
LOVEGROVE SOLICITORS

Designers Beware!

Section 28 of the OH&S Act (Vic) 2004

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Introduction

The central tenant of this new Occupational Health and Safety Act (the "OH&S Act") makes it clear that everyone one in the workplace has a responsibility to prevent injury or ill health.

The OH&S Act provides a framework for improving standards in the health and safety of the workplace by introducing procedures and making responsible those people who manage or control the workplace so as to eliminate work related injury and illness.

The five key health and safety principles which underpin the OH&S Act aims to:

- Provide the highest level of protection against risks to health and safety for all people including employees and the general public;
- Ensure information and ideas about risks and how to control them be shared between the employees and employers; and
- Encourage employees to be represented in relation to health and safety issues.
- To make responsible those people who manage or control things that create health and safety risks in the workplace for eliminating those risks and where they cannot be eliminated totally,
- be responsible for reducing those risks insofar as reasonably practicable;

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- Employers should be proactive in promoting health and safety in the work place;

Section 28 – Duties of Designers of buildings or structures

As of 1 July 2006, Section 28 of the OH&S Act 2004 imposes as a duty on designers of buildings and structures to ensure designs are safe and without risk to health of persons using it as a work place for the purpose for which it was designed.

Section 28 states:

28. Duties of designers of buildings or structures

(1) A person who designs a building or structure or part of a building or structure who knows, or ought reasonably to know, that the building or structure or the part of the building or structure is to be used as a workplace must ensure, so far as is reasonably practicable, that it is designed to be safe and without risks to the health of persons using it as a workplace for a purpose for which it was designed.

Penalty: 500 penalty units for a natural person; 2500 penalty units for a body corporate.

(2) An offence against sub-section (1) is an indictable offence.

Note: However, the offence may be heard and determined summarily (see section 53 of, and Schedule 4 to, the **Magistrates' Court Act 1989**).

The key objective of this section of the OH&S Act is to eliminate workplace risks by looking at the source of the hazard.

The duty under section 28 is intended to ensure that hazards and risks that may exist in the design of a workplace are eliminated or controlled at the design stage, so far as is reasonably practicable.

The section requires that those people who design a building or structure ensure that it is designed, again so far as reasonably practicable, to be safe without risk to people using it as a workplace for the purpose for which it was designed.

To who does the duty apply?

Although the duty applies to designs commenced after 1 July 2006, there may in some situations exist a duty where designs were commenced before this date. Typically this may occur where for existing designs, a redesign is required after the 1 July 2006. In this case the designer may be captured by this duty.

Typically for any design after the commencement of section 28 of the OHS Act, the duty will apply when:

- (1) Buildings or structures to be used as workplaces (structures means a construction not necessarily roofed, which performs a function or functions requiring rigidity and includes a bridge, dam, solo, tunnel, pit, telecommunications tower etc);
- (2) Buildings or structures that are occasional workplaces such as sports stadiums or bridges under repair or maintenance;
- (3) Parts of a building structure including fixtures integral to the use of the building or structure workplace;
- (4) Temporary structures to be used as workplaces other than plant.

Of note this duty does not include:

- The design of the construction and demolition phases of a building or structures lifecycle, where part 3 of the OH&S Act addresses these health and safety issues;
- Residential dwellings which are not intended as workplaces where the OHS Act excludes buildings designed as residences unless they are designed as a workplace, eg residential care buildings for persons who require care because of age or a disability, dwellings where part of the building is intended to be used as a workplace and buildings designed for mixed use including commercial and/or retail, mixed with residential use.

A designer under section 28 of the OH&S Act includes persons (who under section 5 of the OH&S Act includes a natural person, body corporate, unincorporated body or association and a partnership) who designs buildings or structures or part of a building or structure in the course of undertaking their profession, trade or business.

The duty under section 28 clearly applies to professionals who with the expertise and/or technical skills required to design a particular building or structure or part thereof for use as a workplace.

The design process may cover the range of tasks from preliminary sketches, plans or drawings of building and structures before it is constructed to a specialist or expert making technical decisions for incorporation into the design which may affect the risk and health or safety of people using the building or structure as a workplace.

Given processes involved in any design and the broad scope and ambit of the section, several persons may have duties for any particular element or stage in the building or structure design.

Given this designers may include, but not be limited to include:

Architects, building designers & draftspersons who undertake design on behalf of the clients which includes conducting feasibility studies, producing schematic and preliminary designs, construction documentation or tendering.

Further where other designers partake in making decisions regarding the design, either wholly or in part, during any phase of the project they may also come under the duty of section 28. Typically these may include:

Engineers, interior designers, industrial designers and contractors.

Although comprehensive, the list of “designers” is not necessarily exhaustive and with time the Courts with investigations and determinations, will serve to clarify this further.

When does the designer breach their duty?

The duty requires a person who designs a building or structure that is to be used as a workplace to ensure that the building or structure is designed to be safe and without risks to the health of persons using it as a workplace.

The person designing the building or structure should therefore include consideration of the range of work activities associated with the intended uses of the building or structure, and account for these, in preparing a design.

What are the penalties for the breach?

As section 28 of the OH&S Act has just come into force from 1 July 2006, and the section did not exist under the previous OH&S 1985 Act, there is no precedent for how designers will be treated in case of breach and what is the test to be applied when considering how to apply the “**Reasonably practicable**” test.

Reasonably practicable: The duty is subject to what is reasonably practicable. Section 20 of the OH&S Act sets out what is meant by ‘reasonably practicable’ and includes 5 matters which must be taken into account when determining what is reasonably practicable (see

In effect, section 20 (2)(a)-(e)) requires consideration of:

(2) To avoid doubt, for the purposes of this Part and the regulations, regard must be had to the following matters in determining what is (or was at a particular time) **reasonably practicable** in relation to ensuring health and safety—

- (a) the likelihood of the hazard or risk concerned eventuating;
- (b) the degree of harm that would result if the hazard or risk eventuated;
- (c) what the person concerned knows, or ought reasonably to know, about the

hazard or risk and any ways of eliminating or reducing the hazard or risk;

(d) the availability and suitability of ways to eliminate or reduce the hazard or risk;

(e) the cost of eliminating or reducing the hazard or risk.

In determining what is reasonably practicable to eliminate or control risk at the design stage, a designer must weigh up all five of these matters. In doing so, the facts and circumstances in each case will be relevant, including the particular design project and related matters such as:

- the scope of the design brief, which may be set out in contractual arrangements between the parties;
- other parties undertaking parts of the design work;
- the intended uses of the building or structure being designed; and
- the design process in each particular case.

Where there is a risk of harm, the designer should take care in making any decision that it is not reasonably practicable to implement a control measure.

However, what was reasonably practicable in each case will be considered having regard to all the facts and circumstances of each case.

Of important note to all designers is that the maximum penalty for a natural person is 500 penalty units (\$52,405) and 2500 penalty units (\$262,025) for corporations where found guilty under this section.

Further sub-section (2) states that an offence under sub-section (1) is an

indictable offence. An indictable offence is one which is a more serious crime, and can be tried by a jury and if found guilty a designer may also face conviction.

In Conclusion

The designer of buildings and structures now need to carefully consider the implications of section 28 of the Occupational Health and Safety Act 2004.

This section imposes as a duty on designers of buildings and structures to ensure designs are safe and without risk to health of persons using it as a work place for the purpose for which it was designed.

Failure to comply with the duty imposed by this section may result in a breach of the section. Any breach of the section may result in the designer, either as a natural person or corporate body, facing substantial fines. In the case of a serious breach of duty under section 28(1), the governing body is able to bring charges of an indictable nature against a natural person with the result being a substantial fine and/or a conviction.

The Quasi Criminalisation of Design

Some of the concluding remarks and observations are volunteered by Kim Lovegrove principal of Lovegrove Solicitors.

“Previously, design neglect that caused unsafe workplaces or work environments, as the reader would be aware could culminate in civil law suits. The 1st of July heralded a seismic shift, i.e. the quasi criminalisation of what was traditionally a civil matter.

It is quite amazing that the changing paradigm has crept in under the radar. But for Angelo letting me know that an architect had bemoaned the changes and Angelo recounting that he could see the whites in his eyes, it would have escaped our radar too.

It is very rare for anyone to knowingly design something that could culminate in a hazard to the workplace, so it is intriguing that such potent arsenal is being brought to bear upon professionals who are not known for their deliberate and intentional flouting of the law. Furthermore many engineering disciplines such as fire engineering are new sciences where engineers use their best endeavors to design outcomes that minimize the risk of calamity. But by virtue of their fledgling status there are many intangibles and unknowns. In such an environment it is easier to attack the design assumptions, fire spread modeling being case in point.

The worrying thing now is that if a designer were found to have acted negligently in a civil matter to do with the design of the workplace, then that finding would infer that the designer (whether s/he is a fire engineer, mechanical engineer, architect or draftsman) would have transgressed section 28.

To reiterate and intentionally labor the point, traditionally the transgression would have been limited to tort, now there is the double barrel of quasi criminal stigma and redress. The designer and the company employing the designer, design team call it what you may, could all be in the gun. The final sting in the section 28 tail is that if the designer happens to be a registered building practitioner such conduct would invoke the jurisdiction of the Building Practitioners Board as to fitness to practice.

An added concern is to do with the insurance industry's reluctance to provide indemnification for indictable offences. Many policies would exclude claims for fines and indictable offences.

It follows that if the reader is a designer, then the first call to make after you have read this article is to your insurer.

Reason being you need to know whether your insurance policy indemnifies you for indictable offences of this persuasion. A quarter of a million dollar fine is a big hit for a company. A hit like that could wipe out a smaller concern.

Employees would also need to check their employment contracts to find out whether they are indemnified by the employers for this type of design neglect. Because our reading of the section is, that it would be open to a plaintiff to sue the natural person (i.e. flesh and blood) in addition to the company.

Section 28 is bound to cause some heart palpitations, so for Gods sake, price the job correctly. This risk profile has changed and even greater care now has to be brought to bear in the design arena. Check your insurance cover and speak to you lawyers or to us for that matter to get an appraisal of the full magnitude of the changes”.

About the Author(s)

By Angelo Simonetto, Solicitor with concluding remarks from Kim Lovegrove – Principal of Lovegrove Solicitors.

Angelo Simonetto, prior to practising construction law was a Civil & Structural Engineer for over 20 years, so he understands the plight of the engineer

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