

## Workplace Relations Alert

April 2008

### Recent OHS changes - penalties tripled, personal liability for officers

“ These recent OHS changes will have significant consequences for all employers and their officers ”

On 1 January 2008, substantial changes to the Occupational Health Safety and Welfare Act 1986 (SA) (“Act”) came into force. The changes will have significant consequences for all employers and their officers.

The amendments include:

- > an increase in penalties for a corporation;
- > a new offence of reckless endangerment; and
- > clarification of corporate liability and the personal liability of officers.

#### Penalties

The Act triples the penalties for offences by a corporation and brings South Australia into line with the penalties of other States. The maximum penalty is now \$600,000 for a corporation and \$200,000 for individuals (eg directors), although maximum penalties can be doubled if there are aggravating circumstances.

#### Reckless Endangerment Offence

A new ‘reckless endangerment’ offence has been created. The offence is made out if a person or corporation, knowingly or

recklessly, acts in a manner that creates a substantial risk of death or serious harm to another in the workplace. This replaces the previous aggravated offence, which required proof of the person’s state of mind. Any employers (and officers) who fail to adequately consider how their business decisions will affect employee safety run the risk of being charged with this offence.

As an example, if an employer decides to delay critical maintenance on a piece of machinery due to cash flow problems, the employer and its directors may be charged if the delay creates a substantial risk of the machinery breaking down and causing serious harm to employees. It is worth noting that a charge can be laid even if there is no breakdown or any injuries sustained. If a substantial risk is created, an offence may be committed.

Penalties for a breach include up to \$1.2million for a body corporate or \$400,000 or 5 years imprisonment for individuals. Now, more than ever, employers, directors and officers must consider how their business decisions will impact on employee safety.

#### Corporate Liability

The Act now stipulates that the conduct and state of mind of an officer, employee or agent of a corporation will be imputed to the corporation for all offences. Therefore a corporation will be guilty for the acts of its officers, employees and agents unless it can establish that it took all reasonable and practical measures to avoid the breach.

#### Personal Liability of Officers

Significantly, officers of a corporation can now be held personally responsible for breaches of the Act, if the breach is attributable to the officer failing to take reasonable care. Officers include members of the governing body of a corporation, an executive officer, a receiver and manager of any property of a corporation and liquidators. An officer can be found guilty irrespective of whether the corporation is also charged with an offence. As previously mentioned, the maximum penalty for an individual is \$200,000 (or double if aggravating circumstances exist).

The following considerations are relevant to whether an officer failed to take reasonable care:

- > what the officer knew about the matter;
- > the extent of the officer’s ability to make decisions that affect the corporation in relation to the matter concerned;
- > whether the contravention is also attributable to an act or omission of any other person; and
- > any other relevant matter.

#### Case Study: Liability of Officers

In gaining an insight into the likely scope of this new liability of officers, it is useful to consider case law under similar provisions in New South Wales.



A recent case (*Inspector Ken Kumar v David Aylmer Ritchie* [2006] NSWIRComm 323) involved an explosion at a container maintenance business. One of the directors charged under the New South Wales provisions claimed that he was not in a position to influence the conduct of the corporation in relation to particular types of health and safety procedures that had been contravened. In claiming this, he relied on the following facts:

- > he was remote from the site;
- > he lived in another county;
- > he was Chief Executive of the group and had numerous businesses within his responsibility; and
- > these tasks were the responsibility of those at a lower level, who had the necessary expertise and proximity to control such procedures.

In relation to this defence the following findings were made:

- > by virtue of the seniority of his position the director had authority to influence the conduct of the corporation in relation to the particular health and safety procedures;
- > as a director of the company he should have been active in requiring information about the corporation including its health and safety procedures; and
- > liability cannot be avoided by legitimate reliance on the expertise of others.

The director was fined \$22,500 and ordered to pay costs.

Currently many officers rely only on the advice of lower management to base their decisions. This decision and the amendments to the Act highlight the need for officers to be more vigilant about employee safety and to make active and timely enquiries about potential safety issues.

## Conclusion

The amendments to the Act place onerous obligations on employers and their officers. With the penalties tripled, failing to meet these obligations will have serious consequences for those found to have breached the Act. Put simply, all employers and their officers must treat employee safety as a paramount consideration. Not only is it necessary to implement and train all staff on OHS policies and procedures, actively identifying and managing potential safety issues by all officers is now a necessity.

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