

SA Occupational Health, Safety and Welfare (Penalties) Amendment Bill Confirmed

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Further to our recent updates (Issue 11, May 2007) on the status of the Occupational Health Safety and Welfare (Penalties) Amendment Bill we confirm that the House of Assembly has passed the Bill on Wednesday 21 November.

Summary of the changes

Once in force the Act significantly increases the maximum penalties for corporate offenders and the Public Sector to \$300,000 for a first offence and \$600,000 for any subsequent workplace safety breaches.

The Act also creates a new section 59 'reckless endangerment' provision which attracts fines of up to \$1.2million for Corporations and Public Sector Agencies while individuals face a maximum penalty of \$400,000 or imprisonment of up to five years.

It is the Government's intention that the new legislation will take effect in early 2008.

Content of the Act

As part of the State Government's commitment to the South Australian Strategic Plan including a target of reducing workplace injuries the Occupational Health, Safety and Welfare (Penalties) Amendment Bill 2006 has been passed in the House of Assemblies on 21 November 2007.

Key changes found in the Act include:

- » The trebling of penalties for companies;
- » The inclusion of a new offence of 'reckless endangerment'; and
- » New provisions clarifying corporate liability and personal liability for company officers.

Penalties

Under the new provisions the maximum fines payable by companies across all of the divisions has trebled. A first offence of a breach of a general duty of employers under section 19 of the OHS&W Act will attract a Division 2 fine of a maximum of \$300,000, previously \$100,000 and subsequent offences would attract a Division 1 penalty of a maximum of \$600,000, previously \$200,000.

Further penalties for breaches of obligations under the OHS&W Act will now differ for individuals and companies.

The New section 59 – Reckless endangerment

A person (including a company) will be guilty of an offence under this section if the person, without lawful excuse:

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

The maximum penalty for a natural person under the section shall be imprisonment for up to five years or \$400,000 and for a Body Corporate a penalty of up to \$1.2m. It should be noted that an act includes an omission to act.





It is the South Australian State Government's intention that the new legislation will take effect in early 2008.



Liability of Companies and Company Officers

A new section 59A(1) has been created and sets out that the conduct and state of mind of a company's officers, employees and agents of a Body Corporate acting within the scope of his or her actual usual or ostensible authority will be imputed.

Section 59A(2) creates a defence in any criminal proceeding under the Act against a company where the conduct or state of mind of an employee, officer or agent has been imputed to the company under section 59A.

The defence will require proof by the defendant company that it has taken all reasonable and practical measures to prevent the contravention or contraventions of the same or a similar nature.

Section 59B - This new section sets out that statements made by an officer of the Body Corporate are admissible as evidence against the Body Corporate.

Section 59C - Whilst the new section 59C will provide that if a company contravenes a provision of the 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 the contravention of the same provision of the Act committed by a natural person.

In determining the guilt of an officer of the company under section 59C the court will have regard to:

- » What the officer or employee knew about the matter concerned;
- » The extent of the officer's or employee's ability to make, or participate in the making of, decisions that affect the Body Corporate or administrative unit in relation to the matter concerned;
- » Whether the contravention by the Body Corporate or administrative unit is attributable to an act or omission of any other person; and
- » Any other relevant matter.

Effect of changes

The effect of the changes will be:

- » Increased penalties;
- » Increase in employee exposure;
- » Increase company exposure;
- » Shows Government/ SafeWork SA's intentions; and
- » Defences - companies must show measured OHS response.

Given the increase in penalties, employee and company exposure we recommend all companies review their approach to incident management.

Sparke Helmore specialises in incident response management and provides Australia-wide 24/7 access to lawyers following an incident. Sparke can also assist you with:

- » Dealing with Regulators (e.g. SafeWork SA);
- » Media Management;
- » Conducting independent investigations;
- » Establishing Legal Professional Privilege;
- » Liaising with regulators and assisting with company or employee interviews and assistance with submissions to regulators;

And where appropriate

- » Representation following the commencement of a prosecution.

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