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Health and safety alert: Penalties Enhanced

Background

The Health and Safety (Offences) Act 2008 received Royal Assent on 16 October - and is likely to enter into force in 2 months time - in January 2009. This Act has arisen as a Private Member's Bill and it is the second major development this year in health and safety. It follows close on the heels of the Corporate Manslaughter and Corporate Homicide Act 2007 (which came into force in April 2008). The Act represents a significant success as it has rocketed through both houses of parliament virtually unopposed.

Keith Hill, one of the joint sponsors of the Bill, in his address to the Commons said there were three main reasons for the Bill:

- a. tougher, more commensurate punishment;
- b. more effective deterrence; and
- c. greater efficiency in the dispensation of justice.

What does it mean?

The Act:

- Extends to England, Wales, Scotland and Northern Ireland¹ and applies only in relation to Health and Safety offences committed after it enters into force.
- Makes a prison sentence an option for individuals prosecuted for health and safety offences in lower and higher courts. The maximum term in the lower courts is up to 12 Months (6 months in Northern Ireland), and in the higher courts 2 Years.
- Raises the maximum fine which may be imposed by the lower courts from £5,000 to £20,000 for breaches of health and safety regulations.
- Makes certain offences that can currently only go to trial in lower courts, triable in either the lower or higher courts.

Why now?

There is a public perception that health and safety penalties are inadequate and, in particular, those in senior positions in corporate entities ought to be held more accountable personally for health and safety failings in the company.

A study carried out for the HSE recently on the effectiveness of the Use of the Company Directors Disqualification Act 1986² revealed that there were very few cases where that Act had been used (less than 20 cases). There will now be some pressure on courts to use these new found sentencing powers to imprison senior personnel.

At present, whenever there is an accident, in general terms the HSE does not need to prove that businesses didn't do what they were supposed to – the burden of proof is

reversed and it is up to businesses to prove that they did everything "reasonably practicable" in the circumstances to prevent the risk of an injury arising. A difficult onus to prove.

The directors and senior managers will also be convicted if it can be shown that the company failing occurred as a result of their consent, connivance or neglect under Section 37 of the Health and Safety at Work Act 1974. The new Act now provides that a prosecution under this section may attract a jail term.

Are senior personnel vulnerable?

The HSE Enforcement Policy requires that individuals be considered for prosecution as a matter of course in its investigations. We have seen a dramatic increase in the number of director and senior managers being the subject of investigation and prosecution in the past 12 months. This Act ought to cause most organisations to review their health and safety management structure.

Some argue that the problem with the current approach to safety management is that significant time and resources are devoted to producing documents which can be used in court to justify the actions that were taken, rather than on taking action. It could be said that this change will reinforce that position.

Further developments in Health and Safety sentencing

In addition, guidelines on setting appropriate levels of fine for Corporate Manslaughter and Corporate Homicide Act convictions, as well as Health and Safety convictions, are awaited. These are anticipated to increase the levels of fines awarded and to change the basis on which the fine is calculated by reference to turnover rather than profits. The proportion currently being considered is as much as 10% of turnover.

An interesting time in the Health and Safety arena and it would be as well to ensure your house is in safe order now.

For further assistance please call Laura Cameron, Partner in the Commercial Litigation and Disputes Resolution Team at McGrigors LLP on 0141 567 9369 (laura.cameron@mcgrigors.com). Laura has acted for some of the largest UK companies and recently secured a not guilty verdict following the trial of a company director.

Alternatively you may also contact:

Willie Park, a senior solicitor, Aberdeen on +44(0)1224 347 115 (willie.park@mcgrigors.com). Willie has extensive experience in oil & gas matters.

Stuart Armstrong, a senior associate, Manchester on 07860 606 739 (stuart.armstrong@mcgrigors.com). Stuart is a Solicitor-Advocate (Higher Courts Criminal Proceedings) and he specialises in representing clients in high risk industries and assisting in the development of safety management systems.

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¹McGrigors is one of the only regulatory teams to operate throughout the UK.

²RR597 - A survey of the use and effectiveness of the Company Directors Disqualification Act 1986 as a legal sanction against directors convicted of health and

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