TOUGHER PENALTIES UNDER NEW OCCUPATIONAL HEALTH AND SAFETY LAWS

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The deadline for compliance under NSW's new *Occupational Health and Safety Act 2000* has passed. Compliance is absolute and cannot be delegated. The duties are ongoing and matters of safety must be considered to be an evolving process and thus reviewed on a timely basis. While non-compliance might bring about severe penalties, these are nothing compared to the costs to lives that ignoring safety issues brings.

Any organisation or persons found guilty of breaching the Act and its associated regulations will face hefty penalties, including possible imprisonment. Although the new Act makes very little change to the substantive obligations, the associated regulations provide greater guidance as to how some of the duties call be achieved.

It is important to note that the obligations under the new Act also extend to persons who are not employees. For example, if a person suffers an injury whilst visiting a work site, then the occupier of the premises or the person conducting the work will be in breach. In addition, the obligations extend to designers, manufacturers and suppliers of plant and substances for use by people at work.

The Act continues to further develop the notion that directors of companies or 'persons concerned with management' have a separate and coextensive liability with an employer, including an employer corporation. This notion, in part, ensures that criminal sanctions are available to punish recalcitrant corporations by attaching penalties to the officers of those companies.

The defences available to directors or persons concerned with management are limited. In short, the person must prove that he or she was not in a position to influence decisions, or that he or she being in such a position, used all due diligence to prevent the contravention. Directors or managers can be convicted regardless of whether the corporation has been prosecuted. Further, a company is prevented from indemnifying its directors and managers should monetary penalty be imposed, and these penalties are not liabilities in respect of which companies can insure. When you consider that corporations can be penalised $550,000, and in the case of an individual $55,000, these criminal sanctions are not to be treated lightly. In addition, for repeat offenders, the maximum penalty increases to $825,000 and $82,500 respectively.

The Courts are not shy when delivering sentences for breaches under the *Occupational Health and Safety Act*. On 6 September 2002, Multiplex Constructions and a plumbing sub-contractor were fined a total sum of $310,000 by the NSW Industrial Relations Commission, following a fall by a plumber who was employed by a sub-contractor. Investigations revealed that the plumber and other workers were unaware that the site had been declared a prohibited area by Multiplex. This case clearly illustrates that contractors must take responsibility to ensure the safety and welfare of any sub-contractors engaged to work on their site. If this accident occurred today, there is little doubt that the fines may have been greater, as the maximum penalties have not only increased, but there are separate penalties now that deal with the failure to 'consult'.

This newly created obligation requires employers to continually consult with their employees on Occupational Health and Safety matters, and for some to establish OH&S committees and representatives. The regulations provided that committees and representatives must represent relevant 'work groups', having regard to gender, ethnicity, age,

hours of work and geographic location. There are regulations that also govern the method of electing committee members and representatives. The duty to consult is onerous, and employers must invest time and resources to comply. One could say that the duty to consult creates a 'bottom–up' approach to safety, rather than the traditional 'top-down'. This is reflected by the fact that most work place injuries can be prevented by changing behaviour. That is, involving the most significant stakeholder in matters of safety may go a long way to prevent unfortunate accidents that can costs lives.

The NSW WorkCover Authority can inspect a workplace in the event of an accident, or if a complaint has been received regarding an unsafe system of work. The inspectors have wide powers and can demand to inspect any worksite without notice. As such it is imperative that matters of Occupational Health and Safety be given priority. All employers and employer corporations should have in place an updated corporate policy regarding OH&S, and in the case of corporations, this should be endorsed by the CEO or senior executives including directors. Compliance should be part of a corporation's due diligence and anything less will be seen to be unsatisfactory.

In NSW, WorkCover has created a six-step approach to assist employers implement effective safety systems. The drafting of a policy is considered to be the first step, and includes consulting with employees to obtain feedback. WorkCover also recommend that a training strategy is adopted, and organisations should develop and implement risk control strategies and identify and assess hazards. Importantly, any safety system must be continually reviewed and monitored for it to remain effective.

As compliance under the new Act can be daunting, there are numerous public and private organisations and consultants that can assist and develop safety systems. However, it is critical that once a system has been developed, it is rolled out to the workforce and implemented. The message is that workplace safety issues are not static and must be monitored and assessed periodically and when necessary.

Heechung Sung's article first apeared in Abbott Tout's *Legal Update* (December/January 2003) and is reprinted by permission.
