australasian risk management

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australasian risk management

From the editor

Mark Phillips

How many times do we hear of organisations caught by surprise with a crisis of extreme consequences? Frequently, it is those organisations that fall by the sword of three critical elements: no time, no resources and no information.

However, this was not the case with a NSW council which — perhaps justifiably — thought it had all the procedures in place to deal with a disaster, only to discover that other organisations can derail the management process with devastating consequences.

Despite having well-designed and tested management procedures, Eurobodalla Shire Council's efforts to sensitively handle a workplace death were effectively undermined by police and media influences.

'One media outlet thought it was doing the right thing by leaving out the name of the deceased, but by providing too much detail it inadvertently alerted the dead man's family to his death before they had been told by the police,' the council's corporate services manager, Ken Nolan, explains.

'A news bulletin revealed a 58 year-old man employed by the council had been killed at a construction site on Dunn's Creek Road. This may not hold much relevance to a visitor from Canberra or Sydney, but it did for those in a relatively small rural community.'

The council's media officer had prepared a formal media release in accordance with its emergency procedures, but it was withheld pending police notifying the deceased man's family about the accident.

'But the unapproved media bulletin gazumped this sequence and caused a high degree of disquiet for the deceased's family and senior staff at the council,' Nolan says. 'Organisations designing and implementing emergency procedures need to consider the differing motivations and time constraints of other parties involved in the process.

'All of these issues need to be considered when reviewing and improving emergency plans and procedures at an organisation. Eurobodalla Shire Council has learned from this incident and modified its procedures as a result. An informed organisation and its employees are constantly on the lookout for the unexpected.'

The clear message in all of this is that even the best laid plans to deal with a crisis situation can, and sometimes will, go wrong. Even so, because a crisis can occur in any organisation, it is still essential that all organisations take every possible precaution to deal with worst-case scenarios. Experts agree that there are four key steps to help shield against a crisis:

- pre-crisis audit (includes risk evaluation, organisational crisis history and crisis preparedness);
- crisis management plan (includes alert triggers, procedures and resources);
- crisis training (scenario-based to identify weaknesses in the plan); and
- crisis preparedness audits (ongoing evaluation).

Alas, when all these measures are in place, there might also be a fifth step — hoping for the best. ●

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Confronting the 'green tape' challenge

Although Australian businesses broadly support the need to maintain the highest standards when it comes to the country's waterways, air and natural environment, more and more are asking for a better way to achieve these outcomes than a compliance system that is becoming increasingly ad hoc, inconsistent, complex and costly.

One of the major challenges facing Australian businesses over the coming decade will be 'green tape', according to a new study released by the NSW Business Chamber. Released in September this year, *Environmental Law and Small to Medium Enterprises in Australia*, had the following findings.

- Environmental law in Australia is one of the fastest growing areas of law both in terms of scope and complexity.
- Regulatory penalties are becoming more severe and regulatory bodies and local councils are gaining greater power to monitor and prosecute businesses.
- The traditional regulatory focus on large businesses and industry is shifting to also cover small- to medium-sized enterprises (SMEs) which, in resource, energy and waste intensive industries, will be at the greatest risk of increased costs of compliance in a tighter regulatory environment.
- NSW is the most prolific regulator, with 68 Acts relating to the environment passed since 1986, almost equal to the other states combined (84 Acts) and surpassing new Commonwealth legislation (19 Acts).
- The debate over climate change is a clear driver of such growth.
- Local governments across Australia continue to impose stricter environmental conditions in their planning controls, which will impact SMEs.
- An emerging trend of 'vicarious liability', where the corporation is deemed to have breached an Act through the actions of one of its directors or managers, and 'strict liability', where an offence can be imposed without proof of fault or intent, is tightening the burdens on business.

Examples

- Environmental planning instruments, like local environment plans, can create a complex and confusing development process of overlapping requirements.
- We are seeing the early stages of extended producer responsibility, where producers take greater responsibility for managing the environmental impact of their products throughout their life.

Future impacts

- SMEs should prepare for increased regulation in the use of energy by businesses so they are in a position to be competitive when an emissions trading scheme is introduced.
- The disparate nature of environmental law across its many jurisdictions makes it difficult for small businesses which, by their very nature, are heterogeneous and diffuse, to be aware of the environmental regulations impacting their business.

According to NSW Business Chamber CEO, Kevin MacDonald, regulators and business need to be aware of the tectonic shifts occurring in the administration of regulation in Australia.

'Australian businesses are dealing with five levels of intervention in environmental regulation — international law, national law, state law, local councils, and various arms of the judiciary. It is no surprise that we are seeing the emergence of green tape as a real business issue,' he says.

He believes the record of governments in relation to green tape is very much at odds with recent work by all governments to streamline areas of 'red tape'.

'Governments of all political backgrounds have made real progress in recent years in streamlining the traditional areas of red tape without compromising the underlying purposes for which the regulation was developed,' he maintains.

'Reports from the banks and Independent Pricing and Regulatory Tribunal have highlighted the importance of creating regulatory environments that have clarity of intent, consistency in objectives, and can withstand a reasonable social and economic cost/benefit analysis. However, I question if the same rigour is being applied to areas of green tape.

'One of the great competitive advantages of Australia is its natural, clean environment — and I am not saying we should take short-cuts in any area of environmental conservation, protection and resource allocation. At the same time, we cannot let our approach to green tape be ad hoc, inconsistent, costly and complex.

'The question up for debate is whether we are applying the same rigour to decisions relating to environmental issues. We have seen in the area of climate change all areas of government rushing to introduce changes, often under the guise of being seen to 'do something', with those decisions impacting on everything from the establishment of new coal mines to the types of light bulbs used in family homes.

'The danger is that this uncoordinated and ill-considered approach across all levels of regulation will create major costs for Australian businesses and consumers, with little real idea of the benefits provided by

such regulation. I expect that in five to 10 years time, governments will be setting up other inquiries trying to unravel costly and complex green tape systems.'

He believes the green tape trends were very clear before the start of the climate change debate.

'The concern of business is that the climate change issue will result in double regulation — with an emissions trading scheme seeking to produce a market-based solution in effect replicated by regulation on the day-to-day activities of business.'

As such, he says the NSW Business Chamber study represents an important debate starter about green tape.

'The study should not be seen as an attempt by business to unwind regulation. Rather, it should be seen for what it is — a warning to learn from the red tape lessons of the past and ensure that the administration of green tape is done in the most efficient and streamlined way possible.'

NSW Business Chamber has over 30,000 members and is affiliated with 110 chambers of commerce. ●

Environmental breaches: directors and officers beware

In this detailed analysis, Jane Hall, a Senior Associate with law firm Blake Dawson, examines the frequently complicated issue of director liability in relation to environmental breaches.

In September 2006, the Federal Corporations and Markets Advisory Committee (CAMAC) released a report entitled *Personal Liability for Corporate Fault* (the report). CAMAC reviewed the circumstances in which directors and other individuals involved in managing companies can incur personal criminal liability as a result of misconduct by the company. It included a review of legislation dealing with environmental protection (as well as occupational health and safety, hazardous goods and fair trading laws).

The report concluded that there is a broad range of statutory tests within and between jurisdictions for imposing personal liability for corporate misconduct. Liability may be based on one or more of the following:

- positional liability — an individual's formal position in the company;
- managerial liability — an individual's involvement in the management of the company;
- designated officer liability — an individual's designated organisational or operational responsibility for the specific conduct dealt with in the legislation; and/or
- participatory liability — an individual's involvement in promoting, authorising, permitting, or failing to prevent, a breach by the company.

The positional/managerial approach was found to predominate. However, CAMAC identified two main areas of concern — the principle of liability without fault for corporate officers, and the complexity and inconsistency of legislation in the area. It found that, on the whole, the legislation did not require proof by the prosecution of any personal fault on the part of the individual being prosecuted.

As a result, it concluded that provisions of this kind are objectionable in principle and unfairly discriminate against corporate personnel compared to other people. Although these provisions may be well-intentioned — to encourage corporate compliance — CAMAC did not think there was justification for a general abrogation of the rights of individuals.

CAMAC said that while the provisions may be generally acceptable for small companies, they are not well suited to the realities and complexities

of larger companies. This is especially the case in the widely used board model, where there is a majority of non-executive or independent directors who are not involved in day-to-day company operations.

Liability without fault under environmental legislation

At common law, corporate officers are generally not liable for environmental offences committed by their company. However, all Australian jurisdictions have introduced legislation imposing liability on individuals for corporate environmental breaches, by virtue of their position in the company. Such liability, known as 'derivative liability', can potentially attach to directors, chief executives, receivers, liquidators and employees with management responsibilities.

In Victoria, NSW, WA and the NT, if a company commits an environmental offence each or every (depending on which jurisdiction you are in) person who is a director or concerned in the management of the company is also guilty of the offence. These jurisdictions have therefore adopted a positional/managerial liability model.

In the ACT, if a company commits such an offence, a 'prescribed officer' is also guilty. A prescribed officer is defined as:

- a director or other person (however described) responsible for the direction, management and control of the corporation; or
- any person who is concerned in, or takes part in, the management of the company and whose responsibilities include duties in relation to the matters giving rise to the offence.

The ACT therefore adopts a positional/managerial/designated officer liability model.

In Queensland, an executive officer has a statutory obligation to ensure that the company complies with environmental legislation. If the company commits an environmental offence, 'each of the executive officers' of the company also commit an offence; namely, the separate offence of failing to ensure that the company complies with the Act.

An 'executive officer' is a person who is:

- a member of the governing body of the corporation; or
- concerned with, or takes part in, the corporation's management, whatever the person's position is called and whether or not the person is a director of the company.

Given this, the Queensland legislation adopts a very different method of imposing liability on corporate officers. Rather than the corporate officer being deemed to have committed the same offence as the company, the officer is taken to have committed the separate offence of failing to comply with the statutory duty to prevent the contravention by the company. Regardless, it is apparent that a positional/managerial liability model underpins the provision.

Finally, in SA and Tasmania, if a company commits an environmental offence, a person who is an 'officer' of the company is liable. Further, where a company commits such an offence, an officer who knowingly promoted or acquiesced in the contravention is guilty of contravening the provision. An 'officer' is defined to include:

- a director;
- the CEO;
- a receiver or manager of any property of the company or a liquidator of the company; and
- an employee with management responsibilities in respect of the matters to which the contravention or alleged contravention relates.

As such, both SA and Tasmania adopt a positional/designated officer/participatory liability model.

Defences

Defence of 'no knowledge'

This defence has recently been repealed in Victoria and NSW because it was considered to encourage officers to deliberately 'turn a blind eye' to environmental offences. It is also not available in Tasmania, Queensland and SA. In those jurisdictions where the defence remains, the legislation is drafted so as to discourage blind or wilful ignorance:

- ACT — the defence applies if the officer or employee could 'not reasonably have been expected to be aware' of the contravention.
- NT — the defence applies where the person did not know and 'ought not reasonably be expected to have known' that the offence was being committed and took all reasonable steps to prevent or stop the commission of the offence.
- WA — the defence applies where the person did not know and 'could not reasonably be expected to have known' that the offence was being committed.

In these jurisdictions, there is an element of objectivity to the test which prevents a wilful 'head in the sand' approach to environmental management. However, the defences are worded differently in all three jurisdictions, and in the NT the defence is extended to a hybrid due diligence defence.

Defence of 'not in a position of influence'

In Victoria, WA, NSW and Queensland there is a defence available for a corporate officer who was not in a position to influence the conduct of the company in relation to the contravention. No such defence is

At common law, corporate officers are generally not liable for environmental offences committed by their company. However, all jurisdictions have introduced legislation imposing liability on individuals for corporate environmental breaches, by virtue of their position.

available in Tasmania, SA, ACT or the NT.

The difficulty with this defence, for directors in particular, is that as board members, they can in theory influence any conduct of the company. Senior managers also have considerable influence. That said, it might be available to a director in limited circumstances, for example where:

- the director is in a minority on the board in arguing that a more effective but more expensive system of environmental management should be implemented, which the other directors were not prepared to adopt; or
- at the relevant time, the director was on leave of absence, or suffering some other disability when a particular policy decision was taken and may not have been informed of that decision.

Defence of 'due diligence'

In all states and territories there is a due diligence defence available to corporate officers in relation to the derivative liability provisions. However, different tests apply in different jurisdictions.

NSW and Victoria have the same statutory test for due diligence: that the person 'used all due diligence to prevent the contravention by the corporation'. Courts have rejected that a standard of perfection is required to make out the defence — 'while all' must have its proper connotation, similar stress must be given to 'due' (*State Pollution Control Commission v RV Kelly* (1991) 5 ACSR 607).

The defence is similar in WA, although the person must also have used all reasonable precautions to prevent the commission of the offence, in addition to using all due diligence.

In Queensland, the corporate officer needs to have taken 'all reasonable steps to ensure the corporation complied with the provision'.

In the ACT, the corporate officer needs to have 'exercised due diligence to prevent the body corporate from doing the act or making the omission alleged to constitute the offence or an element of the offence committed by the corporation'. There is also a separate due diligence defence outside of this derivative liability provision. Section 153 of the *Environment Protection Act 1997* (Act) basically repeats the due diligence defence, but then sets out a number of matters a court may have regard to when deciding whether a defendant has exercised due diligence. It is not clear how s 153 fits in with the due diligence defence included in the derivative liability provision.

In the NT, the defence is made out if the defendant could not, by the exercise of reasonable diligence, have prevented the commission of the offence by the corporation.

In Tasmania and SA, the alleged contravention must not have resulted from any failure on the defendant's part to take all reasonable and practical measures to prevent the contravention or contraventions of the same or similar nature. Without limiting this test, the defence includes the defence that the act or omission alleged to constitute the contravention was justified by the need to protect life, the environment or property in a situation of emergency and that the defendant was not guilty of any failure to take all reasonable and practicable measures to prevent or deal with such an emergency.

In Tasmania and SA, where a company or other employer seeks to establish the defence by proving the establishment of proper workplace systems and procedures designed to prevent a contravention of the Act, that proof must be accompanied by evidence that:

- proper systems and procedures were also in place whereby any such contravention or risk of such contravention of the Act that came to the knowledge of a person at any level in the workforce was required to be reported promptly to the governing body of the corporation or to the employer, or to a person or group with the right to report to the governing body or the employer; and
- the governing body of the corporation or the employer actively and effectively promoted and enforced compliance with the Act and with all such systems and procedures within all relevant areas of the workforce.

However, to the extent the officer being prosecuted is not an employer, this additional provision will not apply.

From cases considering the due diligence defence in Australia and overseas in the sphere of environmental law, some of the matters which courts have considered when determining whether the defence has been made out include the following (bearing in mind that due diligence will depend on the circumstances of each particular case).

- Are precautions in place to prevent the specific and likely risks arising from operations, rather than merely general precautions taken in the ordinary course of business? Whether appropriate precautions have been taken will be a question of fact, and will be decided objectively according to the standard of a reasonable person in the circumstances (especially in relation to activities requiring experience and acquired skill).
- Was a pollution prevention system in place which was supervised, inspected and improved over time?
- Was a system in place, sufficient within the terms and practices of the relevant industry, to ensure compliance with environmental laws? Are staff required to report back periodically to the officers on the operation of the system? Are staff required to report any substantial non-compliances to officers in a timely manner?
- Do officers review environmental compliance reports? (They are justified in placing reasonable reliance on reports provided to them by corporate officers, consultants, counsel and other informed parties.)
- Do the officers substantiate that staff are promptly addressing environmental concerns brought to their attention by government agencies or other concerned parties including shareholders?
- Are the officers aware of the standards of their industry and other industries which deal with similar environmental pollutants or risks (although standard practice does not set an immutable standard)?
- Do the officers immediately and personally react when they have notice the system has failed?
- Are there remedial and contingency plans for spills, a system of ongoing environmental audit, training programs, sufficient authority to act and other indices of a proactive environmental policy?
- With a mind concentrated on the likely risks and without negligence or fault, were reasonable precautions taken beforehand to prevent the incident, and has due diligence in the form of appropriate and persistent effort to prevent the incident been exercised?
- If the incident is shown not to be foreseeable, or, if foreseeable, a risk 'so remote that a reasonable person, careful of the safety of his or her neighbour would think it right to neglect it', then the defence will be made out. Perfection or the use of increased knowledge or experience embraced in hindsight after the event should form no part of what is reasonable in the circumstances. Conduct after the incident does not lead to the conclusion that the failure to use it earlier was negligence, but it can show that a particular precaution was practicable. Further, while the fact that the 'absence of a mishap' does not entitle a person to ignore safeguards against dangers, it is equally true that years of experience without accidents may tend to confirm an assessment that the risks of harm are negligible.

In all states and territories there is a due diligence defence available to corporate officers in relation to the derivative liability provisions.

Defence available to a corporation

In Victoria, WA and the ACT, there is a defence available to an officer if it can be shown that the company would not have been found guilty of the offence because the company would have been able to establish a defence. In the NT, the defence is worded slightly differently, and is made out if the company had, under the Act, a defence to the offence that the defendant is, apart from the derivative liability provision, to be taken to have committed.

This defence is of limited value in Victoria, where the main environmental offences are offences of absolute liability. For these offences, the only defences available to a company are that the offence occurred in an emergency, or the relevant discharge was in compliance with a permit or licence issued under the Act.

In WA, the defence is of greater value. For the most serious offences, a company may use the defence of using due diligence and reasonable precautions. This means that it will be sufficient for an individual to prove that the company used due diligence and reasonable precautions in order to defend a claim for personal liability. In some situations, the company will also be able to rely on a defence if the offence was caused by accident or for the purpose of preventing danger.

In the ACT, the legislation distinguishes between the offences of:

(a) 'knowingly', 'recklessly' or 'negligently' polluting the environment causing harm; and
(b) polluting the environment causing harm.

The offences in (a) attract much greater penalties than those in (b). In this jurisdiction, the defence is therefore useful for the offences referred to in (a), as the prosecutor must either prove intent, recklessness or negligence. However, the defence is of limited practical utility in relation to the offences referred to in (b), as the offences are strict liability offences.

There is no equivalent express defence available in Tasmania, SA, NSW or Queensland, although such a defence may be implied (because the company must be guilty of the offence for the derivative liability provisions to apply).

In addition to the corporate officer defences summarised above, there is a unique defence available in the NT; namely, that the act or omission that constituted the offence took place without the defendant's authority, permission or consent.

Complexity and inconsistency

From the analysis above, it is clear that CAMAC's concerns about undue complexity and difficulties in understanding compliance requirements are well founded in the context of environmental legislation. This is particularly so for companies operating in more than one jurisdiction in Australia.

Reforms needed

In light of the concerns identified by CAMAC, the report concluded the following.

- Liability for breach of a legal requirement by a company should fall, in the first place, on the company. Appropriately weighted monetary or other penalties for corporate offences can have an impact on shareholders and others who have a stake in the success of a company and may influence the behaviour of those individuals who control and manage the company, whether through their being held accountable by shareholders or otherwise.
- As a general principle, individuals should not be penalised for misconduct by a company, except where it can be shown that they have personally assisted or been privy to that misconduct.
- In some circumstances, a legislature may judge it appropriate to go beyond accessorial liability and impose a duty on a specified individual to ensure that a company complies with a particular legislative requirement. However, this should only operate when the duties of the individual are specific and relate to an operational area reasonably regarded as within that person's actual control, rather than extending the duty to situations which require the exercise of significant judgment or discretion. A model provision for the designated officer approach was proposed by CAMAC.
- In some circumstances, it may be appropriate to impose on relevant corporate personnel a more positive duty of care than may be derived from ordinary principles of accessorial liability. In exceptional circumstances, the public interest in achieving compliance by a company may be seen as requiring officers to assume a more positive role within their sphere of influence and to risk personal liability where they have acted with reckless or negligent disregard of the company's relevant conduct. A model provision for extended accessorial liability was proposed by CAMAC.
- There is a need for a more consistent, as well as a more principled, approach to personal liability across the various jurisdictions. A more standardised approach would reduce complexity and compliance costs and aid understanding. It would assist efforts to promote effective corporate compliance and risk management, while providing more certainty and predictability for the individuals concerned.

Next steps

The report notes that the Federal Government has indicated that it will consider the report and make appropriate recommendations to the Ministerial Council for Corporations. This position was reiterated by the government in August 2006 in its response to the Regulation Taskforce report *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* (January 2006). This report recommended that the Council of Australian Governments undertake a review to identify reforms to achieve more nationally consistent regulation of personal liability for company directors and officers.

Given that the issues raised in the report relate to not only federal legislation, but also state and territory legislation and a range of legislative topics, only one of which is environmental, any broad reform in the environmental sphere is likely to be some time coming. ●

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Investment talent crisis looms

A lack of suitably qualified personnel is raising a raft of new risks for the investment sector.

Investment managers continue to experience outstanding growth and remain optimistic for the future, despite tighter margins. However, a shortage of quality people looms as the most pressing threat to future profitability, according to the Pricewaterhouse-Coopers (PwC) *Australian Investment Management Survey 2007*.

For the first time ever, losing vital personnel has topped the survey's list of threats to profits — ahead of retaining key clients and own fund performance. When it comes to specific challenges facing CEOs, it is a similar story — with retaining key people the most important issue — even ahead of increasing revenue.

'The industry is well managed, responsive to change and comprehensively regulated. But, the biggest question in the mind of many CEOs is whether there are enough quality people to support the market's anticipated growth. Since we started this survey, the level of concern on finding and retaining quality people has never been higher,' says PwC partner, Peter van Dongen.

The survey shows there is a looming shortfall of financial planners. More than a third of respondents indicated their intention to grow planner numbers by more than 25 per cent, but only 13 per cent actually expected to attain this level.

It also forecasts the increase of alternative products in the asset mix — a trend that is being mirrored globally. Currently, 74 per cent of respondents have less than five per cent of their assets housed in alternative products like private equity, hedge funds and infrastructure. However, in three years time, 79 per cent of respondents expect to have greater than five per cent of assets housed there.

'A big part of the Australian industry's success can be put down to product innovation, but with it comes greater risk,' van Dongen says. 'The industry needs to match the resources put into developing products with its efforts to understand and explain the risks to advisers, superannuation trustees and end users. While a lot of effort is going into that, the key question remains: Who is going to understand and advise on the risks if there are not enough financial planners?

'Unless the emerging talent gap is addressed, there must be a serious question as to how the industry's growth aspirations can be achieved without what may be an unacceptable increase in risk.'

New markets and products remain on the CEO agenda, but the key business objective among survey respondents is the increased distribution of existing products in existing markets.

'In part, this is a reflection of the market being a scale game. Still, some CEOs are saying 'enough is enough'. Until more workable legislation to rationalise older products is available, leveraging the existing product suite makes excellent business sense.'

The survey also highlights the export potential of the Australian industry. Over 75 per cent of respondents expect to source greater than five per cent of their assets from outside Australia over the next three years — compared to just over 50 per cent who currently do so.

Interestingly, while respondents were confident in their own handling of conflicts of interest, they thought other industry participants could improve their management of such issues.

'Australian fund managers control $1.2 trillion in assets. This very significant market has been built on a series of complex relationships that has served the needs of the investing public and, indeed, the investment industry, very well. In a mature market like this, it would be naïve to ignore the existing industry architecture and try and start with a totally blank sheet of paper. Clearly, some conflicts should be avoided, but equally, many industry relationships can be responsibly managed,' van Dongen says.

Who is going to understand and advise on the risks if there are not enough financial planners? Unless the emerging talent gap is addressed, there must be a question as to how the industry's growth aspirations can be achieved without an unacceptable increase in risk.

Most respondents to the survey favour disclosure as well as documented policies and procedures to manage conflicts of interest.

Van Dongen summarises, 'While clear and concise disclosure is always a start, sometimes it is not enough. Initiatives by industry bodies and regulators to educate participants on how to manage this complex area are gaining momentum. However, current legislation gives boards responsibility for governance and they must act in investors' best interests. This creates the guiding principle. Ultimately it is up to those charged with governance to take a clear and demonstrable lead on what is acceptable and what is not.' ●

People outstrip profits as the number-one priority

Human resources has been identified as the overriding challenge for private companies as the so-alled 'war for talent' ups the ante on staff retention.

People are now the number-one concern for private companies, ranking before growth and profitability, according to the findings of KPMG's *Private Companies Survey 2007*.

Despite a belief by private companies that the Australian market is teetering on the crest of the boom and that interest rates will continue to rise, business confidence is high — the only blip on the horizon is the shortage of qualified people.

'While we are at near full employment, the war for talent will be ongoing and unrelenting for private companies,' says partner in KPMG's Middle Market Advisory practice, Don Abell.

More than 45 per cent of companies surveyed noted that the strength and ability of their management team were key to the success of their business to date. In addition, 35.9 per cent noted that the talent and commitment from their employees were key to the success of their business.

Having the right people is a strong competitive edge, with 29.2 per cent of respondents indicating quality of customer service being key to their competitive advantage and 26.2 per cent nominating the skills of their management team. More than 47 per cent of companies viewed attracting suitably qualified employees as their major challenge, and 18.5 per cent found retaining staff a major challenge. Also topping the list of challenges was achieving sustainable growth and maintaining profitability against increasing local competition.

'The survey indicates that private companies are not taking the skills shortage lying down, with many having shifted their focus to compete in the war for talent,' Abell says. 'Employers have become more sophisticated in the past three years in the way they engage with employees and are making substantial changes to reward, recognise and therefore keep their employees. A large number of businesses have introduced rewards and annual salary reviews for exceptional performance and over a third are paying their employees an annual bonus.'

As well as financial incentives, employers are becoming more flexible, with nearly half of businesses allowing employees to work from home where appropriate, or permitting greater flexibility in the hours that employees work.

'In addition, nearly half of employers have become more inclusive by regularly keeping employees informed of the company's progress, while nearly two-thirds have started advertising vacancies internally before going to the market,' Abell says.

The survey reveals that companies consider people to be on par with competitive pricing as the most important factor in achieving revenue growth (both 30 per cent), closely followed by the introduction of new products and services.

Interestingly, it also indicates that while 46.7 per cent of companies see the expansion of emerging markets as a major opportunity, and 'entering new geographic markets' as the second most important factor for achieving revenue growth in the next three years, only around 30 per cent of respondents saw themselves as able to compete in the Asia Pacific region.

'Considering that sustainable growth is seen as the second biggest challenge to private companies and they believe the Australian economy has reached its peak, it is very surprising that 43 per cent of companies said they 'didn't know' if they were competitive with their Asia Pacific competitors,' Abell says. ●

Surviving Beaconsfield

Although almost all Australians would have followed the events that followed the Beaconsfield mine collapse, few would be aware of some of the unusual strategies that went on behind the scenes.

'Thinking the worst' was one of the surprising tactics that helped the Beaconsfield mine community survive the intense pressure of the April 2006 underground recovery and rescue operation, according to former Beaconsfield mine manager and the psychologist who saw through the crisis.

Matthew Gill and Dr Robert Long revealed how the human side of the rock fall crisis was managed in an address at the Safety Institute of Australia NSW division's Safety Conference in Sydney in October.

When the Anzac Day rock fall killed miner Larry Knight and trapped miners Todd Russell and Brant Webb, the Beaconsfield community was faced with a unique crisis — all under the glare of what was possibly the greatest media event in Australian history.

Against the odds, the Beaconsfield Mine Joint Venture was successfully able to manage the unexpected events and rescue the two trapped miners after an exhausting 14 day ordeal.

According to Gill and Long, factors including the resilience of management, coordination dynamic, design and use of space, preoccupation with all possibilities and a sensitivity to operations played a part in managing and surviving the crisis. Other important factors included a reluctance to simplify interpretations, a commitment to resilience and the company's carefully-laid disaster plans.

'In the case of Beaconsfield, preoccupation with failure was one characteristic of its success,' Long said. 'Preoccupation with failure is more than just thinking about the worst that could happen — it is far more intentional than that.

'At Beaconsfield, it was having as many options as possible, risk assessing all options, testing in theory and in practice all of those options, above and below ground, and having the creative space and security of culture to imagine the worst that could happen.'

Long said that even the intentional design of the organisation's courtyard outside the emergency operations control group's control room was a critical component in the rescue operation, providing 'connectedness' for the community.

'It was a meeting place, a space to debrief, an observation place to assess fatigue and the mental health of rescuers, as well as a space for managing frustration, eating, conversation and a symbolic place for community, solidarity and collaboration,' he said. ●

Beware carbon confusion

Offsetting the risks of carbon neutrality should be a key issue for all businesses.

Business needs to take a critical approach to understanding what it means to be carbon neutral, in order to capitalise on the opportunities presented by carbon trading as well as avoid future risks, an environment lawyer has warned.

Speaking at a seminar on the risks and costs associated with carbon neutrality, Clayton Utz partner Brendan Bateman said that in the absence of a generally agreed standard for measuring the reporting and abatement of carbon emissions, companies had to think carefully about how they chose to measure their carbon footprint.

'The reality is that the issue is complicated by a number of questions that a business must consider, including what is an emission of the business and what is not,' he said.

According to Bateman, companies face a number of risks — regulatory, financial, business and reputational — if they failed to properly measure their carbon footprint to ensure the integrity of any abatement measures they may undertake.

'To the casual observer, the commitment of businesses to achieving carbon neutrality seems relatively straightforward — it means the business either cuts its emissions to zero or buys carbon offsets to pay someone else to offset its emissions. Or does it?' he said.

Bateman was speaking prior to a panel discussion on the implications for business of the quest to achieve carbon neutrality. Members of the panel included Karel Nolles, associate director, Macquarie Bank; and Judi Hansen, general manager sustainability, Sydney Water.

Nolles examined the wide range of carbon offset instruments available in the market and their price differentials, while Hansen outlined Sydney Water's strategy for becoming carbon neutral by 2020 and the importance of having carbon reduction schemes independently verified.

The third panel member, Paul O'Donnell, partner at Clayton Utz, discussed the risks associated with types of carbon offset products, pointing to the advantages of regulated or verified offset schemes.

'You don't always know what you're getting with non-verified schemes. If you claim a certain level of carbon neutrality or offsetting which is later proven to be incorrect, you may be liable for having made that claim. One of the advantages of verified schemes is the certainty that the abatement you are claiming has occurred,' O'Donnell said. ●

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FBT break from the ATO

Changes to the fringe benefits threshold are a welcome gift when it comes to end-of-year office entertainment, but they are not without some traps for the unwary.

With Christmas just around the corner, employers should consider the tax effectiveness of their corporate entertainment and enjoy the increase of the minor fringe benefits threshold from $100 to $300, according to Deloitte Global Employer Services partner, Frank Klasic.

'With changes in the last year, employers can now spend up to $300 per employee, which could result in more entertainment being exempt from fringe benefits tax (FBT),' he says 'It is important to recognise the FBT implications of any corporate entertainment, because if you do your homework and plan appropriately you can avoid any unforseen cost blowouts.

'Generally, for income tax purposes a Christmas party or function will be tax deductible if it is subject to FBT. If it is not subject to FBT it will not be deductible. However, attendance at the year end Christmas party will almost always constitute entertainment and, as such, FBT can apply.

'There are also special GST restrictions on claiming input tax credits on entertainment costs which are sometimes overlooked by employers.'

Klasic suggests that as a general rule employers should consider all entertainment subject to FBT unless an exemption can be found.

'In some cases, a Christmas party for employees held on the work premises during a working day can be exempt from FBT. There are exceptions to this rule and employers should always check their own situation,' he says.

'Under new rules which have effect from 1 April 2007, if employers spend less than $300 per person on the provision of a fringe benefit, the whole amount can be exempt from FBT when certain conditions are satisfied. This exemption is typically applied at Christmas time when employers provide year-end entertainment to employees.'

Based on a draft ruling issued by the Australian Taxation Office (ATO) in June this year, the $300 limit provides opportunities to treat end of year entertainment as exempt from FBT. In previous years, the exemption limit was only $100 per employee.

Significantly, Klasic says the ATO's draft ruling allows for the new limit to be applied to both an employee and their spouse.

'This means you can have an entertainment event which costs $299 per head and no FBT would apply to either the employee or their spouse,' he says. 'Similarly, often employers will provide gifts such as hampers to staff at a Christmas party event. The $300 limit would apply separately to both the entertainment costs and the hamper, allowing employers to spend up to $299 on each without attracting FBT.'

He notes that another trap to be mindful of is that recreational entertainment (such as an entry ticket to the Melbourne Cup) could also be reportable on employee payment summaries.

'This can catch some employees by surprise if they are not made aware of the implications,' he warns. ●

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