reasoning in *Bradken*, a decision from a simpler time, and one which preceded the concern of the last decade or so with forcing Governments, when acting commercially, to play on a level field.

The reasoning of the majority is marked by concern as to how the TPA has been developed in the light of reports of enquiry, such as the *Swanson Report*[48] and the *Hilmer Report.*[49] The legislative history of the TPA is scrutinised fruitfully[50]. For this work by the majority Justices we have much to be grateful for, as we enter a commercial environment in which agreements between the public and private sectors will only proliferate and grow in complexity. The firm application of the TPA to public sector activities in *NT Power* is salutary and to be applauded.

GRETLEY PROSECUTION – MINE MANAGERS AND SURVEYOR GUILTY OF SAFETY BREACHES

Stephen Finlay McMartin v Newcastle Wallsend Coal Company Pty Ltd & Ors ([2004] NSW IR Comm 202 (unreported, Industrial Relations Commission of NSW in Court Session, Staunton J, 9 August 2004))

Occupational Health and Safety Act – Breach – Liability of Companies – Liability of individuals – Persons concerned in the management of a corporation – All due diligence

Trent Sebbens*

The Industrial Relations Commission of New South Wales in Court Session has recently convicted two mine managers and a mine surveyor over their role in the 1996 Gretley Colliery disaster which led to the deaths of four mine workers. The case is significant in its considers of the circumstances in which individuals will be found to be "concerned in the management of a corporation" and therefore deemed to have committed the same breaches as an employer under the *Occupational Health and Safety Act 1983* (NSW) (OHS Act).[1] The reasoning may be informative for tribunals and courts in other jurisdictions which impose individual liability for safety breaches.[2]

GRETLEY ACCIDENT

On 14 November 1996 a continuous mining machine which was being used to develop a roadway for a new mini-wall at the Gretley Colliery broke into old workings of the nearby Young Wallsend

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48 Ibid at [118].
49 Ibid at [21]ff.
50 Ibid at [116]ff.
* Lawyer, Blake Dawson Waldron.
1 Now repealed and effectively replicated by the *Occupational Health and Safety Act 2000* (NSW).
2 See s 167(2), *Workplace Health and Safety Act 1995* (Qld); s 52, *Occupational Health and Safety Act 1985* (Vic); s 61, *Occupational Health, Safety and Welfare Act 1986* (SA); s 55(1), O*ccupational Safety and Health Act 1984* (WA); s 53(1), *Workplace Health and Safety Act 1995* (Tas); s 180, *Work Health Act 1986* (NT).

Colliery which had been declared abandoned in 1928. The old workings were full of water under high pressure, which swept through the new mine workings drowning four mine workers and endangering others through the inrush of both water and dangerous gases. The mine was working to a plan which showed the Young Wallsend Colliery more than 100 metres away. Unfortunately the plans were inaccurate and at the start of the shift, the old workings were only seven or eight metres away.

The incident led to a combined judicial and coronial inquiry by the Court of Coal Mines Regulation presided over by his Honour Justice James Staunton. As a result of the recommendations of the inquiry,[3] amendments were made to the *Coal Mines Regulation Act 1983* (NSW) (CMR Act) in 1998[4] and the Department of Mineral Resources (DMR) – the industry safety regulator – was restructured.

Following the inquiry prosecutions were commenced against the Newcastle Wallsend Coal Company Pty Limited (NWCC) which operated the Gretley Colliery, its parent company Oakbridge Pty Limited (OPL), the mine manager at the time of the incident, the predecessor mine manager, the mine surveyor, two under-managers in charge and three under-managers. A total of 52 charges were laid under sections 15(1), 16(1) and 50(1) of the OHS Act[5] for failure to ensure the health, safety and welfare of employees and contractors at the Gretley Colliery by exposing them to the risk of inrush of water and/or dangerous gases in the mine from the Young Wallsend old workings.

DEFENDANTS FOUND GUILTY

Following a lengthy hearing characterised by numerous procedural challenges, and the NSW Parliament passing legislation to validate the incorrectly commenced charges,[6] Justice Patricia Staunton of the Industrial Relations Commission found NWCC and OPL guilty of the charges. Pursuant to section 50 her Honour also found the mine managers and mine surveyor guilty of the same charges on the basis they were "persons concerned in the management of the corporations". The under-managers were found not guilty as her Honour considered that they were not "persons concerned in the management of the corporation".

Her Honour found that the primary cause of the incident was reliance on plans provided by the DMR for the Young Wallsend old workings and a failure to adequately check and assure their accuracy. The plans were "record tracings" which had been prepared by the DMR in 1980 from an original drawing of the mine prepared in 1892, and amended in 1909, when the Young Wallsend Colliery was operational. The mine discontinued workings in 1912 and was declared abandoned in 1928. The re-drawings wrongly interpreted the old drawing as depicting workings in two separate seams of coal, when in fact all the workings were in the same seam as those in which the Gretley

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3 See T J Wassaf "Legal Issues Arising from the Staunton Report on the Gretley Colliery Tragedy of 14 November 1996" (1998) 17 AMPLJ 345.

4 *Mines Legislation Amendment (Mines Safety) Act 1998* (NSW)

5 Now sections 8(1), 8(2) and 26(1), *Occupational Health & Safety Act 2000* (NSW).

6 The NSW Parliament passed the *Occupational Health and Safety Amendment (Prosecutions) Act 2003* No 83 (NSW) to retrospectively allow any Minister to commence prosecutions under the OHS Act, as the charges had been incorrectly commenced by the Attorney-General/Minister for Industrial Relations rather than the Minister for Mineral Resources.

Colliery was mining. The original 1892 drawing was not provided to the mine by the DMR and was also not requested by the mine. The extent of the workings shown in the re-drawings were relied upon by the mine in preparing plans for a mini-wall development application for the Gretley Colliery which were submitted to, and approved by, the DMR.[7]

Justice Staunton found that the defendants had failed to access the original 1892 drawing from the DMR which, had they have done so, would have indicated inaccuracies in the re-drawing and uncertainty as to the extent of the Young Wallsend old workings. Further, Her Honour found that the defendants should have undertaken more extensive research into the extent of the old workings, reviewed other sources of information concerning the old workings such as historical texts and conducted pre-drilling or other geological tests. She found that the failure to undertake such research and to be satisfied as to the accuracy of the depiction of the old workings in the re-drawings provided by the DMR, and the assumptions made in those re-drawings, was causally connected to the inrush and therefore the fatalities. Such research would have indicated that the old mine workings were 100 metres or more closer to the proposed development heading than shown on the Gretley Colliery mine plan, and should not have been relied upon to plan and undertake the work. Her Honour stated "the defendants, in my view, knew or ought to have known how critically important it was to ensure that the mine plans they were relying on as depicting those old workings were accurate" and that failing to do so had created a working environment "fraught with risk to safety that was real and foreseeable" (at [808, 804]).

Justice Staunton also found that the failure to perform a risk assessment exacerbated the risk to persons working on the development roadway. Primarily this was because the hazard of inrush of water and dangerous gas from the old workings was not properly identified and therefore not appropriately managed. This had the consequent effect that person working on the development roadway were not alert to the risks of inrush, and the significance of early indicators of those risks such as water seeping into the new workings, which they could have reported and properly followed up. This lack of communication concerning the risk of inrush made those working on the mini-wall development ill-prepared as to what to do, and uninformed as to the dangers they faced, when the actual inrush occurred.

Notably Justice Staunton found that OPL, the parent company of NWCC, was liable for the same offences as NWCC. Her Honour rejected the argument that OPL should be excluded from prosecution on the basis that its involvement in the Gretley Colliery was limited. Justice Staunton held that the overwhelming conclusion on the evidence was that "OPL was very much a hands on and dominant parent company" in relation to the running of the Gretley Colliery which went as far as ensuring that "the strategic and policy directives that it put in place were transmitted into practical reality at the workplace and it achieved this by a high degree of direct control over significant issues, including safety" (at [289]).

NO DEFENCE AVAILABLE FOR CORPORATIONS

NWCC and OPL argued a defence under section 53 of the OHS Act that the cause of the inrush was outside their control and it was therefore impractical for them to make provision for the risk of

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7 Pursuant to section 138(1), CMR Act.

inrush.[8] They argued that they were entitled to rely on the re-drawings provided by the DMR, that the cause of the inrush was the wrong depiction of the old workings in these re-drawings, and that therefore the inrush was effectively caused by the DMR whose actions were beyond their control. The judicial inquiry had previously found that the DMR had contributed to causing the accident through its failures in accurately interpreting and producing the re-drawings and in not properly appraising NWCC's mini-wall application.[9]

Justice Staunton rejected the argument on the basis that the companies had independent duties to ensure the safety of employees and contractors, and also to ensure the accuracy of mine plans. Her Honour found that the cause of the inrush was a failure of NWCC and OPL to properly research the extent of the old working. Arguing that the DMR's error was beyond the defendant's control or was the cause of the inrush missed the point that they had a strict and absolute obligation to ensure a safe place of work and manage against the danger of inrush.[10] Her Honour stated that "there is no doctrine of implied infallibility to be applied to the information ... given out by any government department. While it is reasonable to presume that such information would generally be correct, that in no way removes the defendant's obligations to ensure the accuracy of the information released" (at [465]).

MINE MANAGERS AND MINE SURVEYOR GUILTY

Having found that NWCC and OPL had breached their duties under the OHS Act, Justice Staunton went on to consider whether or not the two mine managers, five under-managers and the mine surveyor should also be deemed to have committed the same offences under the OHS Act pursuant to section 50(1). This provision effectively imposes liability on persons whose acts or omissions are complicit in the activities of the defendant corporations that created the breach. All eight individuals argued that section 50(1) did not apply as they were not “concerned in the management of the corporation”.

Justice Staunton firstly reviewed the appropriate factors which would determine whether the section applied to a particular individual. Her Honour considered that for a person to be concerned in the management of a corporation the person had to have a decision making role or authority which "may involve advice given to management encompassing a participation in its decision making processes and the execution of those decisions going beyond the mere carrying out of directions as an employee" (at [885]). The decision-making authority or advice giving role of the person must affect the corporation as a whole, or a substantial part of it. However, this did not require the individual to be at the highest levels of management in the corporation. Relevant factors to determine the question would also include the size and structure of the corporation, as well as the role of the person within the corporation.

Her Honour concluded that to be subject to section 50(1) a person must hold a "position to influence, by advice or decision making, the conduct of the corporation in relation to its contravention or whose decision making powers within the corporation comprehends activities the

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8 Now section 28, *Occupational Health & Safety Act 2000* (NSW).

9 Despite the judicial inquiries findings the Attorney-General decided not to prosecute the DMR based on legal advice that any prosecution would not be successful.

10 See similar comments concerning reliance on DMR authorisations in *Rodney Morrison v Wambo Coal Pty Ltd* [2004] NSW IR Comm 189 (unreported, Boland J, 2 July 2004).

consequences of which have a significant bearing on the conduct of the corporation relevant to its contravention" of the OHS Act (at [885]).

The two mine managers were found by Justice Staunton to be concerned in the management of NWCC and OPL. Importantly, her Honour noted that whilst it was significant evidence, "it also cannot be said, without more, that appointment to a statutory management position under the CMRA is conclusive evidence of that person being concerned in the management of the corporation that owns or operates the mine" (at [890]). She considered that the most significant factor was the mine managers' appointments as General Manager of the Gretley Colliery. In their General Manager roles they had responsibility for the total management of the Gretley Colliery, broader than just their statutory role, including responsibility for safety, financial, operational, marketing and human resource matters. They also had a strategic decision making role in OPL and responsibility for implementing and overseeing the application of corporate decisions at the Gretley Colliery.

In relation to the under-managers her Honour found that they were not persons concerned in the management of the defendant corporation. She stated that they only held statutory positions under the CMR Act which did not elevate them to become persons concerned in the management of the corporation. She was not satisfied beyond reasonable doubt that they were involved in any decision-making role in relation to the breaches of the OHS Act.

Justice Staunton found that the mine surveyor, however, was concerned in the management of the NWCC and OPL as the surveyor had prepared plans for the mine which were used as a basis to make management decisions about mining activities within the Gretley Colliery. The mine plans were relied on to ensure that mining activities were free of risk including avoiding hazards such as inrush, and their accuracy was therefore absolutely critical. The mine surveyor's role through decision making and advice was therefore causally connected to the corporations' failure to properly research the extent of the Young Wallsend old workings. Her Honour stated that the mine surveyor had taken on the responsibility of ensuring the accuracy of the mine plans by certifying them.

NO DEFENCE FOR INDIVIDUALS

All individuals argued the defence that if they were found to be persons concerned in the management of NWCC and/or OPL, that they had used all due diligence to prevent the companies' contraventions of the OHS Act. Justice Staunton rejected this defence in relation to the mine manager and mine surveyor finding that they were in positions to prevent the contraventions and had not used all due diligence to research the exact location of the old workings or ensure the accuracy of the mine plans. She held that the advice and decision making role of the mine managers would have been a decisive factor in decisions taken by NWCC and OPL as to proposed mining activities at the Gretley Colliery.

IMPLICATIONS

This decision highlights the potential personal liability of managers, and persons who may be found to be concerned in the management of corporations, for breaches of the OHS Act. The decision also reinforces, if not heightens, the responsibility of persons in managerial positions to ensure the safety, health and welfare of employees and contractors at the workplace. This is

particularly significant in the context of the current public scrutiny of managerial liability for workplace deaths resulting in pressure on governments to introduce industrial manslaughter legislation,[11] and the recent focus on the safety performance of the mining industry which will be subject to a special NSW Mine Safety Review headed by former NSW Premier Neville Wran.[12]

Sentencing for NWCC, OPL, the mine managers and mine surveyor is still to occur. Appeal of the decision, or a challenge to the validity of the retrospective legislation validating the defective charges, is reported to be likely.

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11 See R McCallum et al, *Report to WorkCover Authority of NSW: Advice in relation to workplace death, occupational health and safety legislation & other matters 2004* (2004) WorkCover Authority of NSW.

12 See A Stafford "Miners pin hopes on Wran" (2004) *Australian Financial Review* (1 October 2004).