

Officer liability and Key Changes to the OHS Act

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Housekeeping

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- Reference to Sherriff is to “OHS in Practice – A Guide to Legislation in Victoria” by Barry Sherriff.
- Questions for end of presentation please!

Overview

1. The duty imposed by s52 of the OHSAct 1985.
2. Maxwell Report 2004 – the case for change.
3. The new duties imposed on officers and partners by the OHS Act 2004.

S52 of the 1985 Act

- Under s52, where a company committed an offence an officer could be guilty of the same offence (and liable for the same penalty) if the offence:
 - a) was committed with the consent or connivance of the officer; or
 - b) was attributable to any “wilful neglect” on the part of the officer.

S52 of the 1985 Act

- Officer was defined in s52(3) to include:
 - a) a director, secretary or executive officer of the company;
 - b) any person who directs or gives instructions to the directors; and
 - c) a person “concerned in the management” of the company.

Consent?

AB Oxford Cold Storage Co Pty Ltd v Arnott:

- consent means aiding and abetting the commission of a criminal offence
- involves assent, agreement, acquiescence or permission
- full knowledge of the essential facts which made what done an offence
- more than just being present in a conversation

Connivance?

- Has not been tested in any decision
- More than turning a blind eye?
- A failure to act or aiding by secret approval (Macquarie Dictionary).
- The officer may intend the outcome, but provide no direct “consent”.

Wilful neglect

- More than “negligence” or “accident”.
- There is probably an intentional component eg being aware of information relevant to a risk, the magnitude and likelihood of the risk, and ignoring this information.

S52 – Some cases

- Denbo Pty Ltd – the director instructed an employee to drive a vehicle when the employee was concerned about numerous mechanical defects. A fatality occurred and the Director pleaded guilty.
- John Norman Tormey – director ignored company procedures, concerns of engineer and employees regarding instability of suspended ceiling.

Maxwell Report 2004

- A systematic and extensive review of the 1985 Act, and the operations of VWA.
- The review was wide ranging and resulted in the 2004 Act.
- Many changes resulted from Maxwell Report - our focus is just on duties of officers.
- Maxwell described s52 as “almost an afterthought”.

Maxwell Report 2004

- Officers were immune from liability except in the “rarest of circumstances”
- Two key limitations in s52:
 1. officer cannot be liable unless either knowingly involved in the offence or deliberately neglected to take preventative action; and
 2. does not apply to partnerships or unincorporated associations.

Maxwell Report 2004

- The new duty should impose a positive duty for officers to take reasonable care to ensure that the company discharges its duties under the Act.
- Reinforce the importance of company officers taking responsibility for workplace safety.
- Workplace safety is greatly enhanced when senior managers realise safety is their responsibility.

Maxwell Report 2004

- The new duty should recognise that officers have organisational responsibilities as decision makers about safety compliance.
- The definition of officer should mirror S9 of the Corporations Act 2001.
- The new duty should apply to partnerships and unincorporated associations.
- Not applicable to volunteers.

2004 Act

- Relevant sections have been in operation since 1/7/05.
- S143 - 145 of the 2004 Act are significantly different to 1985 Act.
- The new duties do not apply to volunteers.
- Officers of unincorporated companies and partners are now covered.
- Definition of officer mirrors s9 of Corporations Act.

Who is an officer?

- The OHS Act definition includes a person:
- who makes or participates in the making of decisions that affect the whole or substantial part of the entity's business; and
- has the capacity to affect significantly the entity's financial standing.
- Also includes receivers, liquidators, administrators and trustees.

Who is an officer?

- The Worksafe Supplementary Enforcement and Prosecution Policy (SEPP), titled 'Liability of organisations, officers, employees, and other dutyholders' is instructive.
- Person who has real and direct influence on an organisation's policy, planning and financial standing.

Who is an officer?

- Person who has capacity to make or participate in making decisions on financial and business standing.
- Not a person who is responsible for implementing decisions.
- Eg members of boards of management of public authorities.
- Eg office holders of unincorporated bodies and associations.

Who is an officer?

- Those who are part of an executive management committee (or operate a division) that makes decisions that directly influence the organisations financial standing.
- Those who are not directly appointed but significantly affect the corporations financial or business standing.

Who is not an officer?

- Managers of branch officers that do not make or participate in the making of decisions that influence financial standing.
- School principals.
- Volunteers.
- Mid level managers that implement decisions.

Section 144

- S144 imposes criminal liability on an officer.
- S144 is broader than s52 of the 1985 Act.
- Officer will be liable if body corporate has contravened the 2004 Act, and that contravention is attributable to that officer's failure to take reasonable care.

Section 144

- Body corporate need not have been found guilty or convicted of an offence (or even prosecuted) - court must be satisfied of contravention only.
- If the body corporate is found not guilty, conviction against officer cannot occur as there is no contravention by the body corporate (an essential element of s144).

Attributable

- The offence of the body corporate must be attributable to the failure of the officer to take reasonable care.
- Sherriff has argued that failure of officer must be more than merely incidental to or insignificant to offence.
- Sherriff suggests that failure of officer must have been the significant causal contributor to the offence.

Reasonable care

- SEPP states that reasonable care refers to level of judgement, prudence, and activity that a person would be expected to exercise in the circumstances.
- Duty extends to actions, omissions and decisions made.
- Determined objectively.
- Sherriff has suggested that the criminal rather than civil standard is applicable.

SEPP

- VWA will apply prosecution criteria contained in Prosecution Guidelines:
- Sufficient evidence and public interest
- S144 requires consideration of:
 - Officer's degree of knowledge;
 - Officer's capacity for decision making;
 - Actions/inactions of others; and
 - Other relevant matters.

SEPP - Level of Culpability

- The SEPP states VWA will consider:
- Did measures which might have avoided incident fall within responsibilities of officer?
- Eg was officer responsible for facilitating training, supervision or maintaining systems to assess and control risk.
- Did officer take obvious steps to prevent incident?

SEPP - Level of Culpability

- What was the degree of culpability involved in officer's behaviour?
- Did officer have previous warnings or advice regarding matters leading up to incident?
- Should the officer have known about any such warnings or advice?
- Did officer knowingly compromise safety for personal or commercial gain?

SEPP - Level of culpability

- If so, was the officer subject to undue pressure to do so?
- To what extent was contravention attributable to another person?
- What could be reasonably expected of the officer bearing in mind:
 - officers role and knowledge; and
 - nature and context of activity conducted by organisation

Penalty

- Officer cannot be imprisoned.
- Officer may be fined up to the maximum that the company would have been fined for the contravention (if that company was a natural person)
- Eg if the company has contravened s21, and this contravention is attributable to officer, maximum penalty is currently \$187,000.

Penalty

- Other sentencing options are available under the OHS Act and Sentencing Act.
- The officer may also be convicted – this is matter for Judge to consider.

s145

- Essentially mirrors s144 but applies to officers of:
- Partnerships;
- Unincorporated bodies;
- Unincorporated associations.

Questions?

