered by insurance
NEW SOUTH WALES	Breach of a statutory duty (imposed by sections 8 and 22 of the NSW OHS ACT and sections 26, 27, 28, 29, 40 and 56 of NSW MHS ACT) where there is no *reckless conduct* causing death.	Breach of a statutory duty (imposed by sections 8 and 22 of the NSW OHS ACT) where the breach of duty causes the death of a person and the director/officer is *reckless* as to the death or serious injury arising from the conduct that breached the duty.
NORTHERN TERRITORY	Breach of a statutory duty (imposed by section 16) where the act or omission breaching the duty is not intentional.	Breach of a statutory duty (imposed by section 16) where the act or omission breaching the duty is intentional.
QUEENSLAND	There are no additional penalties for breaches of duty where it is the "fault" of the director/officer. As such it is likely that insurance will cover breaches of all statutory duties (imposed by sections 38 and 39) to the extent that the court deems that they were not intentional, reckless or grossly negligent. However as this is a public policy issue it is likely to be a question for the court.	The court is likely to decide that where the conduct was intention, reckless or grossly negligent then public policy will dictate that the insurance contract is void.
SOUTH AUSTRALIA	Breach of a statutory duty (imposed by section 19 and 20) where an aggravated offence was not committed.	Breach of a statutory duty (imposed by sections 19 and 20) where an aggravated offence was committed. An aggravated offence occurs where the offender knew the contravention was likely to endanger seriously the health or safety of another and was recklessly indifferent as to whether the health and safety of another was so endangered.
TASMANIA	There are no additional penalties for breaches of duty where it is the "fault" of the director/officer. As such it is likely that insurance will cover breaches of all statutory duties (imposed by section 9) to the extent that the court deems that they were not intentional, reckless or grossly negligent. However as this is a public policy issue it is likely to be a question for the court.	The court is likely to decide that where the conduct was intention, reckless or grossly negligent then public policy will dictate that the insurance contract is void.
VICTORIA	Breach of a statutory duty (imposed by sections 20, 21 and 22) where there is no "fault" of the offender and the offender was not recklessly placing another in danger of serious injury.	Breach of a statutory duty (imposed by section 32) where the conduct is engaged in recklessly and places another person in danger of serious injury.

Jurisdiction	Covered by insurance	Not covered by insurance
WESTERN AUSTRALIA	Breach of a statutory duty (imposed by sections 9 and 12) where there was no "fault" element; these are known as level 1-3 offences.	Breach of a statutory duty (imposed by sections 9 and 12) where the conduct is due to *gross negligence*; a level 4 offence.
PETROLEUM	There are no additional penalties for breaches of duty where it is the "fault" of the director/officer. As such it is likely that insurance will cover breaches of all statutory duties (imposed by section 9) to the extent that the court deems that they were not intentional, reckless or grossly negligent. However as this is a public policy issue it is likely to be a question for the court.	The court is likely to decide that where the conduct was intention, reckless or grossly negligent then public policy will dictate that the insurance contract is void.

8.1 What can a company indemnify for?

Companies are relevantly prohibited from indemnifying a person against any liability incurred as an officer of the company if:

- the employee did not act with good faith[114]; and
- for legal costs in defending or resisting criminal proceedings in which the person is found guilty.[115]

Hence, if a mining or petroleum safety offence is committed whilst the person who is the beneficiary of the company indemnity is acting in good faith; the company may be able to indemnify the person for the penalty, but not for the legal costs[116] in the event that they are found guilty.

8.2 Requirement for Good faith

Good faith traditionally has been considered to be synonymous with "bona fides" and, to act in good faith means to not act recklessly or wilfully sacrifice the interest of others.[117]

It is possible, given that the duties imposed under mining and petroleum safety legislation are so onerous that a Court may find that the duty of good faith is narrower in this context and that to act in good faith in effect requires a person to act with due diligence.

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114 *Corporations Act* Section 199A 2(c).

115 Ibid Section 199A 3(b).

116 This could be substantial if the matter is taken on appeal.

117 There is a long line of authority on good faith which arises in a number of contexts, but none in an occupational health and safety context. The High Court considered the meaning of good faith in the context of a duty of good faith on a mortgagee in selling the mortgaged property in *Pendlebury v The Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676 and held "*..the mortgagee must not act recklessly or wilfully sacrifice the interests of the mortgagor, and that if he does he is to be regarded as not having acted in good faith"*.

If the traditional meaning is given to good faith in a mining and petroleum safety context, then it is possible that a person could breach the legislation, but still be found to have acted in good faith. Further, it is difficult to envisage a circumstance where a lack of good faith will not amount to "*gross negligence*" or "*reckless conduct*".

9. CONCLUSION

The penalties imposed in the various Australian States for breaches of mining and petroleum safety laws vary significantly, but in each instance can be considered to be substantial. Each of the States legislatures appears to have accepted that a risk of a personal penalty being imposed on a decision maker is a good way to ensure compliance with safety obligations.

The best insurance against the risks under the relevant mining and petroleum safety legislation throughout Australia is to comply with the legislative duties. As Nina Lyhne, WorkSafe Commissioner said when changes were introduced to substantially increase penalties under the WA MSI Act:

> Employers who take safety and health seriously have nothing to fear from the new laws. Most employers are doing the right thing and are placing an appropriate value on safe work practices, but we trust the tougher penalties and other changes will act as a deterrent to employers who do not comply with the laws. [118]

Compliance with these law is really a matter of doing what is right to protect people against being injured whilst at work by exercising due diligence to do what is "reasonably practicable" to ensure a person's safety. As Justice Owens commented in his report into the failure of HIH119 directors and officers (and their advisors) need to start by considering whether what they are proposing to do is right in a moral sense rather than how far the prescriptive dictates can be stretched. In the end the action must accord with the prescriptive dictates, but the decision should be informed by a consideration of whether it is morally right.

For some, the risks of substantial penalties being imposed on them personally for accidents is a significant issue and could be the deciding factor in accepting or remaining in a position. It appears that insurance is available in the Australian market and company indemnities might be able to protect against the risks of the less serious offences and against inadvertent breaches of mining and petroleum safety legislation (although company indemnities will not cover legal costs incurred where there is a conviction). The existence of this protection might encourage some directors and officers or potential directors and officers who might otherwise be discouraged by the risks they now face under mining and petroleum safety legislation to remain in their roles or accept new positions.

No protection is available for those who are "grossly negligent" engaging "*reckless conduct*" or act in bad faith. No such protection should be available as to provide such protection would be contrary to public policy.

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118 *OHS Alert* Issue 2 9 March 2005 at page 13.

119 Justice Neville Owen, *Report into the Failure of HIH Insurance, Volume 1*, A Corporate Collapse and its Lessons, April 2003.