

2007

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

OCCUPATIONAL HEALTH AND SAFETY AMENDMENT BILL 2007

EXPLANATORY STATEMENT

Circulated with the authority of
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Overview

The *Occupational Health and Safety Act 1989* (the OHS Act) provides a legislative framework to secure the health, safety and welfare of employees at work. This Bill amends the provisions relating to the Occupational Health and Safety Council (the Council) and makes some changes to the construction of the safety duty offences (in the OHS Act and the *Dangerous Substances Act 2004*).

Clauses

Clause 1 Name of Act

This clause sets out the name of the proposed Act as the *Occupational Health and Safety Amendment Act 2007*.

Clause 2 Commencement

This clause provides that the Act will commence the day after its notification on the Legislation Register.

Clause 3 Legislation amended

This clause states that the Act amends the *Occupational Health and Safety Amendment Act 1989*. The note shows that the Act also makes amendments to the *Dangerous Substances Act 2004* and the *Public Sector Management Act 1994*. These consequential amendments are made through Schedule 1.

Clause 4 Functions

Section 12 (1) (a) (iii) and (b) (iii)

This clause removes the references to ‘occupational rehabilitation’ from the functions of the Council. The references to occupational health and safety and workers compensation remain.

The references to occupational rehabilitation are removed because they are no longer necessary. Section 12 was developed at a time when occupational rehabilitation was not covered in the *Workers Compensation Act 1951*, and thus required an express reference. The Workers Compensation Act was amended in 2000 to include occupational rehabilitation. The reference to workers compensation in section 12 is adequate to cover the concept of occupational rehabilitation.

Clause 5 Section 12 (1), new note

This clause should be read with clause 7. It adds a standard note about the powers of an entity and is consequential on the omission of section 13 by clause 7.

Clause 6 Section 12 (2) (g), (h) and (i)

This clause should be read with clause 4 and removes further references to ‘occupational rehabilitation’ which is now encapsulated in the concept of ‘workers compensation’ generally. The Council has the function to advise the Minister on matters relating to the provision of education and training in relation to workers compensation.

Clause 7 Powers

Section 13

This clause omits an unnecessary provision. It states that the Council has power to do all things necessary or convenient to be done for or in connection with the exercise of its functions. This is unnecessary because section 196 of the *Legislation Act 2001* provides that a provision of a law that gives an entity (including a person) a function also gives the entity powers necessary and convenient to exercise the function. A note to that effect is added to section 12 by clause 5.

Clause 8 Membership

Section 14 (1) (c)

This clause increases the membership of ministerial appointees to the Council from three members to four. This brings the ministerial appointee membership in line with the employer and employee representatives.

Clause 9 Section 14 (1), new notes

This clause inserts standard notes about the making of appointments.

Clause 10 Section 14 (2)

This clause omits an unnecessary provision. Section 199 (4) of the *Legislation Act* provides that the exercise of a function by a body is not affected only because of a vacancy in the body's membership.

Clause 11 Sections 15 to 17

This clause remakes section 15 to bring it into line with current drafting practice. Existing subsection (2) (a) is remade as new subsection (2) to omit the reference to holding office for the period specified in the instrument of appointment. It is unnecessary because section 206 (2) of the *Legislation Act* provides that if a law provides for a maximum period of appointment, the instrument of appointment must state the period for which the appointment is made. Existing subsection (2) (b) is remade in an updated form as new subsection (3). The appointment conditions would be reasonable conditions related to an appointment, such as administration, leave and remuneration conditions.

The clause also remakes section 16 to ensure the independence of the Chair. It requires the Minister to appoint only a ministerial appointee member of the Council as the Chair. The Minister cannot appoint a member who is appointed to represent the interests of employees or employers as Chair of the Council. The Occupational Health and Safety Commission can also not be appointed as the Chair.

The Minister may appoint any member as Deputy Chair.

The clause also remakes section 17 about leave of absence to bring it more closely into line with current drafting practice.

Clause 12 Resignation

Section 19

This amendment omits an unnecessary provision about resignation because section 210 of the *Legislation Act* provides for the resignation of office holders.

Clause 13 Section 20

This clause remakes section 20 about ending the appointment of a Council member. Subclause 1 makes clear that the section applies to all members of the Council except the Occupational Health and Safety Commissioner. This is because the Commissioner is not appointed to the Council by the Minister. The Commissioner is an ex-officio member of the Council. Section 14 (1) (d) provides for the Commissioner's membership.

Subclause (2) lists the circumstances where the Minister must end a member's appointment. Subclause (4) lists the circumstances where the Minister may exercise a discretion to end a member's appointment on the Council.

Subclause (3) inserts an improvement to the Minister's current power to end an appointment because a member has been convicted of an offence punishable by imprisonment for one year or longer. It provides that the Minister may only end an appointment under these circumstances if the Minister is satisfied that the conviction affects the member's suitability as a member of the Council.

The other change from the current provision is that the Minister's power to end an appointment in circumstances where a member is absent without leave from 3 consecutive meetings of the Council has been changed from a mandatory power to a discretionary power.

Clause 14 Acting members Section 21

This clause omits an unnecessary provision about acting appointments.

Section 21 (1) is about the circumstances in which an acting appointment may be made. This provision is unnecessary because section 209 of the Legislation Act provides the circumstances in which acting appointments may be made, including during any period when an appointee can not for any reason exercise functions of the position.

Section 21 (2) and (3) is about the procedure for acting appointments of members representing employees and employers. This provision is unnecessary because section 209 (2) of the Legislation Act provides that the power to appoint a person to act is exercisable in the same way, and subject to the same conditions, as the power to make the appointment.

Subsection 21 (4) provides that anything done by or in relation to an acting member is not invalid merely because the occasion for the appointment had not arisen, there was a defect or irregularity in relation to the appointment, the appointment had ceased to have effect or the occasion to act had not arisen or had ceased. This provision is unnecessary because section 225 of the Legislation Act is to the same effect.

Clause 15 Calling meetings Section 22 (1) and (2)

This clause brings the subsection more closely into line with current drafting practice. In particular, it omits a reference to 'chairperson' and substitutes 'chair', which is the current drafting term.

Clause 16 Procedures at meetings
Section 23 (1), (2) and (3)

This clause brings the subsection more closely into line with current drafting practice. In particular, it omits a reference to ‘chairperson’ and substitutes ‘chair’, which is the current drafting term.

Clause 17 Immunity from suit
Section 24 (1)

This clause brings the subsection more closely into line with current drafting practice. In particular, it omits a reference to ‘good faith’ and substitutes ‘honest’, which is the current drafting term.

Clause 18 Failure to comply with safety duty – exposing people to substantial risk of serious harm
New section 48 (3)

This clause attaches strict liability to the element of the safety duty offence in subsection 48 (1) (b).

It is considered that this is consistent with the initial intention for the subsection. The explanatory statement to the amending Bill stated:

Section 35D provides that it is an offence if the failure to comply with a safety duty exposed a person to a substantial risk of serious harm because of the failure to comply with the duty. The mental elements of the offence include either recklessness or negligence about whether the failure would expose the person to that risk. The offence carries a maximum penalty of 1500 penalty units, imprisonment for five years or both. ‘Serious harm’ is defined in the dictionary of the Criminal Code 2002.

Subsection 35D(2) provides that absolute liability applies to the requirement to comply with a safety duty under subsection 35D(1)(a). As absolute liability applies to the requirement to comply with a safety duty, the defence of mistake of fact does not apply to this requirement. Therefore, the offender’s ignorance about the existence of the duty is not relevant for the purposes of the offence, nor is it relevant that the offender was mistaken about whether he or she owed the relevant duty. However, subsection 35D(2) does not render the whole of the offence an absolute liability offence. It simply applies absolute liability to the one particular element of the offence.

(see *Explanatory Statement: Occupational Health and Safety Amendment Bill 2004*, clause 14, and *Explanatory Statement: Dangerous Substances Bill 2003*, clauses 43 to 46 for the comparable discussions in relation to that regime).

Currently, under section 48 a person is required to comply with a safety duty. This is the first element of the offence and attracts absolute liability. As absolute liability applies to the requirement to comply with a safety duty, the defence of mistake of fact does not apply to this requirement. Therefore, the offender’s ignorance about the existence of the duty is not relevant for the purposes of the offence. The clause does not amend this element of the offence.

The second element is that the person commits an offence if the person fails to comply with the safety duty. This element imports a fault element of intention (or arguably recklessness) in accordance with the provisions in the *Criminal Code 2002*. The imposition of a fault element for this element of the offence is inconsistent with the regulatory context and poses unjustified limitations on enforcement as the prosecution

would need to prove that the person was aware of the safety duty and intentionally or recklessly failed to comply with the safety duty. In particular, it would be difficult to prove that a defendant intended to omit performance of a duty if the defendant was unaware that the duty existed. In an occupational health and safety context duty holders are expected to be aware of their duties and obligations to their employees etc. This is a long-standing principle and is based on reasons of workers and public safety.

Clause 18 amends this element to be strict liability. Strict liability is appropriate as it allows for the defence of reasonable mistake of fact under section 36 of the Criminal Code. So if a person in control of plant checks the temperature gauge on a piece of machinery to ensure that it is safe and falls within the limits of accepted industry standards (or any regulations) but the gauge is faulty and the piece of machinery is showing no signs of overheating etc, the person is not liable for an offence that may result from this scenario because it occurred because of a reasonable mistake of fact.

The third element of the offence provides that a person would only commit an offence if the failure to comply with the safety duty exposes another person to substantial risk of serious harm. Fault also applies to this element in that the prosecution must prove that the person was either reckless or negligent as to whether the failure would expose another to substantial risk of serious harm or cause serious harm.

The offence remains a fault element offence. The prosecution would be required to prove, first, that there was a safety duty and the defendant failed to comply (no fault element would apply to this element) and second, that the failure exposed a person to, or caused a person, serious harm, and the defendant was either reckless or negligent in relation to the harm.

Offences incorporating elements of strict liability are carefully considered when developing legislation and generally arise in a regulatory context where for reasons such as public safety or protection of the public revenue, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties. In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The rationale in this case is that duty holders under the Act, as opposed to members of the general public, are expected to be aware of their duties and obligations. The defendant's frame of mind in relation to the existence of, and compliance with, the safety duty is irrelevant. However, some knowledge or intention is required in order to justify the level of penalty for this particular offence. This is provided through the third element of the offence.

**Clause 19 Failure to comply with safety duty – causing serious harm to people
New section 49 (3)**

This clause attaches strict liability to the element of the safety duty offence in subsection 49 (1) (b).

Refer to the comparable discussion in clause 18.

Clause 20 Dictionary, definition of *chairperson*

This clause changes the current dictionary definition of ‘chairperson’ to ‘chair’ to reflect current drafting practice and to make reference to the chair being appointed under section 16.

Clause 21 Dictionary, definition of *deputy chairperson*

This clause changes the current dictionary definition of ‘deputy chairperson’ to ‘deputy chair’ to reflect current drafting practice and to make reference to the deputy chair being appointed under section 16.

Schedule 1 Other amendments

Schedule 1 contains amendments to other legislation.

Part 1.1 Dangerous Substances Act 2004

This part contains amendments to the *Dangerous Substances Act 2004*.

The inspector powers and compliance measures in the OHS Act and the Dangerous Substances Act have been aligned to create consistency and ease of use and understanding for inspectors, the courts and the community. Continued consistency between the regimes is desired as far as possible. As such Part 1.1 amends the safety duty offences in the Dangerous Substances Act along the same terms as proposed in the OHS Act.

Clause 1.1 New sections 43 (3)

This clause attaches strict liability to the element of the safety duty offence in subsection 43 (1) (b).

Refer to the comparable discussion in clause 18.

Clause 1.2 New sections 44 (3)

This clause attaches strict liability to the element of the safety duty offence in subsection 44 (1) (b).

Refer to the comparable discussion in clause 18.

Clause 1.3 New sections 45 (3)

This clause attaches strict liability to the element of the safety duty offence in subsection 45 (1) (b).

Refer to the comparable discussion in clause 18.

Clause 1.4 New sections 46 (3)

This clause attaches strict liability to the element of the safety duty offence in subsection 46 (1) (b).

Refer to the comparable discussion in clause 18.

Part 1.2 Public Sector Management Act 1994

This part contains amendments to the *Public Sector Management Act 1994*. The amendments relate to Schedule 3 which modifies the OHS Act as it applies to the public sector. The amendments effectively transfer the Council’s functions under Part 5A of the

OHS Act (as modified by Schedule 3 of the Public Sector Management Act 1994), concerning inquiries and reports in relation to matters affecting public employees to the chief executive. These powers have never been exercised by the Council and have been delegated to the head of ACT WorkCover or the OHS Commissioner since commencement of the provisions in 1994.

Clause 1.5 Schedule 3, modification 3.17, new section 88L

This clause omits the offence in section 88L concerning contempt of council. This offence is no longer necessary given the transfer of the inquiry function to the chief executive.

Clause 1.6 Schedule 3, modification 3.17, new section 88M (1)

This clause omits reference to ‘a member of the council’ and replaces it with ‘the chief executive’. The clause transfers the Council’s function under section 88M (1) to the chief executive.

Clause 1.7 Schedule 3, modification 3.17, new section 88Q (1) (b)

This clause omits reference to the ‘council’s’ and replaces it with the ‘chief executive’s’. The clause transfers the Council’s function under section 88Q (1) (b) to the chief executive.

Clause 1.8 Schedule 3, modification 3.17, new section 88S

This clause omits section 88S which is no longer necessary given the transfer of the function.

Clause 1.9 Schedule 3, modification 3.17, new part 5A, further amendments, mentions of *council*

This clause omits various reference to ‘a member of the council’ and replaces it with ‘the chief executive’. These changes are necessary to give effect of the transfer of the Council’s functions under Part 5A to the chief executive.

Endnotes

The endnotes contain useful information including dates for the introduction of the Bill and notification the Legislation Register.