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News Alert - SA Occupational Health, Safety and Welfare legislation amended
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30 October 2007

After much debate the *Occupational Health, Safety and Welfare (Penalties) Amendment Bill 2006*, first introduced to Parliament in December last year, was passed by the South Australian Legislative Council on 23 October 2007. At the time of writing the Bill is not yet in force. It is likely to be proclaimed this week or next, at which time its amendments to the *Occupational Health, Safety and Welfare Act 1986 (SA) (OHS&W Act)* will come into effect.

The Bill is a response to a review of the penalty scheme conducted by the SafeWork SA Advisory Committee. The Committee involved representatives of employers, employees and Government.

Key changes include:

- trebling of penalties for companies
- the creation of a new offence of reckless endangerment, and
- new provisions which clarify corporate liability and introduce a system of personal liability for company officers.

Further details on these amendments are as follows.

Penalties

Penalties for breaches of obligations under the *OHS&W Act* will now differ for individuals and companies. Under the new scheme, the maximum fines payable by companies (across all of the divisions) have been trebled. For example, a first offence of a breach of the general duty of employers under s19 of the *OHS&W Act* will attract a Division 2 fine of a maximum of \$300,000, where it was previously \$100,000. Subsequent offences would attract a Division 1 penalty of a maximum of \$600,000 instead of \$200,000.

New offence of reckless endangerment

The Bill will also amend the *OHS&W Act* by creating a new criminal offence for endangering persons in the workplace.

The new offence replaces the 'aggravated offence' in s59 of the current *OHS&W Act*. In order to establish a person's liability under the current aggravated offence provision it is necessary to

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prove that the person knowingly contravened the *OHS&W Act* and was recklessly indifferent to the consequences. There is a perception that this test has created unreasonable evidentiary hurdles for prosecution. There has not been a single successful prosecution under this section in almost 20 years of operation. The government holds the view that the new offence will provide a more workable offence for the most serious breaches of the *OHS&W Act*.

A person (including a company) will be guilty of the new offence if the person, without lawful excuse:

- acts in a manner that creates a substantial risk of death or serious harm to another person who is in a workplace, and
- knew that his or her act or acts would create such a risk, or
- was recklessly indifferent about whether his or her act or acts would create that risk.

Under the new section, an act includes omitting to act.

The penalties for the new offence are:

- in the case of a company, a fine of up to \$1.2 million, or
- in the case of a person, a fine of up to \$400,000 or up to five years' imprisonment.

Liability of companies and company officers

A new s59A(1) will be inserted to clarify that the conduct and state of mind of a company's officers, employees and agents will be imputed to the company provided they are acting within the scope of their actual, usual or ostensible authority.

Section 59A(2) will create a defence in any criminal proceedings under the *OHS&W Act* against a company where the conduct or state of mind of an employee, officer or agent has been imputed to the company under s59A. The defence will require proof by the defendant company that it had taken all reasonable and practicable measures to prevent the employee, agent or officer's contravention, or contraventions of the same or a similar nature.

Section 59B will provide that in proceedings for an offence against the *OHS&W Act*, a statement made by an officer of a body corporate is admissible as evidence against the body corporate.

Most notably of the new provisions relating to corporate liability, section 59C will provide that if a company contravenes a provision of the *OHS&W Act*, and the contravention is attributable to an officer of the company failing to take reasonable care, then the officer is guilty of an offence and liable to the same penalty (with the exception of imprisonment) as for a contravention of the same provision of the Act committed by a natural person.

In determining the guilt of an officer of a company under s59C, a court must have regard to:

- what the officer knew about the matter concerned, and
- the extent of the officer's ability to make, or participate in the making of decisions that affect the company in

- relation to the matters concerned, and
- whether the contravention by the body corporate is also attributable to an act or omission of any other person, and
- any other relevant matter.

The new corporate liability provisions have general application across the *OHS&W Act*, including offences for breach of the substantive statutory duty provisions contained in Part 3 of the *OHS&W Act*. The corporate liability provisions also apply to the employees of administrative units in the Public Service, in that their conduct and state of mind can be imputed to the administrative unit and they can be found personally liable for contraventions committed by the administrative unit.

Ramifications for employers

- **The trebling of penalties will significantly elevate the commercial risks associated with OHS&W compliance failures for many businesses.**
- **To avoid personal liability, company officers must take a direct interest in their OHS&W responsibilities.**
- **The available defences for companies and company officers require a clear trail of considered measures taken to address workforce OHS&W risk.**

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