Occupational health and safety law

to accompany *Fundamentals of Business Law* (4th edition) by M.L. Barron and R.J.A. Fletcher

Prepared by Peter Anderson of the Australian Chamber of Commerce and Industry

Appendix A

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Learning objectives

At the end of this chapter you should be able to:

- explain key features of Australian occupational health and safety law
- identify the sources of Australian occupational health and safety law
- summarise the statutory design of occupational health and safety law
- list the major legal duties of employers and employees under occupational health and safety law
- recognise the relationship between occupational health and safety law and common, criminal and industrial law
- distinguish occupational health and safety and workers' compensation laws from other laws governing safety and injury compensation
- discuss the legal concept of a duty of care and how that duty can be met
- appreciate the different functions of occupational health and safety legislation, regulations and codes of practice
- identify the key concepts in compensating workplace injuries
- identify national occupational health and safety policy and law-making bodies, and their role and functions.

Summary of contents

This chapter will cover:

- the objects of occupational health and safety law
- the statutory design of occupational health and safety law
- the relationship between occupational health and safety law and other bodies of law (common law, criminal law, employment and workplace relations law)
- the major features of occupational health and safety law (the workplace, employers, employees, independent contractors, occupiers)
- duties under occupational health and safety law (duties of employers, duties of employees, duties of third parties)
- enforcement of occupational health and safety law
- specialist occupational health and safety laws (regulations, codes of practice, guidance material, specialist statutes, international standards)
- liability for workplace injuries
- national occupational health and safety law and policy.

Introduction

One of the principal sub-sets of employment law in Australia is occupational health and safety law (OHS law). This body of law defines the rights and obligations of employers, employees and third parties relating to health, safety and welfare in workplaces, and is sometimes referred to as industrial or workplace safety, health and welfare law.

Occupational health and safety law is related to both employment law and workplace relations law. These are discussed in Chapters 21 and 22, in which OHS law is briefly mentioned. That discussion should be read in conjunction with this chapter.

Occupational health and safety law is a large topic. Its scope is enlarged because the legislation and administration of each Australian jurisdiction treats many specific OHS issues differently. This chapter is only intended to introduce the major elements of OHS law.

Key terminology

The following terms are used throughout this chapter:

occupational health and safety	rights and obligations relating to health, safety and welfare in the workplace
employer	a legal entity contracting to receive personal services from an employee under a contract of service
employee	a person contracting to provide personal services to an employer under a contract of service
employment	the legal relationship between an employer and an employee under a contract to provide personal services
independent contractor	a person contracting to provide personal services to a principal under a contract for services
workplace	the place or places where personal services are performed under a contract of employment
duty of care	legal obligation of employers, employees and third parties to each other under OHS law
risk assessment	an overall assessment of the risk factors in a workplace that may lead to a breach of a duty of care
hazard identification	identifying hazards in a workplace that present a specific occupational health and safety risk
cause of action	the basis upon which legal action could be brought in order to enforce civil or criminal obligations
prosecution	legal proceedings by the state for breach of criminal law
regulations	laws made by governments pursuant to powers delegated by statute
statutes	laws made by parliaments
codes of practice	rules made by governments or statutory bodies regulating specific occupational health and safety issues, usually (but not always) of a non-mandatory nature or for guidance
Robens model	a style of legislative design for OHS laws advocated in the 1970s by Lord Robens, a British academic
health and safety representatives	employees in a workplace with specific functions and powers granted under OHS law
health and safety committees	workplace committees comprising employer and employee representatives, with specific functions and powers under OHS law
national OHS strategy	a national strategy to eliminate or reduce workplace death and injury in Australia developed by NOHSC
NOHSC	the National Occupational Health and Safety Commission established by statute as the peak national policy-making body for occupational health and safety in Australia

OBJECTS OF OCCUPATIONAL HEALTH AND SAFETY LAW

Occupational health and safety law originated in the common law made by the courts in the late nineteenth and early twentieth centuries. Laws relating to employers and employees that were developed in these courts implied terms into subsequent contracts of employment. (This is discussed in Chapter 21.) One of the implied terms was a duty on an employer to protect the health and safety of employees. The courts created this duty as a response to industrialisation, and as a way of reflecting in the law the moral principle of care and attention for the wellbeing of fellow individuals, particularly where one party put the other at foreseeable risk of danger or injury.

While OHS law has developed substantially since its early common-law formulation, the objects of contemporary OHS law continue to reflect these principles; for example, the *Occupational Health and Safety Act 1985* (Vic.) states that its objects are to:

- secure the health, safety and welfare of persons at work
- protect persons at work against risks to health or safety
- assist in securing safe and healthy work environments
- eliminate, at the source, risks to the health, safety and welfare of persons at work
- provide for the involvement of employees and employers and associations representing employees and employers in the formulation and implementation of health and safety standards.

Occupational health and safety legislation in all other Australian jurisdictions contain similar objects.

It can be seen from these objects that modern OHS law seeks to protect employees in a number of different ways. As well as requiring that employees actually be safe while at work, the law also requires employers to actively identify risks, to prevent risks from arising, to eliminate risks that should be anticipated and to involve employees and their representatives in these endeavours.

The most recent official statistics indicate that approximately 140 000 workplace injuries and accidents still occur in Australia each year, with close to 400 deaths annually. Some of these may be unavoidable, but most are not. Occupational health and safety laws force managers and employees in workplaces to treat occupational health and safety as a core business issue. As a result, workplaces have, generally speaking, become safer since these laws were enacted. Plant is now better designed, and there is greater use of safety materials and equipment, higher awareness of safe systems of work, clearer warning signs of danger and stricter labelling of dangerous materials. Monitoring of health and safety occurs on a more regular basis and there are active safety committees.

Despite these improvements, health and safety in the workplace requires constant attention. A workplace that is safe one day can become unsafe overnight if managers, employees or fellow employees fail in their responsibilities to each other. There should be an active desire for continuous improvement; otherwise complacency leads to breaches of law.

The objects of modern OHS law reflect this active approach. A workplace in which a passive 'she'll be right' attitude to health and safety has been adopted will not meet the objects of the law, nor comply with the legal duties it imposes. Nor will it fulfil that moral duty to each other that originally founded OHS law more than one hundred years ago.

STATUTORY DESIGN OF OCCUPATIONAL HEALTH AND SAFETY LAW

Statute-based law

Over the past century, OHS law in Australia has been transformed from primarily judge-made law to primarily statute law made by parliaments. This reflects the importance that the community, through their elected representatives, place on the subject.

However, the courts continue to play an important role. Parliaments may make statutory laws, but the courts interpret and enforce them. In this way modern OHS law in Australia is a combination of statute law made by parliaments and court-based decisions that interpret and enforce that legislation.

The Australian Constitution does not confer a specific power upon the Commonwealth Parliament to make laws with respect to occupational health and safety. Primary responsibility for this type of legislation lies with State parliaments, and therefore each of the six Australian State parliaments have enacted their own specific OHS legislation. In addition, the Commonwealth Parliament has OHS laws governing Commonwealth government employees and certain other matters, and both of the Territory parliaments have also enacted specific statutes.

As a result, Australia has nine separate occupational health and safety systems: one in each of the six States, one in each of the two Territories and one for Commonwealth employees and for other Commonwealth purposes. The principal Acts are:

New South Wales	*Occupational Health and Safety Act 2000*
Victoria	*Occupational Health and Safety Act 1985*
Queensland	*Workplace Health and Safety Act 1995*
South Australia	*Occupational Health, Safety and Welfare Act 2000*
Western Australia	*Occupational Health and Safety Act 1984*
Tasmania	*Workplace Health and Safety Act 1985*
Northern Territory	*Work Health Act 1986*
Australian Capital Territory	*Occupational Health and Safety Act 1989*
Commonwealth	*Occupational Health and Safety (Commonwealth Employment) Act 1991*

DETERMINING WHICH LAW APPLIES

When there is a multiplicity of laws, it is necessary to consider which OHS law applies in a specific workplace.

In the private sector, the law of the State in which the workplace is based will be the law that applies to that workplace. In the public sector, if the Commonwealth government is the employer, then Commonwealth laws will apply. If a State government is the employer, then the laws of that State will apply. These are general rules only; there are some exceptions in cases where private sector workplaces have been given authorisation by the Commonwealth to operate under Commonwealth laws.

EXAMPLE

Jill is employed by Able Printing Company Pty Ltd, a private business with its head office located in New South Wales. Able has branches in New South Wales and Queensland. Jill works in the Queensland branch, based in Rockhampton. The OHS law that regulates the rights and obligations between Jill and Able Printing Company is Queensland State law; that is, the *Workplace Health and Safety Act 1995*.

EXAMPLE

Robert works in Perth. He is employed by Centrelink, a Commonwealth government agency that provides social welfare benefits. The occupational health and safety law that regulates the rights and obligations between Robert and Centrelink is Commonwealth law; that is, the *Occupational Health and Safety (Commonwealth Employment) Act 1991*.

STRUCTURE OF OCCUPATIONAL HEALTH AND SAFETY LAW

While multiple statutes add complexity to the law, there are many similarities in the legislative design of each system. However, they are not identical. The legislative design that has been followed in Australia since the mid-1980s is referred to as the 'Robens model': a statutory model advocated by Lord Robens, a British academic working in the late 1970s. The model was generally enacted in the United Kingdom, and then adopted (with some modifications) in Australia.

Under the Robens model, there is a primary statute that describes its broad objectives (discussed above) and then imposes duties on employers, employees and some third parties. There are a number of duties, some general and some specific. The primary duty is called the duty of care, and the extent to which it applies depends on the terms of the statute. The Robens model does not set rigid rules and standards, and does not specify the way in which employers and employees should meet their duty of care. Rather, the statute requires each workplace to develop and implement the necessary measures that meet the duty of care.

In return for giving this discretion, the statute requires each workplace to actively engage in prevention activities and the involvement and training of employees in workplace health and safety. This style of OHS law is known as 'performance-based' rather than 'prescription-based' legislation. The critical factor is the performance of the employer in meeting its duty, rather than the application of predetermined prescriptive legislative standards.

The Robens model presumes that some specific standards and rules on certain matters can be established, primarily through regulations, codes of practice and guidance material. In addition, the primary statute establishes enforcement mechanisms by government inspectorates and the courts for breaches of the duty of care, together with a rigorous penalty regime.

The underlying philosophy of the Robens model is to impose an active responsibility on employers, managers, supervisors and employees to maintain a safe and healthy workplace.

COMMON CHARACTERISTICS OF THE LAW

The Robens model provides a framework for the legislation in all Australian jurisdictions. Under it, the common characteristics of Australian OHS legislation can be summarised as:

- a single principal statute in the jurisdiction
- regulations, codes of practice and/or guidance material that underpin the principal statute

- general statutory duties of care on employers towards their employees and third parties, requiring active protection of health and safety
- general statutory duties of care on employees towards fellow employees and third parties
- general statutory duties of care on third parties
- systems of education and training, and workplace consultation between employers and employees
- creation of offences for breaches of legal duties
- a high level of penalties for breaches
- investigation of suspected breaches by government inspectors
- enforcement of breaches by the courts.

RELATIONSHIP OF OCCUPATIONAL HEALTH AND SAFETY LAW WITH OTHER LAWS

Although OHS law is a distinct sub-set of law, it operates in conjunction with related areas of law, particularly common law, criminal law and employment and workplace relations law.

Common law

Contract law (discussed in Chapter 7) and tort law (discussed in Chapter 3) are two forms of common law made by the courts that are related to OHS law. Although statutes regulating occupational health and safety are the primary source of law on this topic, contract law and tort law also play a role.

As discussed above, the courts have implied into contracts of employment a duty on employers for the safety of employees. An unsafe workplace is not only a breach by an employer of statutory obligations but also a breach of contract. In Chapter 3 it was explained that the law of tort establishes a general cause of action in negligence. The duty of care owed by a person or organisation to another under tort law is similar (but not identical) to the statutory duty of care under OHS law. This means that an unsafe workplace can also expose an employer to legal action in tort for negligence and breach of the common-law duty of care.

Statutory workers' compensation laws have also been established in each Australian jurisdiction to compensate employees who sustain injuries arising from or in the course of employment. As a result, some workers' compensation laws limit or preclude actions for damages in tort or contract being brought by an employee against an employer for workplace injuries, notwithstanding the existence of these causes of action under the common law.

Criminal law

Many statutes create offences in relation to conduct that renders an offender liable to prosecution by the state. Occupational health and safety statutes contain criminal offences for breaches of statutory duties and obligations. While penalties are usually monetary (and can be substantial), in serious cases imprisonment is a sanction available to the courts. In addition to statutory penalties, general criminal offences such as criminal damage and manslaughter can be applied in the occupational health and safety context.

An emerging policy issue in OHS law is whether a specific statutory offence of industrial manslaughter should be created, as a supplement to existing criminal sanctions. A number of unions support this measure, but employers argue that it is unnecessary, given the sanctions that are already available.

Union calls for legislation on industrial manslaughter

By Annabel Hepworth

NSW claims to have the toughest laws in Australia involving negligence by employers.

The powerful Australian Manufacturing Workers Union called on the NSW Government yesterday to introduce a new criminal offence of industrial manslaughter, arguing that senior company officers should be held liable for boardroom and management decisions leading to employee deaths.

The NSW state secretary of the AMWU, Paul Bastian, urged the Government to introduce manslaughter legislation, saying NSW had one of the worst workplace death rates in the Western world.

The legislation should carry penalties such as the disqualification of employers or company directors for set periods, and prison sentences, Mr Bastian said.

Hundreds of manufacturing workers marched on the NSW Government's Workplace Safety Summit at Bathurst to put pressure on the Industrial Relations Minister, John Della Bosca, to introduce legislative reform.

Mr Bastian said that while under the state's laws it was theoretically possible to prosecute employers for manslaughter when an employee died as a result of gross negligence, in reality there had never been a successful prosecution. The law only caught small businesses where directors had a hands-on role, and present provisions did not allow for the courts to consider the conduct of a company and its office as a whole.

NSW Labor Council secretary John Robertson called on the Government yesterday to establish a specialist manslaughter unit within WorkCover to review workplace deaths and advise Mr Della Bosca whether an employer should be charged.

The unit should include investigators and people with expertise in criminal law; this would determine whether the criminal law dealt adequately with industrial manslaughter. It would put employers 'on notice', Mr Robertson said. He said he had been assured by Mr Della Bosca that legislation already existed to launch a prosecution under present criminal law where the negligence of an employer or company director led to the death of a worker.

'But the reality is that if the powers are there, they have never been applied in NSW, some say because of the difficulty of applying the onus of proof to the workplace accident situation,' Mr Robertson said. 'You would only need to see one such prosecution undertaken to change the way each and every employer and each and every company director regards their responsibilities.'

NSW Opposition spokesman on industrial relations Michael Gallacher said Mr Della Bosca would do nothing on the issue before March's state election as he did not want to antagonise the business community.

Late yesterday, a spokesman for Mr Della Bosca said: 'Generally, we do feel that NSW has the toughest laws in Australia relating to negligence by employers.'

The NSW Crimes Act allowed for the charge of manslaughter and referred specifically to workplace negligence. The spokesman said Mr Della Bosca's office was re-examining how the laws were applied.

Source: *Australian Financial Review*, 7 July 2002, News section, p. 14

EMPLOYMENT AND WORKPLACE RELATIONS LAW

Occupational health and safety law regulates one aspect of the relationship between employers and employees and is a sub-set of employment and workplace relations law. These are discussed in Chapters 21 and 22.

The rights and obligations created by occupational health and safety statutes are in addition to all existing rights and duties imposed by employment law and by workplace relations law.

It is not possible to use employment law or workplace relations law to contract out of statutory occupational health and safety obligations. However, employment and workplace relations law can add to rights and obligations, especially through certified agreements or Australian Workplace Agreements (discussed in Chapter 22). Within limits, the Australian Industrial Relations Commission can arbitrate and include in industrial awards some additional matters of wages and employment conditions that relate to occupational health and safety.

EXAMPLE

A mining union makes three claims to the Australian Industrial Relations Commission for variations to industrial awards based on health and safety grounds: a rule preventing twelve-hour shifts; an allowance of $50 per week for working underground; and a rule that requires union delegates to also be health and safety representatives. The Australian Industrial Relations Commission has jurisdiction to hear and determine the case for twelve-hour shifts and an underground work allowance because they relate to wages and employment conditions and are 'allowable matters' (a concept discussed in Chapter 21) under s. 89A of the *Workplace Relations Act 1996* (Cwlth). However the union claim for delegates is not an allowable matter for arbitration in industrial awards.

EXAMPLE

A contractor working on a building site leaves electrical wiring lying on the ground around pools of water. Workers on the site take industrial action by walking off the job until the dangerous situation is rectified. Under workplace relations law, taking industrial action outside a bargaining period is unlawful, exposing workers to penalties and damages. However, workplace relations law creates an exception to this rule where 'the action was based on a reasonable concern about an imminent risk to health and safety', and other work that could be safely performed was not made available (s. 4(1), *Workplace Relations Act 1996*).

MAJOR FEATURES OF OCCUPATIONAL HEALTH AND SAFETY LAW

Key concepts

HEALTH, SAFETY AND WELFARE

The expression 'health, safety and welfare' is commonly used in the principle statutes of most jurisdictions. This phrase refers to overlapping but not identical concepts. 'Health' refers more directly to the physical condition of individuals, 'safety' to the dangers and risks in the work environment and 'welfare' to the more general wellbeing of employees. Under Australian law these concepts relate to both physical and psychological conditions.

THE WORKPLACE

Occupational health and safety statutes have application to 'workplaces'. Each statute usually has a definition of 'workplace', or a similar concept such as 'place of work' or 'industrial premises'. While reference to a 'workplace' prevents the law from being applied more generally, the concept is usually broadly defined. For example, the *Occupational Health and Safety Act 2000* (NSW) defines 'place of work' as any 'place where persons work'.

A workplace is typically a physical building where work is performed, but it can also be an outdoor area, a motor vehicle or even a private home. It includes not just plant and equipment, but the whole of the work environment—including air quality and noise. It can also include places where employers and employees meet for official purposes (such as a hotel where a work dinner is held).

EMPLOYERS

Occupational health and safety statutes regulate the conduct of employers. Each statute has its own definition of 'employer', but the concept is usually similar to that contained in employment law (discussed in Chapter 21): a legal entity contracting to receive personal services from an employee under a contract of service.

EMPLOYEES

Similarly, occupational health and safety statutes regulate the conduct of employees. Each statute also has its own definition of 'employee', similar to that in employment law: a person contracting to provide personal services to an employer under a contract of service.

INDEPENDENT CONTRACTORS

Occupational health and safety statutes also extend obligations and duties to independent contractors. An independent contractor working in a workplace has duties to employees and other persons in the workplace even thought the contractor may not be their employer. As discussed in Chapter 21, an independent contractor is a person contracting to provide personal services to a principal under a contract for services.

OCCUPIERS

Occupational health and safety statutes generally seek to operate as broadly as possible. Employers and independent contractors are legally defined concepts, but the statutes also extend liability to 'occupiers' of a premises. The concept of an occupier is drawn from tort law (discussed in Chapter 3). While an employer or independent contractor will usually occupy a workplace, the statutory definitions of 'occupier' are usually broad enough to cover any person in possession of the premises, whether or not they have care and control of employees or persons working in it.

DUTIES UNDER OCCUPATIONAL HEALTH AND SAFETY LAW

The central features of Australian OHS law are the statutory duties that are imposed. These duties derive from the 'duty of care' and the concept of 'standard of care' developed by tort law, but they have been expanded upon and codified in each occupational health and safety statute. These duties are separate causes of action that expose offenders to civil and criminal liability.

Who owes the statutory duties?

Occupational health and safety legislation imposes statutory duties on multiple parties. The nature of statutory duties differs according to the party owing the duty, and to whom it is owed. It is necessary to examine legislation in each jurisdiction to identify the precise terms of each duty and the party that owes the duty. As a general rule, the following parties owe legal duties to employees under Australian OHS law:

- employers
- employees
- members of the public at a workplace
- manufacturers, suppliers and importers of plant and substance
- installers and designers of plant
- occupiers and persons in control of a workplace
- self-employed persons
- independent contractors.

Principal duties of employers

Employers have two primary duties under Australian OHS law. These are:

- a general duty to provide, maintain and ensure, so far as is reasonably practicable, a working environment that is safe and without risks to the health of employees (including apprentices and trainees) while they are at work
- a general duty to ensure people (other than employees of the employer) are not exposed to health or safety risks arising from work being undertaken.

There are also specific duties imposed on employers, such as:

- providing and maintaining safe plant and systems of work that minimise health risks
- ensuring that plant and substances are used, handled, stored and transported safely
- giving employees whatever information, instruction, training and supervision is necessary.

Some statutes contain additional, specific duties; for example, larger employers may be required to establish health and safety committees. There are also duties to recognise health and safety delegates and representatives, duties to maintain health and safety policies and procedures, duties to consult employees on health and safety matters and duties to monitor health and safety. Even where a statute does not contain this level of detail, it is likely that these obligations will still arise if an employer is to meet a general duty of care.

Statutes in each jurisdiction also impose specific obligations on employers to report work injuries and dangerous incidents to the relevant public authorities. Although each statute specifies a different time period, the general rule is that employers must report such matters as soon as they become aware of them.

Under the statutory duty of care, the obligation on an employer to provide a safe workplace is absolute, subject only to the defence that it was not reasonably practicable to do so.

It is not necessary for a workplace injury or death to have occurred for employers to be in breach of their duty of care. The statutory duty is breached wherever risks to health and safety exist, even if the workplace has a 'good' safety record. In meeting this duty of care the courts impose a high standard. They require an active risk assessment by employers, not just protecting employees from risks that could be foreseen or from risks that are brought to an employer's attention. It is no defence for an employer to argue that they did not intend the risk to exist or an injury to occur. These general duties are interpreted in terms of strict liability; the offence is committed if the cause of action is made out, irrespective of the intention of the offender.

CASE EXAMPLE

Drake Personnel Ltd. v. Workcover Authority of NSW (1999) 90 IR 432

Facts: An employee of a labour hire firm had his hand crushed in a machine while he was working at a factory controlled by a client of the firm and under the supervision of that client. The machine was inadequately guarded. The labour hire employer had conducted a risk assessment of the factory, but the employee was working a different machine at the time of injury, and the labour hire firm had not been notified of this. The labour hire firm was prosecuted under New South Wales law for breach of their statutory duty of care. The labour hire firm argued that they did not own the factory, did not instruct or control the day-to-day work of the employee and did all reasonably possible to meet their duty by conducting a risk assessment.

Decision: The Full Bench of the Industrial Relations Commission of New South Wales upheld the conviction of the labour hire firm. The court said at 452 that:

> the duties imposed by the Act are not merely duties to act as a reasonable or prudent person would in the same circumstances ... the obligation of the employer is to 'ensure' the health, safety and welfare of the employees at work. There is no warrant for limiting the detriments to safety contemplated to those which are reasonably foreseeable ... the obligation under that section is a strict or absolute liability to ensure that employees are not exposed to risks to health or safety.

The courts have also held that the duty requires an employer to protect not only the attentive worker, but also a careless, lazy or inadvertent worker. It can also be a duty to protect workers from the result of the workers' own negligence.

The active obligations imposed by these statutes means that employers must pursue prevention strategies before risks emerge or injuries happen, and not simply rely on rectifying unsafe workplaces after an injury has occurred. Some of the active steps employers must take to meet these duties include:

- regularly conducting risk assessments of their workplace and all workplaces where their employees work
- regularly conducting hazard identification assessments
- regularly checking plant, machinery and substances for labelling, proper maintenance of safety equipment, guarding and warning signs
- educating and training employees in occupational health and safety policies and procedures, and repeating this education and training at regular intervals
- consulting employees and their representatives on health and safety issues
- preparing and maintaining appropriate policies and procedures.

Principal duties of employees

Occupational health and safety law imposes corresponding duties on employees. The principal duties imposed by statute on employees are:

- to co-operate with their employer or any other person to fulfil requirements imposed in the interests of safety and health
- to use equipment in a safe and proper manner and in accordance with the employer's instructions.

Some statutes also impose additional, specific duties on employees, such as a duty not to wilfully or recklessly interfere with or misuse safety equipment, or to refrain from putting their own safety or that of others at risk by consumption of alcohol or drugs.

However, it is no defence to a breach by an employer to argue that the employee affected by the breach (or another employee) also failed to meet their duty. Duties owed by each party are stand-alone obligations.

EXAMPLE

Cathy works in a shoe shop with Sharon. Phil and Sue own the shop. After a Christmas lunch, Cathy and Sharon return to work. Sharon has had too much to drink and inadvertently injures Cathy when she drops a ladder on her while trying to reach a pair of shoes in the storeroom. As employers, Phil and Sue have breached their duty of care to Cathy because they allowed Sharon to resume work in an unsafe state. They are liable even though Sharon may also have breached her duty of care and may be subject to a penalty for that breach.

ENFORCEMENT OF OCCUPATIONAL HEALTH AND SAFETY LAW

Occupational health and safety laws in Australia are actively enforced and provide severe penalties for breach of duties.

Prosecution

Statutory duties are enforced by the courts. Government authorities and accredited inspectors investigate breaches, and then bring prosecutions for offences. It is an offence to obstruct inspectors in their investigation of alleged health and safety breaches and when exercising their rights of entry into a workplace.

For a breach to occur, the elements of each offence need to be established by the prosecuting authorities. The party who is being prosecuted then carries the onus of making out any available defences.

Penalties

Penalties for breaches of OHS laws vary according to the type of breach. Penalties are heavier for employers than they are for employees. As with the criminal law generally, statutes specify maximum penalties and the courts have a discretion to award penalties up to the maximum. In serious cases, some statutes allow for imprisonment of offenders.

The level of penalties varies from jurisdiction to jurisdiction, and is regularly updated by governments and parliaments. For example, the maximum penalties in New South Wales under the *Occupational Health and Safety Act 2000* (NSW) are:

Maximum penalty for individuals	$82 500 per offence
Maximum penalty for corporations	$825 000 per offence
Maximum on-the-spot fine	$1500 per offence

Imprisonment term for serious offences

CASE EXAMPLE

DPP v. Esso Australia Ltd [2001] VSC 263

Facts: A major explosion occurred at a gas refinery in Longford, Victoria, resulting in two deaths, eight serious injuries and widespread damage. The employer company was prosecuted for eleven breaches of its duty of care and other duties under OHS legislation. It was alleged that the employer did not carry out a safe system of work, had failed to properly protect employees from risk to their health and safety, had not undertaken appropriate hazard identification, had not undertaken proper risk assessments, had not adequately monitored the workplace and had not adequately trained employees.

Decision: The Supreme Court of Victoria (in a jury trial) convicted the company. It found that the prosecution had established all eleven breaches of OHS laws. The Court imposed penalties totalling $2 million on the employer. In his sentencing remarks, Cummins J referred to the statutory duties under Victorian law and concluded that:

> the provision by employers of a safe workplace and safe systems of work is a serious matter ... this tragic case once again demonstrates, if it needs further demonstration, the vital importance of workplace safety ... The identification of hazards in a major hazard installation is obvious and fundamental.

Improvement and prohibition notices

In addition to enforcing OHS laws by prosecution, statutes in each jurisdiction also allow inspectors to impose 'improvement notices' and 'prohibition notices'. An 'improvement notice'

Coroner blames Esso for Longford disaster

By Liz Gooch

The State Coroner today blamed oil giant Esso for the 1998 Longford gas disaster which killed two workers and cut the state's gas supply for about two weeks,

Handing down findings from an inquest into the deaths of Peter Wilson, 51, and John Lowery, 49, Coroner Graeme Johnstone said Esso's failing on a number of levels including workplace safety and employee training contributed solely to the explosion which ripped through the natural gas processing plant in Victoria's south-east.

'Clearly Esso is solely responsible for the disaster and tragedy that is known as Longford,' Mr Johnstone said. 'Esso failed to conduct a periodic risk assessment which could have prevented the incident.'

Mr Johnstone said there had been a failure to audit for hazards in accordance with Esso's procedures.

He said that if correct reporting had occurred, the problems that resulted in the Longford explosion may have been avoided.

One of the dead men's co-workers, Ian Kennedy, said outside the court that it was a relief to have closure but there was nothing to celebrate because two people had lost their lives.

In a written statement, Esso expressed sorrow for the men's families and said it had made improvements at the Longford plant since the tragedy.

'We hope this finding will provide some closure to the families of Peter and John. We wish to once again express our sorrow to their families, our employees and the community for the fatalities, injuries and other impacts of the Longford accident,' Esso Australia chairman Robert Olsen said.

Esso said it had responded to the Royal Commission's recommendations and had spent more than $500 million at Longford since 1998.

The Longford plant has also submitted its safety case to gain licensing under Victoria's new Major Hazardous Facilities laws.

'We will continue to put safety and ethical behaviour ahead of all other considerations,' Mr Olsen said.

Mr Wilson, a maintenance superintendent and Mr Lowery, a maintenance supervisor, died on September 25, 1998 when a gas explosion shook the Longford plant as equipment couldn't handle the unusually high gas flow.

For two weeks after the blast, Victorian businesses and households struggled to operate without gas in a crisis which was estimated to cost gas users about $1.3 billion.

Businesses were shut, workers were stood down without pay and emergency legislation was introduced to preserve the remaining gas.

In June 1999, a Royal Commission found that Esso's failure to adequately train workers in safety procedures caused the disaster and recommended that the company upgrade its training, safety monitoring and emergency procedures.

In July last year, Esso was fined a record $2 million in the Supreme Court after being found guilty of eleven charges under the Occupational Health and Safety Act.

After the verdict, 10 000 consumers and businesses who suffered financial loss during the gas shortage sued Esso in the Federal Court.

Eighteen Esso workers and their families also mounted a class action against the company in the Supreme Court. In a separate case, the Insurance Council of Australia sued Esso on behalf of 120 large businesses that lost production or had shut down during the gas crisis.

Source: *The Age*, 15 November 2002

is a notice served on an employer requiring steps to be taken to rectify a risk in the workplace that has made work unsafe. A 'prohibition notice' is a notice served on an employer that work must stop or a particular machine must not be operated until the workplace or the plant is made safe.

In some jurisdictions provision is also made for alternative or additional forms of enforcement, including on-the-spot fines, ordering the publication of occupational health and safety breaches by a company in its annual report, and ordering the undertaking of specific expenditures by an employer on remedial occupational health and safety measures.

Administering organisations

Occupational health and safety laws in Australia are actively administered and enforced. For example, in the year 2000–01 there were approximately:

- 1000 employed inspectors
- 162 400 workplace inspections

- 38 700 improvement notices issued
- 7200 prohibition notices issued
- 1900 on the spot fines
- 700 court prosecutions
- $8 million of fines awarded by the courts.

Responsibility for OHS law sits with the government and parliament in each jurisdiction. Oversight of these laws is the responsibility of the relevant government minister; their day-to-day administration is the responsibility of a public authority in each jurisdiction. These change from time to time, but at present they are:

New South Wales	■ WorkCover NSW
Victoria	■ Victorian WorkCover Authority
Queensland	■ Department of Industrial Relations (Workplace Health and Safety Division)
South Australia	■ WorkCover Corporation ■ Department of Administration and Information Services (Workplace Services)
Western Australia	■ Department of Consumer and Employment Protection (WorkSafe Division)
Tasmania	■ Department of Infrastructure, Energy and Resources (Workplace Standards Tasmania)
Northern Territory	■ Department of Employment, Education and training (Office of Work Health)
Australian Capital Territory	■ ACT WorkCover ■ Chief Minister's Department (Workplace Safety and Labour Policy)
Commonwealth	■ Comcare (Safety Rehabilitation and Compensation Commission)

In addition, accredited trade union officials have powers under some OHS laws and regulations, as well as some Commonwealth and State workplace relations legislation and awards, to enter and inspect workplaces for breaches of industrial or OHS laws.

SPECIALIST OCCUPATIONAL HEALTH AND SAFETY LAWS

While the principal occupational health and safety statute in each jurisdiction is the primary source of law, the Robens model contemplates that a secondary source of law exists on specialist matters. These are contained in occupational health and safety regulations, in codes of practice and in guidance material issued by occupational health and safety authorities.

Regulations

Each Australian jurisdiction has enacted regulations that underpin the principle occupational health and safety statute. These regulations cover multiple topics, and in many cases specify health and safety standards on specialist subjects.

Compliance with regulations is not optional. Regulations are made under the authority of the principal statute and have the force of law. Breaches render offenders liable to enforcement proceedings. Moreover, compliance with regulations is not usually a complete defence to prosecution for breach of the general statutory duty of care. It is, however, a factor that courts will take into account in deciding whether a breach has occurred.

There are general regulations and specialist regulations. The principal source of regulations in each jurisdiction is:

New South Wales	■ Occupational Health and Safety Regulations 2001
Victoria	■ Occupational Health and Safety (Manual Handling) Regulations 1999 ■ Occupational Health and Safety (Hazardous Substances) Regulations 1999 ■ Occupational Health and Safety (Major Hazard Facilities) Regulations 2000 ■ Occupational Health and Safety (Noise) Regulations 1992 ■ Occupational Health and Safety (Plant) Regulations 1995
Queensland	■ Workplace Health and Safety Regulations 1997
South Australia	■ Occupational Health, Safety and Welfare Regulations 1995
Western Australia	■ Occupational Safety and Health Regulations 1996
Tasmania	■ Workplace Health and Safety Regulations 1998
Northern Territory	■ Work Health (Occupational Health and Safety Regulations) 1996
Australian Capital Territory	■ Occupational Health and Safety Regulations 1991
Commonwealth	■ Occupational Health and Safety (Commonwealth Employment) Regulations 1991 ■ Occupational Health and Safety (Commonwealth Employment) (National Standards) Regulations 1991

Major topics dealt with by regulations include:

- manual handling of goods
- major hazardous substances (including duties on manufacturers to provide safety data sheets for dangerous goods)
- major hazard facilities
- noise levels
- plant and machine safety

- asbestos
- storage and transportation of dangerous goods
- issuing of certificates and authorisations
- registration of some plant and equipment with government authorities
- labelling of dangerous goods
- regulations for specialist industry sectors (such as construction or demolition work)
- method of reporting workplace injuries and incidents.

Codes of practice and guidance material

To assist employers and employees meet their statutory duties, occupational health and safety authorities and governments develop and issue codes of practice and guidance material.

There are more than one hundred official codes of practice and dozens of guidance notes that exist in the Australian jurisdictions. They cover very specialist areas and have usually been developed by government authorities in conjunction with industry and union representatives. In some instances, all jurisdictions have combined resources to develop national guidelines that have then been adopted (sometimes with modifications) by individual States and Territories.

Examples of subjects dealt with in current codes of practice and guidance material include demolition, trenching, working in confined spaces, scaffolding, cash in transit, diving and snorkelling, workplace amenities, first aid, labelling, management of HIV/AIDS, falls from heights, workplace violence, fatigue management and environmental tobacco smoke.

Generally, codes of practice and guidance material are not of themselves mandatory. They establish standards and systems of work that are indicative of good health and safety practices. However, as with regulations, compliance is not usually a complete defence to prosecution for breach of duty of care, although it may be a relevant factor that courts take into account. Sometimes codes of practice and guidance material are directly inserted in regulations. If this occurs, then they form part of the regulations and compliance with them is mandatory.

Specialist statutes

In addition to the principal statute in each jurisdiction, OHS law also includes specialist Acts of parliament. These concern some specific industries, or some specific activities. The mining and maritime industries are two industries where specialist OHS legislation exists.

Examples of specialist statutes are:

- *Occupational Health and Safety (Maritime Industry) Act 1993* (Cwlth) (administered by the Seacare Authority)
- *Mining Act 1971* (SA)
- *Rural Workers Accommodation Act 1969* (NSW)
- *Dangerous Goods Safety Management Act 1995* (Qld)
- *Road Transport (Dangerous Goods) Act 1995* (Vic.)
- *Electricity Industry Safety and Administration Act 1997* (Tas.)
- *Timber Industry Regulation Act 1926* (WA).

INTERNATIONAL STANDARDS

Some international standards on occupational health and safety matters have been developed by the International Labour Organisation (ILO). The ILO is an international body made up of government, employer and worker representatives. ILO standards are not binding on Australian

employers and employees unless they have been specifically incorporated into Australian statutes by Commonwealth, State or Territory governments. The Australian government does not automatically ratify international standards of the ILO. Instead, it operates a policy that it will do so only when appropriate and where law and practice in each Australian jurisdiction already complies with the standard.

Examples of international standards on occupational health and safety matters are:

ILO 155	Occupational Safety and Health Convention 1981
ILO 184	Safety and Health in Agriculture Convention 2001
ILO 182	Worst Forms of Child Labour Convention 1999
ILO 170	Chemicals Convention 1990
ILO 138	Minimum Age Convention 1973.

LIABILITY FOR WORKPLACE INJURIES

Occupational health and safety laws regulate the rights and responsibilities of employers, employees and third parties in the workplace, and impose penalties for breaches of duties. As discussed above, a duty can be breached even though no workplace injury has occurred.

Occupational health and safety statutes do not provide a system for compensating employees for loss and damage from workplace injuries. This is the responsibility of separate laws. Compensation is primarily:

- statutory compensation under workers' compensation legislation
- court-ordered compensation under common-law actions in tort or contract (discussed earlier in this chapter).

Workers' compensation law is a large topic. Chapter 21 provides an introduction to workers' compensation law in Australia, the key features of which are:

- Statutory compensation exists for injuries and diseases arising out of or in the course of employment.
- Statutory compensation is based on strict liability; that is, if an injury or disease occurs, then it is compensated. Statutory compensation does not require fault of the employer to be established, nor is payment avoided because of fault by the employee.
- Statutory compensation has arbitrary limits; for example, on the level of compensation, the age at which compensation ceases and the length of time compensation is paid for.
- Statutory compensation is paid as weekly payments, or as a lump sum or a combination of both, depending on the legislative scheme.
- Statutory compensation primarily compensates for economic loss (e.g. medical expenses, loss of income) and usually limits compensation for non-economic loss (e.g. pain and suffering).
- Statutory compensation can limit access to common-law damages in contract and tort, depending on the legislative scheme.
- Statutory compensation is funded by compulsory levies on employers, with some provision for self-insurance by authorised employers, and differential premium rates based on high- and low-risk industries or employers.
- Statutory compensation systems include legal obligations on employers to allow injured workers to return to work after prescribed periods of compensated absence.
- Injured workers have obligations to participate in rehabilitation, otherwise compensation can be removed or suspended.

- Severe penalties are imposed on employers and employees for non-compliance.
- Statutory compensation schemes are administered by government agencies established for these purposes (usually the WorkCover Authority) and in some schemes use the assistance of insurance companies to manage claims.
- Courts and review tribunals are established to deal with compensation disputes.

Despite these similarities, there are many variations between workers' compensation laws in Australia. For example, some jurisdictions compensate journey accidents on the way to work, while others do not; some jurisdictions have tighter rules for 'stress' claims; and some jurisdictions expand the definition of 'employee' beyond common-law concepts. It is necessary to check specific legislation and regulation in each jurisdiction in order to establish legal rights and responsibilities in individual cases.

In 2001 there were approximately 325 000 statutory workers' compensation claims made against employers in Australia. In addition, there is a cost to employers of short-term sick leave taken by employees arising from workplace injuries. The cost and complexity of workers' compensation systems provide a powerful incentive for employers and employees to take all reasonable steps to meet their duties of care under OHS laws before injuries and accidents occur.

NATIONAL OCCUPATIONAL HEALTH AND SAFETY LAW AND POLICY

Australia has extensive, multiple legislative systems of OHS law and workers' compensation law. These laws are required to be relevant to employers and employees of differing circumstances and sizes, across all industries. They must also deal with moral as well as legal considerations; these are sometimes controversial and the issues they deal with can be emotive and complex. Public policy in this area must also respond to rapid changes in industrial, economic and social circumstances and attitudes.

This presents substantial challenges for policy makers. Determining the appropriate balance of fairness between the interests of employers, employees, manufacturers, contractors, occupiers and the broader community is no easy task. Difficult policy trade-offs have to occur to achieve some degree of equity, certainty and economic reality. The process of developing and reviewing law and policy in this area is as challenging as the administration of the law itself.

National Occupational Health and Safety Commission

The National Occupational Health and Safety Commission (NOHSC) is the principal national policy-making body for occupational health and safety in Australia. It is a statutory body created under the *National Occupational Health and Safety Commission Act 1985* (Cwlth).

NOHSC operates on a tri-partite basis; it comprises representatives of the Commonwealth and all State and Territory governments, of employers (through the Australian Chamber of Commerce and Industry) and of employees (through the Australian Council of Trade Unions). It also has an independent chairperson.

The Commission has a secretariat based in Canberra, and its subcommittees meet regularly to discuss occupational health and safety policy and strategy. NOHSC helps individual jurisdictions co-ordinate activities on matters of mutual interest, and seeks greater levels of consistency in the regulatory framework between jurisdictions on key issues.

NOHSC does not make or administer law. It develops policy, educates and informs, conducts research and makes recommendations to governments, to industry and to employees.

Regular reports on the work of NOHSC are provided to Commonwealth, State and Territory ministers through the Workplace Relations Ministers' Council.

State and Territory governments have generally adopted a similar tri-partite approach to occupational health and safety policy making in their jurisdiction. In some cases, State and Territory OHS laws provide for the establishment of formal, tri-partite consultative structures.

National Occupational Health and Safety Strategy

In April 2002 all governments, employer and union representatives comprising NOHSC developed and adopted a 'National Occupational Health and Safety Strategy 2002–2010'. This strategy identifies five national priorities in respect of which specific national action plans should be developed. These five priorities are:

- reduction in high-incidence risks and severity risks
- improvement in the capacity of business operators to manage occupational health and safety effectively
- more effective prevention of occupational disease
- elimination of hazards at the design stage
- strengthening of the capacity of government to influence occupational health and safety outcomes.

The NOHSC national strategy is a decade-long plan with specific national targets for continuous improvement. These targets are:

- a significant, continuing reduction in workplace fatalities, including a reduction in the incidence of work-related fatalities by at least 20 per cent by 2012
- a reduction in the incidence of workplace injury by at least 40 per cent by 2012.

Occupational health and safety law reform

All Australian governments regularly review OHS laws. Some of the major reviews being undertaken are:

- a Commonwealth government-initiated inquiry by the Productivity Commission into national consistency of occupational health and safety and workers' compensation arrangements across Australia (announced July 2002)
- a review of South Australian workers' compensation and OHS legislation (announced June 2002)
- a statutory review of OHS laws in Western Australia (ongoing; required every five years) (2002)
- a ministerial review of OHS laws in Queensland (July 2001).

Appendix overview

The main points in this appendix are:

1. Occupational health and safety laws regulate the rights and obligations of employers, employees and third parties in relation to workplace safety.
2. Australia has an extensive and complex system of OHS laws, principally comprising a combination of laws made by Commonwealth, State and Territory parliaments.
3. Occupational health and safety laws interact directly with common-law tort and contract law, with criminal law and with employment and workplace relations law.
4. The key features of OHS laws are contained in a principal occupational health and safety statute in each Australian jurisdiction.
5. In each jurisdiction, specialist Acts, regulations, codes of practice and guidance material supplement the primary piece of legislation.
6. Although there are differences between the legislation in each jurisdiction, there are substantial common features.
7. Most Australian legislation is based on a legislative design called the Robens model. Under this structure, OHS laws impose a general duty of care on employers and employees, and allow a great deal of discretion for employers and employees in each workplace to decide how they will meet their general duties to each other.
8. The general statutory duty of care is the central concept in OHS law in Australia.
9. The duty of care applies to employers, employees and third parties such as independent contractors, occupiers and manufacturers. The terms of the duty differ according to who owes it and to whom.
10. The statutory duty of care is absolute. It is strictly interpreted by the courts to mean that employers must actively seek to eliminate risks. A workplace that contains risks that can reasonably be eliminated is breaching its duty of care even where no injury or accident occurs.
11. Actively eliminating risks includes conducting regular risk assessments, hazard identification, consultation with employees, training and supervision. Employers who do not take these steps are at real risk of breaching their duty of care.
12. Severe penalties apply for breaches of the duty of care under statutory OHS laws. This includes substantial monetary penalties on corporations and individuals and, in some serious cases, imprisonment.
13. Occupational health and safety laws are enforced by the courts. Breaches are investigated by government inspectors, who will initiate prosecutions where they are found to have occurred. Inspectors can also serve notices on employers requiring rectification of unsafe practices.
14. Occupational health and safety laws do not provide compensation for workplace injuries. This is provided by separate workers' compensation laws and, in some cases, the common law.
15. Statutory workers' compensation laws are strict liability laws. They are not dependent on who or what was at fault for causing the workplace injury or disease.
16. Statutory workers' compensation laws can, depending on their terms, limit access by workers to common-law courts for compensation for workplace injuries. In return, set amounts of compensation are prescribed.
17. Employers have statutory obligations, subject to some qualifications, to provide employment for injured workers when they return to work from a compensated injury.
18. Law and policy in relation to occupational health and safety requires a balance to be maintained between the interests of employers, employees and the community as a whole. Governments regularly review OHS laws.

Consolidation questions

1. The principal source of OHS law in Australia is:
   (a) judge-made common law
   (b) international law
   (c) statutory law made by the federal parliament only
   (d) statutory law in each Australian jurisdiction
   (e) codes of practice issued by the National Occupational Health and Safety Commission.
2. List five of the major objects of Australian OHS law.
3. As a general rule, a private employer and its employees are governed by the statutory OHS law of which State or Territory?
   (a) the State or Territory where the employer has its head office
   (b) the State or Territory where the employer is incorporated
   (c) the State or Territory where the employee lives
   (d) the State or Territory where the employee works.
4. What are the common characteristics of Australian OHS legislation?
5. Describe the way in which Australian OHS law is 'performance-based' rather than 'prescription-based'.
6. Employers who meet their duty of care to employees under tort law and their contractual obligations to employees under contract law will automatically be in compliance with their occupational health and safety obligations. True or false? Give a reason for your answer.
7. As a general principle, workplace relations agreements and industrial awards can add to but not detract from the obligations on employers and employees that are created by occupational health and safety statutes. True or false? Give a reason for your answer.
8. In addition to duties on employers and employees, what other parties have rights and obligations imposed on them by OHS laws?
9. What are the two major statutory duties on employers and the two major statutory duties on employees imposed by Australian OHS laws?
10. Give five examples of the way that employers can meet their duty of care to their employees under OHS law.
11. It is a defence under OHS law for an employer to establish that it was not reasonably practicable to provide a safe working environment. True or false? Give a reason for your answer.
12. Employers will not be in breach of their duty of care to employees:
    (a) if the workplace has not had a safety injury or accident
    (b) if the workplace has been inspected by a government inspector
    (c) if no employees report any unsafe conditions
    (d) if the employer does not intend to cause accidents or injuries
    (e) all of the above
    (f) none of the above.
13. Who enforces OHS laws, and what type of penalties can be imposed for breaches?
14. What role do codes of practice play under Australian OHS law?
15. What is the primary source of law governing the entitlement of employees to be compensated for injuries in the workplace?

Case study questions

LIQUID GOLD PTY LTD

Felicity works for Liquid Gold Company Pty Ltd. Liquid Gold, which makes honey-flavoured ice cream, is owned by Dave, Doug and Dennis. Felicity works with Tom and Nick on the production line, packaging barrels of ice cream. Tom is employed by Liquid Gold as her supervisor. Nick is a temporary casual employee employed by the local labour hire firm (Get a Job Pty Ltd) to help cope with busy production periods.

Dave and Doug are serious about occupational health and safety. They call in a workplace consultant (Safe Productions Pty Ltd) to conduct a training course, which Felicity attends. After the course, Safe Productions tells Dave and Doug that they have a safe workplace and that all staff know what is expected of them. Dennis, on the other hand, thinks health and safety rules are bureaucratic nonsense. According to Dennis, everyone should have individual responsibility to look after themselves.

While working on the production line Felicity asks Tom to stop the conveyor belt because she is feeling giddy. Tom stops the belt just as Felicity faints. As Felicity is walked back to the staff amenities room she trips over a pothole in the bitumen floor and injures her back.

Dave and Doug are alarmed at this accident, and call in Safe Productions to investigate. Safe Productions discovers that Nick had increased the speed of the conveyor belt two weeks earlier, after Dennis had requested faster production.

Dave and Doug report the incident to a government inspector, as required by OHS law. The inspector investigates the incident and concludes that all of the directors of Liquid Gold Pty Ltd (Dave, Doug and Dennis) have breached their duty of care to Felicity.

Discuss the following:

1. Is the inspector correct in his conclusion? Give reasons for your answer.
2. Dave and Doug claim that Liquid Gold is not liable because Safe Productions Pty Ltd certified to them that the workplace was safe. Are they correct?
3. Dave and Doug claim that Liquid Gold is not liable because Nick was not their employee. They claim that Get a Job is liable. Are they correct?
4. Dave and Doug claim that Liquid Gold is not liable because they did not know that Nick had increased the speed of the conveyor belt. Are they correct?
5. Dave and Doug claim that Liquid Gold is not liable because they organised Safe Productions to train staff. Are they correct?
6. Dave and Doug claim that Liquid Gold is not liable because Tom was Felicity's supervisor, not them. Are they correct?
7. Dave and Doug claim that Liquid Gold is not liable because the staff training session was enough for them to prove that they had taken all steps reasonably practicable to protect employees from an unsafe workplace. Are they correct?
8. Dave and Doug claim that Dennis (not they) should be liable, because Dennis had given the instruction to speed up the conveyor belt, and that Dennis (not they) had a 'she'll be right' attitude to workplace safety. Are they correct?

SPORTY PRODUCTIONS

Richard is the sole proprietor of Sporty Productions. Richard is photographer who takes photographs at major sporting events, and sells the photos to sports magazines. He employs five staff, who all work in his processing laboratory and help out with sales.

Jennifer has worked for Richard for five years. She has a certificate as a film processor. Wendy is a new, inexperienced employee. On 23 April, Richard is at a grand slam tennis event taking photographs. While he is away Wendy puts a solution in the production process. Jennifer touches the solution and sustains a burn to her hand. Jennifer had set a rule that only she was to put solution into the production process. Wendy knew of that rule, but disregarded it. On investigation, a government inspector finds that the solution had a clear warning label and that Wendy should have read the warning. The label required the solution to only be used by a person who had a certificate in processing, which Wendy did not have. On further investigation, it is discovered that the solution used in this case had been a faulty batch caused by a manufacturing error. That defect made the solution toxic, causing the burn to Jennifer's hand. The government inspector asks your help in deciding who should be prosecuted for breach of OHS laws, and whether the prosecution would succeed.

1. Which parties in this case owed a duty of care to each other?
2. Which parties in this case have breached their duty of care, and to whom?
3. Is a defence available to Richard that Jennifer was in charge of production?
4. Is a defence available to Richard that the solution had a manufacturing defect?
5. Is a defence available to Richard that Wendy acted contrary to instructions?

Give reasons for your answers.

ANSWERS TO CONSOLIDATION QUESTIONS

1. The correct answer is (d). The principal source of OHS law in Australia is statutory law in each Australian jurisdiction.
2. Five major objects of Australian OHS law are:
   - to secure the health, safety and welfare of persons at work
   - to protect persons at work against risks to health or safety
   - to assist in securing safe and healthy work environments
   - to eliminate, at the source, risks to the health, safety and welfare of persons at work
   - to provide for the involvement of employees and employers, and associations representing employees and employers, in the formulation and implementation of health and safety standards.
3. The correct answer is (d). As a general rule, a private employer and its employees are governed by the statutory OHS law of the State or Territory where the employee works.
4. The common characteristics of Australian occupational health and safety legislation are:
   - a single, principal statute in each jurisdiction
   - regulations, codes of practice and/or guidance material that underpin that statute
   - general statutory duties of care on employers towards employees and third parties, requiring active protection of health and safety
   - general statutory duties of care on employees towards fellow employees and third parties
   - general statutory duties of care on third parties
   - systems of workplace education and training, and consultation between employers and employees
   - creation of offences for breaches of legal duties
   - a high level of penalties for breaches
   - investigation of suspected breaches by government inspectors
   - enforcement of breaches by the courts.

5. Australian OHS law is 'performance-based' rather than 'prescription-based' because it imposes a general duty of care on employers, and forces employers in each workplace to implement the steps needed to meet their duty. Under this model of legislation, it is the performance of the employer in meeting their duty that is assessed, rather than their conformity with predetermined prescriptive legislative standards.

6. False. Employers who meet their duty of care to employees under tort law, and their contractual obligations to employees under contract law, will not automatically be in compliance with their occupational health and safety obligations. Occupational health and safety duties are in addition to the legal obligations imposed by tort or contract law. While the steps required to meet each case may be similar, these legal obligations are all stand-alone sources of law, and must be complied with independently.

7. True. As a general principle, workplace relations agreements and industrial awards can add to but not detract from the obligations on employers and employees imposed by occupational health and safety statutes. It is not possible to 'contract out' of statutory occupational health and safety obligations. It is, however, possible to add to them in workplace agreements or through provisions in industrial awards made by industrial relations tribunals.

8. In addition to duties on employers and employees, other parties have rights and obligations imposed on them by OHS laws:

- independent contractors
- manufacturers, suppliers and importers of plant and substance
- installers and designers of plant
- occupiers and persons in control of a workplace
- self-employed persons
- members of the public at a workplace.

9. The principal statutory duties on employers are:

- a general duty to provide, maintain and ensure, so far as is reasonably practicable, a working environment that is safe and without risks to the health of employees (including apprentices and trainees) while they are at work
- a general duty to ensure people (other than employees of the employer) are not exposed to health or safety risks arising from work being undertaken.

The principal statutory duties on employees are:

- to cooperate with the employer or any other person to fulfil requirements imposed in the interests of safety and health
- to use equipment in a safe and proper manner and in accordance with their employer's instructions.

10. Employers can meet their duty of care to employees under OHS law by taking the following steps:

- regularly conducting risk assessments of their workplace and all workplaces where their employees work
- regularly conducting hazard identification assessments
- regularly checking plant, machinery and substances for labelling and warning signs
- maintaining safety equipment and guarding in good order
- educating and training employees in occupational health and safety policies and procedures, and repeating education and training at regular intervals
- consulting employees and their representatives on health and safety issues
- preparing and maintaining appropriate policies and procedures
- conducting health and safety research.

11. True. It is a defence under OHS law for an employer to establish that it was not reasonably practicable to provide a safe working environment. However the courts interpret the duty of care strictly. It is an absolute duty, subject only to this defence being made out by the employer. Meeting this duty requires an active approach to health and safety by the employer. The defence will not be made out by a passive or inadequate management approach to health and safety.

12. The correct answer is (f): none of the above. An employer will be in breach of their duty of care to employees whether or not an injury or accident has occurred; whether or not the workplace has been inspected by a government inspector; whether or not employees report any unsafe conditions; and whether or not the employer intends to cause accidents or injuries. None of these matters are defences to a breach of the duty of care, nor do they mean that the duty of care has been met.

13. Occupational health and safety laws are enforced by the courts. Court proceedings for breaches of OHS law are brought by government inspectors. Inspectors can also issue improvement notices and prohibition notices. The courts can impose severe monetary penalties on corporation and individuals for breaches of OHS laws up to prescribed maximum amounts. In serious cases the courts can also order imprisonment, depending on the terms of the applicable statute. Inspectors in some jurisdictions can also issue on the spot fines.

14. Under Australian OHS law governments and government authorities can develop and issue codes of practice and guidance material. They usually cover specialist areas and are developed in conjunction with industry and union representatives. Generally codes of practice and guidance material are not of themselves mandatory. They establish standards and systems of work that are indicative of good health and safety practices. However, as with regulations, compliance is not usually a complete defence to prosecution for breach of duty of care but may be a relevant factor that courts take into account. Sometimes codes of practice and guidance material are directly inserted in regulations. If this occurs then compliance with codes of practice and guidance material is mandatory as they form part of the regulations.

15. The major source of law governing the entitlement of employees to be compensated for injuries in the workplace is statutory workers' compensation law in each Australian jurisdiction. In addition, common-law action for damages under tort law or contract law may be available, subject to it being prohibited or restricted by the statutory law of a particular jurisdiction.

ANSWERS TO CASE STUDY QUESTIONS

Liquid Gold Pty Ltd

1. Yes, the inspector is correct in concluding that all directors have breached their duty. Under OHS law, company directors cannot apportion blame for breaches of the duty of care among themselves. The company owes the duty, and the company has breached the duty irrespective of the conduct of individual directors. The duty of care has been breached because there was no safe system of work once the conveyor belt was sped up. There was also an unsafe working environment with the pothole in the floor. In addition, it is likely that there was a breach of the duty of care because the company had not taken enough active steps to conduct regular risk assessments.

2. No, they are not correct. While it was a good idea to have Safe Productions conduct an inspection, employers cannot transfer their duty of care to a workplace consultant.

3. No, they are not correct. Employers cannot transfer their duty of care to a labour hire firm that employed a worker who contributed to the breach.

4. No, they are not correct. In addition to the answer to Question 3, it is also no defence for this employer to argue that they did not know that Nick had increased the speed of the conveyor belt. Liability under OHS laws does not require knowledge or intent to breach a duty of care. A duty of care is breached if an unsafe work practice is undertaken on premises under the care and control of the employer, intended or not.

5. No, they are not correct. While conducting a training session for staff is a good idea, this alone does not mean that an employer's duty of care is satisfied. An employer carries that duty of care, whether or not staff are trained in what to do. A failure to train is itself a breach of that duty.

6. No, they are not correct. Employers are required to meet their duty of care irrespective of who is or is not supervising their employees.

7. No, they are not correct. A training session for staff does not in itself mean that an employer has satisfied their duty of care.

8. No, they are not correct. Under OHS law, company directors cannot apportion blame for breaches of the duty of care among themselves. The company owes the duty, and the company has breached the duty irrespective of the conduct of individual directors.

Sporty Productions

1. Richard, as the Sporty Productions employer, owed a duty of care to all staff, including both Jennifer and Wendy. Jennifer and Wendy both owed a duty of care to each other, to other employees and to Richard as their employer. The manufacturer of the faulty batch of solution also owed a duty of care to users of the product, being Sporty Productions and its employees.

2. Richard, as the sole proprietor of his business Sporty Productions, has personally breached his duty of care to Jennifer because of the faulty solution in the laboratory. He has also breached his duty to other employees (including Wendy) because a duty is not only owed to employees who are injured, but to all employees. Wendy has breached her duty of care to Jennifer and to Richard. She should have read the warning label before using the solution, and should have obeyed the work rule prohibiting use of the solution by an unqualified person. The manufacturer of the solution has also breached its duty of care, both to Richard and to employees of Sporty Solutions, because it produced and sold a faulty batch of solution.

3. No. It is not possible for an employer to make out a defence that a particular employee (whether or not they were the injured person) was in charge. An employer owes a duty to all employees however they may be supervised, or whoever they are.

4. No. It is not a defence available to Richard that the solution had a manufacturing defect. However, if Richard can satisfy a court that following the purchase of the product he took all reasonable steps practicable to satisfy himself that it was free from defect and that his workplace was free of risk, he may be able to make out a defence that it as not reasonably practicable to provide a working environment free of this particular hazard. If Richard were found to have breached his duty, a court would be likely to take the fact that there was a manufacturing defect beyond Richard's control into account in determining the level of penalty.

5. No. There is no general defence available to an employer under OHS law to claim that an employee acted contrary to instructions. An employer has a duty to actively maintain a risk-free workplace, and cannot rely on having provided training or instructions to avoid liability.