

Pike River: A Matter of Direction

Director's Liability and Corporate Governance

Introduction

In November 2010 29 men lost their lives following an explosion at Pike River Mine in one of New Zealand's most catastrophic workplace accidents. A Royal Commission on the Pike River Mine Tragedy ("the Royal Commission") was subsequently established in December 2010 and on 6 June 2012 the Government announced the creation of an Independent Taskforce into Workplace Health and Safety.

This paper looks at the existing obligations of company directors under the health and safety regime in New Zealand and the likely future direction of related directors' duties in light of the Pike River experience.

The Royal Commission Report

The Report of the Royal Commission on the Pike River Mine Tragedy was released on 5 November 2012 and amongst other wide ranging recommendations, supports a comprehensive review of the legislation covering health and safety in New Zealand including the responsibilities of company directors. Though the Royal Commission was clear that their primary assessment was of the Pike River tragedy, the proposed changes to health and safety were of general application.

What is the current position of Directors' Responsibilities?

In the civil jurisdiction the Courts in New Zealand have been reluctant to break away from the concept of the corporate "veil". This traditional view is that the company and the directors are two separate entities and that the Court must be very circumspect in endeavouring to impose a personal duty of care on the directors that erodes the principles of limited liability. As a consequence, a duty of care was only attributed to a director in circumstances where there has been a distinct and manifest assumption of personal responsibility¹ or an otherwise special relationship has been established.²

Under the Health & Safety in Employment Act 1992 ("HSE") responsibility in the workplace rests predominantly with the "employer". Under the HSE the company, as employer, is required to take "all practicable steps" to ensure the safety of its workers or others in a place of work.³ The current New Zealand legislation accordingly places no other individual responsibility on directors, or collective responsibility on a board, to ensure the safety of workers.

Directors can only be prosecuted under the HSE if the company has committed an offence that the director has directed, authorised, assented to, acquiesced in, or participated in the companies' failure.⁴ This effectively means that a director may face liability where he actually knew about the circumstances relating to the incident, knew that the company was in breach of the HSE and actively participated in making decisions in relation to the circumstances resulting in the incident. Not surprisingly there have been very few instances where directors have been prosecuted under this section.

From a practical standpoint, the HSE casts director's liability outside the reach of larger companies. In a smaller company the directors have a more integral role in the day to day operations, and thus the company's failures. In larger companies the governing board and management are distinctly separate and corporate liability is less likely to come within the realm of the board.

Recent Themes in Corporate Governance

A number of decisions following the failure of finance companies have focused on corporate governance generally and the corresponding responsibilities of directors.⁵ The judiciary has of recent times endeavoured to emphasise that directors are required to understand the fundamentals of the business, to monitor performance, and review policies on a regular basis. The directors must

determine those policies which management will implement under the supervision of the directors. Judges have said that it is not acceptable for a director to delegate compliance to others and an individual director cannot delegate to other directors their responsibilities or rely on those other directors to understand the company's business.

If the Court's statements in respect to governance obligations in the finance company decisions extend to health and safety, then those principles will be all the more onerous, particularly in highly technical and sophisticated industries.

Pike's Board of Directors comprised a Chairman, John Dow, who had a background in the metalliferous mining industry, and five other non-executive directors. None of the directors had previous experience in respect to underground coal mining operations. The Royal Commission Report criticised Mr Dow and said that he had assumed things were under control "*unless told otherwise*" which effectively amounted to an abrogation of his good governance responsibilities.

There is a discernible theme in the Royal Commission Report as to the attitude of the Pike River board in considering that health and safety issues were the prerogative of management. While the board, or at least the Chairman, was privy to a wealth of information concerning risk assessment at the mine, this vital information was not appropriately collated or brought together for the board's appropriate consideration. Information to which the board had access was not conveyed to executive management or those employees directly responsible for issues of health and safety in the mine. The Royal Commission made particular reference to a "culture of production" at Pike River where financial objectives were given pre-eminence over health and safety considerations.

International Context

The Royal Commission made comparison with positions in the United Kingdom and in Australia.

In the United Kingdom, its comparative legislation contemplates prosecutions of directors where health and safety offences committed by the company 'with the consent or connivance of, or [was] attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate'.⁶ This is broader than the corresponding provision in the HSE in New Zealand as in the United Kingdom directors are accordingly liable where a company's wrong doing is attributable to "any neglect" by them that contributed to the company's breach of duty in a health and safety context.

In Australia, there have been recent initiatives at federal level to impose positive obligations on directors of corporations in relation to health and safety.⁷ The Model Work and Safety Bill provides that a director is required to exercise due diligence to ensure that management conducts business in accordance with the health and safety obligations imposed on the company.

The international trend points clearly in the direction of greater accountability for directors on issues of health and safety. It seems very likely New Zealand will follow the UK and Australian position.

The Royal Commission Recommendations

Three of the 16 recommendations of the Commission focus solely on directors' responsibilities, namely:

Recommendation 5: The statutory responsibilities of directors for health and safety in the workplace should be reviewed to better reflect their governance responsibilities.

Recommendation 6: The health and safety regulator should issue an approved code of practice to guide directors on how good governance practices can be used to manage health and safety risks.

Recommendation 7: Directors should rigorously review and monitor their organisation's compliance with health and safety law and best practice.

The Spectre of Corporate Manslaughter

In the wake of Pike, Labour party MP Andrew Little has prepared a member's Bill to introduce the offence of corporate manslaughter to the Crimes Act 1961. As proposed, the offence would apply to situations where the acts or omissions of the directors or senior managers of a body corporate cause a person's death in circumstances amounting to a gross breach of a duty of care owed by the organisation to the deceased. The bill proposes penalties including:

- a. A fine not exceeding \$10 million dollars;
- b. A term of imprisonment not exceeding 10 years; and
- c. An Order requiring the company or organisation to publicise the conviction, including in any annual report.

Comments from both members of the government and other political parties suggest that there is some support for an offence of corporate manslaughter, or a comparable offence, to be introduced.

Implications of Pike River

From the Royal Commission Report it is clear that the Commissioners see liability for workplace accidents commences in the boardroom. Health and safety cannot be considered a peripheral issue and must be a fundamental part of business decisions at all levels of the company. If the Pike River recommendations are adopted, which appears likely, then it is correspondingly likely that the Independent Taskforce into Workplace Health and Safety, due to provide its final report in April 2013, will propose that directors face more onerous obligations to ensure safety in the workplace and that such obligations will be regarded as paramount.

Directors of businesses will be required to have a comprehensive and up to date risk framework, to engage independent advice when required on issues of risk, to fully arm management with sufficient information and to hold management strictly to account in respect to compliance.

It appears inevitable that the scope of governance, and the obligations attaching to individual directors both in the sphere of health and safety and generally, are about to become a lot more onerous.

1 *Trevor Ivory Limited v Anderson* [1992] 2 NZLR 517 (CA)

2 *Hedley Byrne & Co Limited v Heller & Partners Limited* [1964] AC 465 (HL); *Williams v Natural Life Health Food Limited* [1998] 1 WLR 830 (HL)

4 Section 56 Health and Safety in Employment Act 1992

5 *Davidson v Registrar of Companies* [2011] 1 NZLR 542, High Court Wellington August 2010; *R v Moses, Doolan & Young* High Court Auckland, CRI-2009-004-1388, 8 July 2011; *R v Graham & Ors* [2012] NZHC 265, High Court Wellington, 24 February 2012; *R v Petricevic & Ors* [2012] NZHC 665, High Court, Auckland, 5 April 2012; *Steigrad v BFSL 2007 Limited* HC Auckland CIV-2011-404-611, 15 September 2011.

6 Section 37 Health and Safety at Work Act 1974

7 Section 27 of the Model Work and Safety Bill has been enacted at federal level, and in the Australian Capital Territory, New South Wales, Northern Territory and Queensland. It provides that an officer of a corporate entity must exercise due diligence to ensure that the person conducting the business or undertaking complies with [their] duty of obligation.