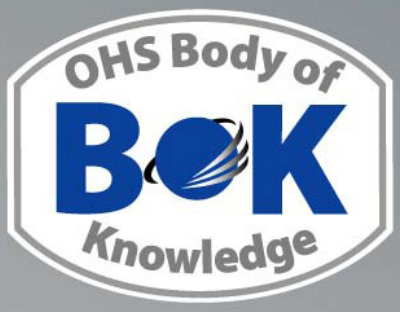

Principles of OHS Law

Core Body of Knowledge for the Generalist OHS Professional

Safety Institute of Australia Ltd

Australian OHS Education Accreditation Board

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Disclaimer

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Topic Specific Technical Panel and authors

The members of the Topic Specific Technical Panel and the authors were selected on the basis of their demonstrated, specialist expertise. Panel members and authors were not remunerated; they provided input and wrote the chapter as part of their contributions to the OHS profession and to workplace health and safety.

Australian OHS Education Accreditation Board

As 'custodian' of the OHS Body of Knowledge the Australian OHS Education Accreditation Board project managed the development of the chapter.

S.I.A. Safety Institute of Australia Ltd

The Safety Institute of Australia supports the ongoing development and dissemination of the OHS Body of Knowledge through the Australian OHS Education Accreditation Board which is auspiced by the Safety Institute of Australia

Synopsis of the OHS Body Of Knowledge

Background

A defined body of knowledge is required as a basis for professional certification and for accreditation of education programs giving entry to a profession. The lack of such a body of knowledge for OHS professionals was identified in reviews of OHS legislation and OHS education in Australia. After a 2009 scoping study, WorkSafe Victoria provided funding to support a national project to develop and implement a core body of knowledge for generalist OHS professionals in Australia.

Development

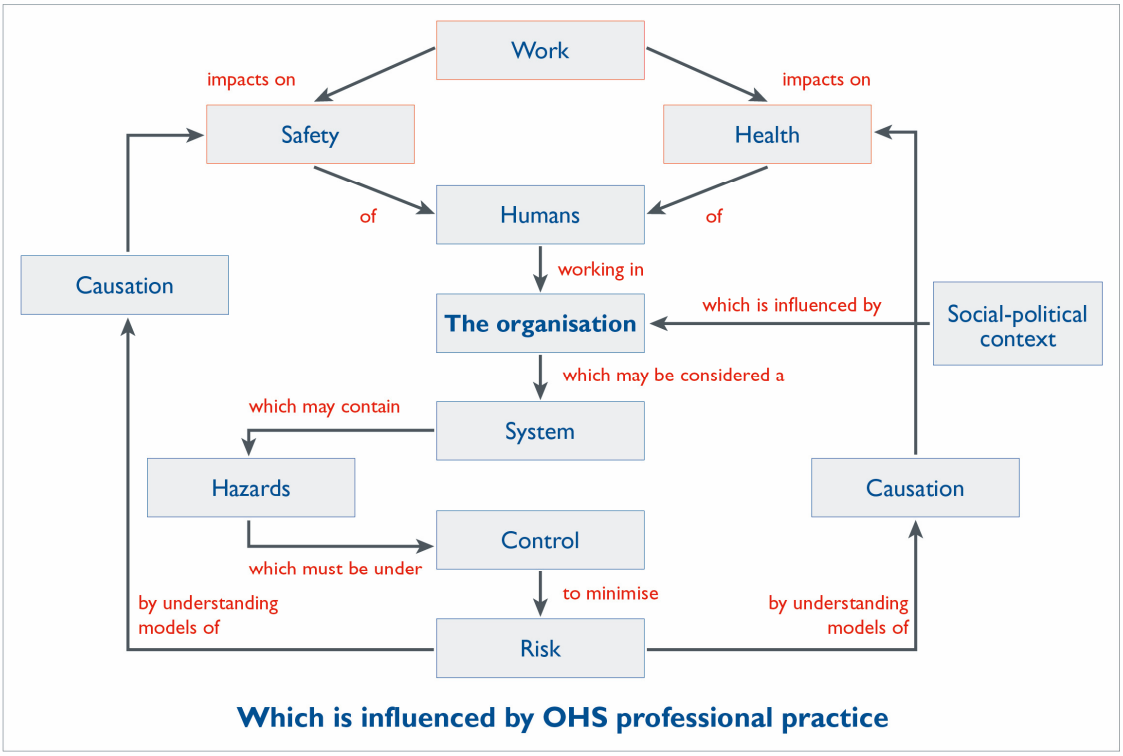
The process of developing and structuring the main content of this document was managed by a Technical Panel with representation from Victorian universities that teach OHS and from the Safety Institute of Australia, which is the main professional body for generalist OHS professionals in Australia. The Panel developed an initial conceptual framework which was then amended in accord with feedback received from OHS tertiary-level educators throughout Australia and the wider OHS profession. Specialist authors were invited to contribute chapters, which were then subjected to peer review and editing. It is anticipated that the resultant OHS Body of Knowledge will in future be regularly amended and updated as people use it and as the evidence base expands.

Conceptual structure

The OHS Body of Knowledge takes a 'conceptual' approach. As concepts are abstract, the OHS professional needs to organise the concepts into a framework in order to solve a problem. The overall framework used to structure the OHS Body of Knowledge is that:

> **Work** impacts on the **safety** and **health** of humans who work in **organisations**. Organisations are influenced by the **socio-political context**. Organisations may be considered a **system** which may contain **hazards** which must be under control to minimise **risk**. This can be achieved by understanding **models causation** for safety and for health which will result in improvement in the safety and health of people at work. The OHS professional applies **professional practice** to influence the organisation to being about this improvement.

This can be represented as:



Audience

The OHS Body of Knowledge provides a basis for accreditation of OHS professional education programs and certification of individual OHS professionals. It provides guidance for OHS educators in course development, and for OHS professionals and professional bodies in developing continuing professional development activities. Also, OHS regulators, employers and recruiters may find it useful for benchmarking OHS professional practice.

Application

Importantly, the OHS Body of Knowledge is neither a textbook nor a curriculum; rather it describes the key concepts, core theories and related evidence that should be shared by Australian generalist OHS professionals. This knowledge will be gained through a combination of education and experience.

Accessing and using the OHS Body of Knowledge for generalist OHS professionals

The OHS Body of Knowledge is published electronically. Each chapter can be downloaded separately. However users are advised to read the Introduction, which provides background to the information in individual chapters. They should also note the copyright requirements and the disclaimer before using or acting on the information.

Principles of OHS Law

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Core Body of Knowledge for the Generalist OHS Professional

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Core Body of Knowledge for the Generalist OHS Professional

Principles of Work Health and Safety Law

Abstract

This chapter reviews the basic principles underlying current Australian work health and safety (WHS) legislation. It is essential for the provision of OHS advice and OHS decision making in organisations to be underpinned by an understanding of these principles. It is equally important that OHS professionals are able to identify when it is appropriate to seek professional legal advice. After outlining the historical context for the current legislative framework, this chapter reviews core concepts including the sources of OHS law and provisions of the model Work Health and Safety Act. It focuses on duty of care, the qualifiers to this duty, an officer's duty to exercise due diligence, and enforcement mechanisms available to regulators. The chapter concludes with implications for OHS practice.

Keywords

statutory law, common law, duty of care, reasonably practicable, PCBU, enforcement, inspectors, due diligence, officer

Terminology

Depending on the jurisdiction and the organisation, Australian terminology refers to 'Occupational Health and Safety' (OHS), 'Occupational Safety and Health (OSH) or 'Work Health and Safety' (WHS). In line with international practice this publication uses OHS with the exception of specific reference to the Work Health and Safety (WHS) Act and related legislation.

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1 Introduction

The *Australian Work Health and Safety Strategy 2012-2022* envisions "healthy, safe and productive working lives" achieved through "effective systematic management of risks result[ing] in improved worker health and safety and productivity" (SWA, 2012a, p. 5). While one action area of the strategy is a "responsive and effective regulatory framework" (p. 3), the effectiveness of such a framework depends on its appropriate application by all those who provide advice on how the spirit as well as the detail of the law applies in occupational health and safety (OHS) practice. While legal professionals working in the OHS area are the experts in this, it is imperative that a basic understanding of these principles underpins OHS advice and OHS decision making in organisations.

This chapter complements *OHS Body of Knowledge* chapter – *Socio-political Context: OHS Law and Regulation in Australia* – by identifying and discussing the underlying principles of judicial reasoning and legal theory applying to OHS. The objective is to delineate the knowledge that generalist OHS professionals require in order to appropriately interpret relevant legislation and engage with the evolving case law to identify implications for practice.

To advise duty holders about the application of the law, OHS professionals should understand not just the details of specific provisions, but the context and underlying legal principles.

After a brief historical context,[1] the chapter addresses the key principles underlying OHS laws with a focus on relevant elements of the model Work Health and Safety Act (SWA, 2011a), and concludes with a discussion on the implications for OHS practice.

2 Historical context

Australia's current Work Health and Safety Acts are difficult to understand without some knowledge of how OHS legislation has developed, particularly since the early 1970s.

Initially, Australian OHS legislation was based on the nineteenth-century United Kingdom Factory Acts.[2] Early statutes were principally concerned with the working hours of children and young adults, and then women (see, for example, Bloy, 2011; Gray, 1987). In 1844, the Factories Act regulated machinery safety in the UK textile industry by establishing strict liability specification safety standards in statutes, supplemented by regulations that also were predominantly specification standards. A *specification standard* states the safeguard that has to be adopted for an employer or factory owner to comply with the Act. Provisions in the 1844 Factories Act were enforceable by an independent state inspectorate, which could resort

[1] See also *OHS BoK* Socio-Political Context: OHS Law and Regulation in Australia (section 2.2)

[2] See *OHS BoK* Global Concept: Work (section 2)

to prosecution. From the 1860s, regulatory protection was extended ad hoc to other industries (Johnstone, Bluff & Clayton, 2012, pp 43-4).

During the second half of the nineteenth century and the beginning of the twentieth, this UK model of OHS regulation was adopted by the Australian colonies and states, initially by Victoria (in 1873 and 1885) followed by South Australia (1894), New South Wales and Queensland (1896), Western Australia (1904) and Tasmania (1910). Until the 1970s, each of these statutes was amended piecemeal to extend to new industries and to address safety issues arising from developments in technology (see, for example, Purse, Dawson & Dorrian, 2010).

While this approach to preventive OHS regulation became deeply entrenched in the first half of the twentieth century, it suffered from significant defects, which were articulated in the British Robens Report of 1972, pp 1-13):

- Because the regulatory provisions were developed ad hoc, the statutes provided uneven coverage across workplaces, with protective focus mainly on factory-based physical hazards, particularly dangerous machinery; many workplaces received no coverage.
- "[T]oo much law" was "intrinsically unsatisfactory," resulting in a mass of detailed, technical, unintelligible and easily outdated rules.
- Over-reliance on external state regulation had resulted in lack of workplace initiative and "personal responsibility," leading to "apathy…the most important single reason for accidents at work" (Nichols & Armstrong (1997) provide a compelling critique of this assertion); and lack of involvement in OHS by workers and unions.
- The specification-standard approach ignored the view that many hazards arise from the way work is organised.
- The fragmentation of administrative jurisdictions had resulted in a bewilderingly complex pattern of control.

Other criticisms of the traditional model of OHS regulation focused on its inadequate consideration of occupational disease, and enforcement problems relating to an under-resourced inspectorate that relied too heavily on advice and persuasion rather than prosecution to promote compliance, and imposed unacceptably low maximum penalties for breaches.

These issues were relevant also to the Australian OHS statutes in existence at the time of the Robens Report. Indeed, similar criticisms of the New South Wales and South Australian legislation were made in the *Report of the Commission of Inquiry into Occupational Health and Safety* (Williams, 1981) and the *Report of the Occupational Safety, Health and Welfare Steering Committee* (Mathews, 1984), respectively.

The Robens Report proposed a modification of the traditional preventive regulatory model based on two principal objectives (Robens, 1972, p 12):

1. To streamline the state's role in the traditional regulatory system through the "creation of a more unified and integrated system" (Robens, 1972, p 12). This involved bringing together all OHS legislation into an umbrella statute containing broad *general duties* (a codification of the common law duty of care) covering a range of parties affecting OHS, and seeking to address all health and safety risks. The general duties were to be supplemented with regulations and codes of practice. The various inspectorates were to be united in one body, and inspectors empowered to issue administrative sanctions – including improvement and prohibition notices – and to prosecute for contraventions.

2. To create "a more effectively self-regulating system" (Robens, 1972, p 12). In the Robens vision, *self-regulation* involved systematic management approaches to eliminate or at least reduce work-related risks and, at the workplace level, workers and management working together to implement and improve upon the OHS standards set by the state. Employers were to have a duty to consult employees – represented by health and safety representatives (HSRs) – on OHS matters. The Robens model envisaged greater cooperation between the OHS inspectorate and workers and their representatives (Robens, 1972, p 65).

The Robens model and its implementation in the UK Health and Safety at Work etc. Act 1974 strongly influenced the Australian OHS statutes enacted from the late 1970s through to the early 1990s. However, many of the Australian statutes during this period went beyond the Robens model, particularly in giving enforcement powers (provisional improvement notices and the right to direct that dangerous work cease) to HSRs, providing inspectorates with the power to issue infringement notices and, in the case of New South Wales, vesting trade union secretaries with the power to launch prosecutions. From the late 1980s, the regulations and codes of practice established by the Australian OHS statutes increasingly adopted process standards, that is, standards setting out a series of steps (usually a risk-management process) to address specific hazards.

From 2000 to 2008 many of the Australian statutes moved further away from the Robens model by, for example: recasting the employer's duty of care to employees and others as a duty on a *person conducting a business or undertaking* (PCBU) to workers and others (Queensland); introducing enforceable undertakings and non-pecuniary court sanctions; and imposing higher maximum penalties where statutory contraventions involve elements of *mens rea* ('guilty mind') and/or resulted in fatality. Such jurisdiction-specific innovations and variations led to different rules applying in different states and territories. This created additional compliance costs for employers operating in more than one jurisdiction and different and potentially inequitable treatment for workers depending on the jurisdiction in which they worked. Subsequent calls for national harmonisation of OHS laws led to the

development of the model Work Health and Safety Act (WHS Act) (SWA, 2011a) and the Work Health and Safety Regulations (WHS Regulations) (SWA, 2014).[3]

The model WHS Act is largely based on the recommendations of the *National Review into Model Occupational Health and Safety Laws* (Stewart-Crompton, Mayman & Sherriff, 2008, 2009; see also SWA, 2012b). The review panel members engaged in broad-based consultation and research and, in accordance with their terms of reference, made recommendations on "the optimal structure and content of a model OHS Act that is capable of being adopted in all jurisdictions" (Stewart-Crompton et al., 2008, p. iii). The Workplace Relations Ministers Council (WRMC, 2009) accepted more than 90% of the panel's recommendations (some with comment or limitations). Development of the WHS Act and Regulations was administered by Safe Work Australia; the drafts were subject to tripartite consultation and public comment, and the model Act was endorsed by the WRMC. All jurisdictions except Victoria and Western Australia (at the time of writing) have adopted the model WHS Act and Regulations, with some local modifications. The current Victorian legislation has significant similarities to the harmonised Act; for a comparison of provisions, see AIG (2011).

The national review panel reports (Stewart-Crompton et al., 2008, 2009) are useful guides to understanding the structure of the WHS Act (2009, pp. 407-410) and key elements, such as the definition of *reasonably practicable* (2008, p. 44) and *due diligence* required of an officer (2009, pp. 61-62).

3 Understanding the core concepts

3.1 Sources of law

Under the Australian legal system, *law* may be defined as "rules of behaviour to which our society attaches some sort of sanction through the courts" (Foster, 2012, para 1.2). In general, these rules are binding on all members of society. The law imposes obligations, which if not met may trigger some sort of sanction or punishment. Where do these legal rules come from? In Australia today there are two binding sources of law – legislation and the common law.

3.1.1 Legislation and common law

Legislation is a specifically enunciated rule that is either (1) directly enacted by a parliament (as an Act of Parliament) or (2) formulated in accordance with the principles for *delegated legislation* approved by parliament and, typically, approved by the constitutional head of state for the jurisdiction concerned (the governor or the governor-general, on the advice of a minister of state). Delegated legislation will normally take the form of *regulations*. The model WHS Act (SWA, 2011a), which is in force in most jurisdictions in Australia, is an example of the first category, being approved by respective State or Federal Parliaments. The WHS Regulations (SWA, 2014) are an example of the second, being delegated legislation

[3] See also *OHS BoK* Socio-Political Context: OHS Law and Regulation in Australia, section 7.

drafted by public servants and formally approved by the executive authority. Importantly, delegated legislation can be formulated only if it falls within the 'regulation-making' power contained in the authorising Act of Parliament. If it goes outside that area, it may be held to be invalid. For an example related to OHS law, see the decision in *House v Forestry Tasmania & Attorney-General for Tasmania* (1995), where health and safety regulations were struck down as invalid because they went beyond the scope of the power given by the main Act passed by Parliament.

The model WHS Act has provision for *codes of practice* to be approved by ministers (WHS Act, s 274, SWA, 2011a; Comcare, 2014). In contrast to the Act and regulations, these codes are not of themselves legally binding. Section 275 of the model WHS Act provides that they may be used as evidence of compliance or non-compliance with the formal legislation; while a court may conclude that appropriate safety measures were taken, in most cases code compliance will be a strong indication that what was *reasonably practicable* was done.

In contrast to legislation, *common law* originates in court decisions, some made many hundreds of years ago. Common law tends to develop gradually as courts respond to societal change; the authority of any individual judge to change the pre-existing law is limited. Courts are hierarchical, with lower courts obliged to follow previous decisions of courts higher in the hierarchy. The exception is the High Court of Australia, the nation's ultimate court of appeal, which, in unusual cases, may depart from its previous decisions. Decisions of the High Court are binding on all other Australian courts.

While legislation and common law are two logically separate sources of law, they interact in important ways. As a general principle, legislation may change the principles of common law. However, in a legal system governed by a written national constitution (as in Australia), parliamentary power may be constrained by constitutional limits and if a court rules that Parliament has exceeded its powers then legislation may be struck down as invalid. In addition, legislation is not self-executing; for a legislative rule to have effect, a court will need to decide that the rule has been breached. Consequently, courts have an important ongoing role in interpreting the meaning of statutes and regulations.

In determining what a provision of legislation means, courts are guided and constrained by principles developed both as part of the common law and under specific legislation (see, for example, Foster, 2012, paras 2.38-2.79; Pearce & Geddes, 2011). The most important principles are that the intention of Parliament is to be found primarily in the words actually used in the provision, and that the courts should seek to adopt an interpretation that would best achieve the purpose or object of the relevant legislation (see, for example, Acts Interpretation Act 1901 (Cth), s 15AA). In resolving ambiguity, one is allowed to take into account comments in law reform documents that led to the legislation in question (see Foster, 2012, paras 2.76-2.79). This means that in interpreting the WHS Act, for example, the courts may be able to take into account comments in the *National Review into Model Occupational*

Health and Safety Laws (Stewart-Crompton et al., 2008, 2009) that led to the enactment of the harmonised legislation.

3.1.2 Criminal law and civil law

The distinction between 'criminal' and 'civil' law is another important one for OHS professionals to keep in mind. In general terms, obligations classified as *criminal* are those that society has an interest in enforcing, that is, where contravening behaviour is seen as a threat to society in general. They are usually enforced at the instigation of a public official such as the Director of Public Prosecutions or, in OHS law cases, by a WHS regulator or an inspector authorised by a regulator to do so. Contraventions of these obligations are punished either by a term of imprisonment or some sort of fine paid to the relevant government body. In contrast, *civil* obligations are those owed by citizens to each other. A civil law suit (such as an action for damages, breach of contract or workers' compensation) is initiated by the individual who has been harmed and any resultant damages or compensation payment is made to that individual.

OHS professionals should understand the difference between criminal and civil legal action. In the area of OHS law, particular injuries or risks may lead to two separate actions. For example, an injury in the workplace may lead to a civil action for compensation for harm, the result of which may be an award of money to the injured worker, and, in completely separate court proceedings, to a criminal prosecution conducted by an inspector (or the regulator itself) and a penalty imposed on the responsible party. Civil law plays an indirect role in improving safety in the workplace through the obligations it imposes on employers and others to take reasonable care for the safety of workers, and through the impact of damages awards that may result when these obligations are breached (see Foster, 2012, part 2, chapters 3-6, 11). Criminal law addresses the issue more directly by seeking to prevent accidents happening through penalising the creation of risks to safety.

3.1.3 Federal system

Australia has a legal system governed by a written constitution that sets up a *federation*, not a 'unitary' system (as in, for example, New Zealand). Legislative power is divided between the various states and territories on the one hand, and the Commonwealth on the other. In broad terms, the Commonwealth Parliament has a set of carefully enumerated legislative heads of power (mostly under s 51 of the Constitution), and the states enjoy 'general' law-making power over nearly all topics. The territories, while established under authority of federal legislation, vary in this context; some (Australian Capital Territory, Northern Territory and Norfolk Island) are 'self-governing' and in general may make laws on any topic not explicitly prohibited by their head legislation (e.g. Australian Capital Territory (Self-Government) Act 1988 (Cth)), and others (Jervis Bay Territory and several external territories) are governed directly by laws made by or authorised under Commonwealth Acts. While the Commonwealth has a more limited set of legislative powers, s 109 of the Constitution

provides that a valid Commonwealth law will override those of the states to the extent of any inconsistency (and, similarly, general federal law overrides inconsistent laws of self-governing territories).

These characteristics of the Australian legal system explain the structure of laws governing OHS in Australia. There is no specific power under s 51 of the Constitution for the Commonwealth Parliament to enact nationally uniform laws on the topic of OHS. There are some constitutional powers that would give wide, though not complete, federal coverage. The option adopted is agreement between most jurisdictions to enact broadly 'harmonised' legislation, which starts from the same text, with jurisdictional variations that are intended to be minor and not impact on broad policy matters. With the exception of Victoria and Western Australia, each state and territory, and the Commonwealth for areas within its direct control, have passed separate Acts and regulations based on the model act. The Acts are, on the whole, meant to be identical, and most are called by the same name – Work Health and Safety Act. (In the Northern Territory, the legislation is the Work Health and Safety (National Uniform Legislation) Act 2011. See COAG Reform Council (2013), which identifies current disparities in OHS law 'harmonisation.')

The remainder of this chapter focuses on the provisions of the model Work Health and Safety Act (SWA, 2011a), which is in force in seven of the nine Australian law-making jurisdictions.

3.2 Fundamental definitions

3.2.1 *Work*

OHS laws are limited to 'work,' but what is work? OHS legislation is designed to regulate the activities of people involved in work or in providing things to enable work to be done, for the protection of the health and safety of people who may be affected by the work being undertaken. While in some ways the laws extend to public health and safety, there must still be a direct connection with work. This is clearly indicated:

- by the title and objects of the legislation
- in definitions of key terms such as *workplace* and *worker*
- in the expressed scope of duties.

Despite the importance of the concept, *work* is not defined in the legislation; the courts have not yet considered its definition in this context. Definitions in other legislation (e.g. workers' compensation or taxation) will be applicable only to the context and operation of that legislation. The courts may ultimately need to determine whether a particular activity is 'work' and whether the OHS legislation applies. In doing so, the courts will take into account common usage and understanding of the term (*Barlow v Heli-Muster Pty Ltd* [1997]). Laws promoting OHS must be construed to "give the fullest relief which the fair meaning of [their]

language will allow (*R v Irvine* [2009] citing *Bull v Attorney-General (NSW)* [1913]; *Waugh v Kippen* [1986])."

Work is commonly understood to be "exertion directed to produce or accomplish something; labour; toil" (*Barlow v Heli-Muster Pty Ltd* [1997]) that is usually undertaken in exchange for monetary reward, and the payment of money will be a strong indication that the activity is work. However, payment is not a necessary component of work where the term has a wider meaning in the context of the relevant Act (*Minister for Immigration, Local Government and Ethnic Affairs v Montero* [1991]; *Braun v Minister for Immigration, Local Government and Ethnic Affairs* [1991]). Because the application of WHS laws extends to activities of volunteers and contractors, definitions referring to employment cannot be applied to 'work' for the purposes of the WHS laws, as that would limit the intended scope of the laws.

In many cases an activity to gain a livelihood or reward will clearly constitute 'work.' On the other hand, activities of a purely domestic, recreational or social nature will not be 'work' in the ordinary sense of the term (Stewart-Crompton et al., 2009, pp. 39-44). Between the two extremes there are cases where no particular factor is conclusive.

Safe Work Australia (2011b, p. 2) identified the following as indicators of *work* for the purposes of the model WHS Act:

1. The activity involves physical or mental effort by a person or the application of particular skills for the benefit of another person or for themselves (if self-employed), whether or not for profit or payment;
2. Activities for which the person or other people will ordinarily be paid by someone is likely to be considered to be work;
3. Activities that are part of an ongoing process or project may all be work if some of the activities are for remuneration;
4. An activity may be more likely to be work where control is exercised over the person carrying out the activity by another person; and
5. Formal, structured or complex arrangements may be more likely to be considered to be work than ad hoc or unorganised activities.

The activity may be work even though one or more of the criteria are absent or minor.

See Sherriff (2011a) for a more detailed list of criteria.

3.2.2 PCBU

A *person conducting a business or undertaking* (PCBU) – the person or entity in whose business or undertaking work is done – is identified by answering the question 'whose business or undertaking is this?' A PCBU can be an individual, company, partnership or association (WHS Act, s 5). An individual may be a PCBU if they own the business, but not if they only have conduct of the business or undertaking as a worker or officer. (This is to avoid a person being found to be a PCBU only because they have day-to-day management or effective control of a workplace or plant, etc.) An individual can be a PCBU and a worker at

the same time (s 7), but only a PCBU that is a company, partnership or association will have officers.

3.2.3 Officer

The WHS Act (s 4) adopts the Corporations Act 2001 (Cth) definition of an *officer* that applies to corporations, partnerships and associations. Officers include not only formal office holders (such as directors, secretaries and appointed liquidators), but also those who effectively 'call the shots' by participating in decisions that affect the whole or a substantial part of the business or undertaking, and those on whose instructions or wishes the directors are accustomed to act. An officer of the Crown or a public authority that is a body corporate is defined as a person who "makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of" the Crown (WHS ACT, s 247) or public authority (s 252).

Excluded from the definition of an officer are elected members of a local authority and state and Commonwealth ministers (s 4, s 247). A volunteer may be an officer, but cannot be liable for a failure to comply with a health and safety duty (other than a duty of a worker or other at the workplace under ss 28-29) (s 34).

Officers have a significant role in enabling the PCBU to eliminate or minimise risks from the conduct of the business or undertaking. They accordingly have a duty to exercise due diligence (see section 3.6.1) to ensure compliance by the PCBU (s 27).

3.2.4 Workers

Workers are individuals who carry out work for a PCBU. The WHS Act (s 7) provides an extended definition of *worker*:

> (1) A person is a *worker* if the person carries out work in any capacity for a person conducting a business or undertaking, including work as:
> (a) an employee; or
> (b) a contractor or subcontractor; or
> (c) an employee of a contractor or subcontractor; or
> (d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or
> (e) an outworker; or
> (f) an apprentice or trainee; or
> (g) a student gaining work experience; or
> (h) a volunteer; or
> (i) a person of a prescribed class. …
> (3) The person conducting the business or undertaking is also a *worker* if the person is an individual who carries out work in that business or undertaking.

Workers may affect the health or safety of themselves or others by their acts or omissions and accordingly have a duty to take reasonable care for themselves and others while at work (s 28).

3.2.5 Others

Also, people other than a PCBU, officers or workers at a workplace may affect the health or safety of themselves or others from their acts or omissions while at the workplace. Accordingly, these *other persons* have a duty to take reasonable care for themselves and others while they are at the workplace (s 29). While the meaning of the word *others* has been a topic of debate, the most likely interpretation is that it is intended to extend the duty of the PCBU to impose an obligation to see to the safety of anyone who is not a 'worker' mentioned in s 19(1), but whose health and safety may be put at risk by the conduct of the relevant business or undertaking.

3.3 Duty of care in the WHS Act

3.3.1 Context

The phrase 'duty of care' has become one commonly used in OHS law. It is useful to put it in context before examining how it appears under the legislation. Deriving from civil law, a *duty of care* is a legal duty to take care for the safety of another person. Its importance stems from the landmark decision of the UK House of Lords in *Donoghue v Stevenson* [1932]: Lord Atkin used the phrase 'duty of care' to describe the obligation he saw arising from a number of previous cases to "take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour" (p. 580). In due course, the concept became the first of three major elements that had to be established by a plaintiff to make out a civil action in the tort of negligence (the other two being 'breach of duty' and 'causation').

When criminal obligations were imposed on those in charge of workplaces to look out for the safety of other workplace participants, it was natural to transfer this phrase used for many years in civil litigation to the criminal statutes. In many cases a breach of the civil duty of care also would be seen as a criminal offence under the OHS laws (although, as noted previously, the civil implications and the criminal offence would be dealt with in different courts and in separate trials).[4]

In Part 2 of the model WHS Act, Division 2 and s 19 are titled "Primary duty of care," and Division 3 takes up "Further duties." Whereas the s 19 obligation is a foundational duty that will usually apply to all workplace situations, the latter duties supplement that obligation by

[4] Another reason for the duties in the civil and criminal areas to be connected is that the law of civil liability – tort law – contains a civil action called "breach of statutory duty" under which in some situations (e.g. workplace injuries) the breach of a criminal provision also will give rise to civil liability based on that breach alone. For a detailed discussion of that action, see Sappideen and Vines (2011, ch. 18).

reference to *persons conducting a business or undertaking* in differing circumstances, whether managing workplaces (s 20) or fixtures, fittings and plant (s 21), or performing other roles relating to the design, manufacture, importation, supply or construction of plant, substances or structures (ss 22-26). Space precludes a detailed discussion of the various additional duties in Division 3. This section focuses on the main obligations imposed under s 19 as the primary duty of care. Qualifiers to the duty (including the concept of *reasonably practicable*) and the determination of duties are addressed in sections 3.4 and 3.5, respectively (see also SWA, 2011b). Section 3.6 considers obligations of officers and the concept of *due diligence*, and enforcement mechanisms are outlined in section 3.7.

3.3.2 Duty owed to workers – s 19(1)

Under s 19 (*Primary duty of care*) of the WHS Act:

> (1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:
> (a) workers engaged, or caused to be engaged by the person; and
> (b) workers whose activities in carrying out work are influenced or directed by the person,
> while the workers are at work in the business or undertaking.

This is a fairly wide provision. It is intended to remove much of the debate that took place under previous OHS laws about whether a worker is an 'employee' or an 'independent contractor,' to focus on the fact that an undertaking of some sort is being conducted that will create certain risks, and to impose obligations on those in charge of the undertaking to think ahead and endeavour to remove risks as far as reasonably practicable. Just as the duty is imposed on a wide range of PCBUs (see sections 3.2.2 and 3.5), it is broadly drafted to impose an obligation in relation to a wide range of 'workers' (see section 3.2.4).

In determining whether or not an offence has been committed against s 19, a court will usually carefully consider each separate 'element' of the offence by conducting a grammatical analysis of the clause. The following is an example of how this might be done. (This technique of highlighting key concepts can be applied to all provisions of the Act.)

> **A person conducting a business or undertaking** must **ensure**, so far as is **reasonably practicable**, the health and safety of:
> (a) **workers engaged, or caused to be engaged** by the person, and
> (b) workers whose activities in carrying out work are influenced or directed by the person,
> while the workers are at **work in the business or undertaking**.
>
> The elements of an alleged offence committed by A (the 'accused') are:
> 1. Is A a PCBU?
> 2. Has someone's health and safety not been **ensured**?

3. Was the person whose health and safety was not ensured (say, W) a "**worker**"?
4. Was W either a "**worker engaged or caused to be engaged**," or a "worker whose **activities...are** influenced or directed by the person"? W does not have to fall into both categories for an offence to have been committed. (Where A has a duty to ensure X *and* Y, if either X or Y are not ensured, there is a failure of duty.)
5. Was W "at work in the business or undertaking" (of the PCBU) when the failure to ensure occurred?
6. Even if all of the above are true, the prosecution also must prove that it was 'reasonably practicable' to have ensured safety; in other words, the prosecutor must show that something else could have been done that falls within the terms of 'reasonably practicable' as defined in s 18. (This limitation on the duty is discussed in section 3.4.)

If all of the elements of the offence can be established (to the standard of 'beyond reasonable doubt'), then A will be found guilty of an offence. The level of penalty involved will be determined by examining which of the factors set out in Part 2, Division 5 (ss 31-33) of the WHS Act are relevant, or whether one of the exceptions in s 34 applies.

Section 19(2) of the WHS Act extends the above duties owed to workers to an obligation to others:

> A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

3.4 Qualifiers to the duty of care

OHS legislation reflects an understanding that there are practical limits to the ability of a person to eliminate the various risks associated with what they do, and that there is a need to effectively use available resources to achieve optimal minimisation of these risks. The duties of care are accordingly qualified (or limited) in several ways.

OHS laws provide that a duty holder must comply with duties to the extent to which they have control over relevant matters. While this is expressed as the extent to which a duty holder must go, it also sets a limit – that is, they are not required to take steps in relation to matters over which they do not have control (see, for example, WHS Act, s 16(3)b). Whether a duty holder can control or influence a particular thing or the actions of another person, or whether there are limits on their ability to control or influence, may be relevant to what they *can* do or may *reasonably* be expected to do. The WHS Act makes it clear that a duty holder cannot avoid responsibility by contracting control to someone else and thereby attempting to contract out of their obligations (SWA, 2011c). However, in fulfilling their responsibility it

may be reasonable in some cases to rely on the expertise of specialist contractors (see, for example, *Reilly v Devcon Australia Pty Ltd* [2008]).

While duty holders are not necessarily required to carry out all the duty of care actions themselves, they are required to *ensure* particular outcomes, so far as is reasonably practicable (e.g. through another party). Note that s 17 of the Act spells out that a duty to "ensure health and safety" requires elimination of risks so far as is reasonably practicable, and if they are unable to be so eliminated, minimisation of risks so far as is reasonably practicable. Under s 3(2), the highest level of protection reasonably practicable should be provided.

The duties of care are all qualified by what is *reasonable* for the duty holder in the particular circumstances, with:

- the duties of a PCBU requiring what is *reasonably practicable* (e.g. ss 19(1), 25(2)).
- the duties of a worker or other person at a workplace requiring *reasonable care* (ss 28-29)
- the duty of an officer to exercise due diligence, which includes taking certain *reasonable steps* (s 27(5)).
-

3.4.1 *Reasonably practicable* for a PCBU

What is reasonably practicable must be identified in relation to the particular circumstances existing at the particular time. This must be done by assessing all relevant matters to determine what is reasonably able to be done. Matters that must be weighed up include:

> (a) the likelihood of the hazard or the risk concerned occurring; and
> (b) the degree of harm that might result from the hazard or the risk; and
> (c) what the person concerned knows, or ought reasonably to know, about:
> (i) the hazard or the risk; and
> (ii) ways of eliminating or minimising the risk; and
> (d) the availability and suitability of ways to eliminate or minimise the risk; and
> (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk (WHS Act, s 18; see also OHS Act 2004 (Vic), s 20).

What is reasonably able to be done has two elements – what *can* be done and whether it is *reasonable* to do less (and if so, what) than that which will achieve the highest level of protection that is possible. Elements (a), (b) and (e) above relate to the question of reasonableness, while elements (c) and (d) relate to what can be done. Also, control is a factor relevant to determining what can be done by the duty holder. Consideration of cost is not limited to circumstances where the cost of achieving further minimisation of risk is grossly disproportionate to the risk. It also may be relevant to deciding between risk controls or combinations of controls that will achieve an equivalent level of risk minimisation. For a detailed explanation of the concept of reasonably practicable and the process for determining what is reasonably practicable in the circumstances, see Safe Work Australia (2013).

3.4.2 *Reasonable steps* by an officer

Officers may not have all the specific factual or technical knowledge or information relevant to the due diligence requirements placed on them (see section 3.6.1). The requirement in s 27(5) that officers take reasonable steps acknowledges that they will need to rely on the advice and expertise of others in carrying out their role. That reliance must be soundly based and reasonable in the circumstances. (For a consideration of reasonable steps and reasonable reliance on advice from others in the context of obligations of an officer under the Corporations Act 2001 (Cth), see *Australian Securities and Investments Commission v Healey* [2011]).

3.4.3 *Reasonable care* for a worker or other person at a workplace

The standard of care to be observed by a worker or other person at a workplace (ss 28-29) will be that which is reasonably expected of a person in their position, considering:

- Their role and associated expectations
- Their ability to control relevant matters
- Knowledge they have or ought reasonably to have
- Their skill and ability.

3.5 Determination of duties

OHS laws aim to provide for the protection of the health and safety of all who are involved in or may be affected by work being done. The laws apply to all elements relevant to the provision of work, including:

- How (systems of work)
- Where (the workplace, defined in WHS Act, s 8)
- With what (plant and substances, defined in s 4)
- By whom (including capability and competence through instruction, training and supervision).

Those who are responsible for or provide any of these elements will have the ability to affect the health or safety of others when doing so. They are accordingly held accountable by the law for proactively ensuring, so far as is reasonably practicable, that their activities protect and do not put at risk the health or safety of others (where those activities are carried out as part of the conduct of a business or undertaking). Consistent with this 'cause and effect' approach, the duties are placed on the three layers of OHS influencers – the PCBU, officers, and workers and others (defined in section 3.2).

Each duty holder associated with work may affect health or safety both directly and through the influence they have over others associated with work. This includes those requiring or performing work and, in relation to plant or substances or structures, those 'along the chain'

(e.g. design through manufacture or construction and supply) and 'through the life cycle' (e.g. commissioning, use, maintenance and demolition). Consequently, while each duty holder has a duty, others may have a duty at the same time over the same matter (s 16). Where there is more than one duty holder in relation to a matter, they must consult so far as is reasonably practicable (s 46).

Those who may be affected by the carrying out of the work are those who are doing it (the workers), others in the vicinity at the time (other workers of the PCBU, other PCBUs at the workplace and visitors at the workplace) and those who may be affected by the outcome of the work (e.g. those using structures, customers, road users, entrants to property). Each of these classes of people is protected by the duties of care placed on a PCBU, workers and others at the workplace.

As outlined in section 3.3.2, the WHS Act places a primary duty of care on a PCBU in relation to workers engaged or caused to be engaged by the PCBU, or whose activities in carrying out work are directed or influenced by the PCBU (s 19). The primary duty extends in relation to others who may be affected by work carried out as part of the conduct of the business or undertaking. The primary duty includes various matters that collectively comprise the elements relevant to the provision of work noted above. The primary duty requires, for example, that a PCBU ensures the provision and maintenance of safe plant (s 19(1) and (3)b) and that its activity does not put at risk the health or safety of those using it (ss 19(2), 19(3)b).

Also, the WHS Act places specific duties on PCBUs who carry out specified activities of:

- Management or control of a workplace (s 20) and fixtures, fittings or plant at a workplace (s 21)
- Design (s 22), manufacture (s 23), importation (s 24) or supply (s 25) of plant, substances or structures
- Installation, construction or commissioning of plant or structures (s 26).

These duties are aimed at ensuring that the workplaces and things used at work are safe and without risks to health.

Although not described as 'health and safety duties' or 'duties of care,' the WHS Act places other duties on PCBUs that support the duties of care and their enforcement. These are the duties to consult workers (s 47) and other duty holders (s 46),[5] to notify the regulator of defined incidents (s 38) and to preserve incident sites (s 39).

Each of the duties placed by the WHS Act on PCBUs is supported by more specific and detailed procedural requirements in regulations. Those requirements also follow the 'cause

[5] WHS Act s 46 requires each duty holder to consult, cooperate and coordinate activities with all other persons who have a duty in relation to the same matter.

and effect' rationale of the duties of care, being placed on those who control the relevant matters or activities and for the protection of those who may be affected by those matters.

3.6 Good governance in OHS – compliance by an officer

This chapter has established that a PCBU has duties of care and associated procedural obligations under the WHS Act. These duties essentially relate to providing workers with the work environment, tools, facilities and processes for work to be carried out safely. The leaders of an organisation are critical to a good safety culture, accountability throughout the organisation, and the provision of financial, physical and human resources necessary for health and safety. They establish the conditions necessary for a safe working environment. In short, a PCBU must rely on those who govern it to *enable* compliance by the PCBU. It is for this reason that the WHS Act includes a positive duty on officers to exercise due diligence to ensure compliance by the organisation of which they are an officer (s 27).

3.6.1 *Due diligence*

Under s 27(5), *due diligence* involves taking reasonable steps to:

> (a) acquire and keep up-to-date knowledge of work health and safety matters; and
> (b) gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations; and
> (c) ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and
> (d) ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and
> (e) ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act; and
> (f) verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).

Each of the steps, or elements, for due diligence, is directed to the steps needed to effectively govern in OHS, while also supporting and driving a good safety culture. See Sherriff (2011b) for a discussion of the relationships between each element of due diligence and culture and leadership, and Tooma (2012).

Reliance on advice and information provided by others may represent reasonable steps, but that reliance must be reasonable. Such reliance will be reasonable if:

- The officer can be satisfied of the competence of the person on whom they rely
- The officer can be satisfied that the person on whom they rely is properly informed, having available to them information necessary to enable them to properly advise, and

- The officer reads/considers the information or advice and does not simply rely on the conclusions or recommendations. (See *Australian Securities and Investments Commission v Healey* [2011]).

Officers require access to information and advice to enable them to understand OHS laws and good practice, the hazards and risks generally associated with the operations of the PCBU, what resources and processes must be in place for compliance and risk minimisation, and to verify compliance. Good governance principles in areas such as corporations law compliance, financial management, consumer protection and environment protection are applicable to OHS. Officers should ensure that the governance structure, reporting processes and report contents provide for timely quality information and advice on each of the elements of due diligence. For further information relevant to the duty of an officer, see SWA (2011d).

3.7 Enforcement

Compliance with each jurisdiction's OHS laws is monitored and enforced by that jurisdiction's OHS regulator.[6] The principal enforcement mechanism of OHS regulators are inspections undertaken by specially trained inspectors. Generally, inspections are either targeted or responsive. *Targeted inspections* focus on industries, occupations, hazards and/or demographics identified by the regulators as part of their strategic planning. Generally, targeted areas are either high risk (measured by reference to either the volume of claims or the claims incidence) or represent a vulnerable section of the community (e.g. young workers, migrants). *Responsive inspections* take place as a result of incident notifications made by PCBUs,[7] or complaints or requests received from unions, workers or members of the public.

The aim of inspections is to assess the extent of compliance by duty holders with OHS laws and, where non-compliance is identified, to secure compliance. To fulfil this role, inspectors are given powers to:

- Enter and search workplaces (without notice)
- Require any person at the workplace to answer questions
- Require the production of documents
- Inspect, examine and seize anything at the workplace
- Secure, preserve and prevent the disturbance of a workplace (WHS Act, Part 9 and ss 198-210; see also Sherriff & Tooma (2010, pp. 100-103); Johnstone & Tooma (2012, pp. 214-224.)

[6] Cth – Comcare (www.comcare.gov.au); NSW – WorkCover NSW (www.workcover.nsw.gov.au); Qld – Workplace Health and Safety Queensland (http://www.deir.qld.gov.au/workplace/); SA – SafeWork SA (www.safework.sa.gov.au); Tas – WorkSafe Tasmania (www.worksafe.tas.gov.au); Vic – Victorian WorkCover Authority (www.vwa.vic.gov.au)'.; WA – WorkSafe (www.commerce.wa.gov.au/worksafe); ACT – WorkSafe ACT (www.worksafe.act.gov.au); NT – NT WorkSafe (www.worksafe.nt.gov.au).

[7] Pursuant to Part 3 (*Incident notification*) of the WHS Act, PCBUs immediately must notify the regulator of any deaths, serious injuries or illnesses, or dangerous incidents of which they become aware arising out of the conduct of the business or undertaking.

The powers of inspectors are subject to legal professional privilege. Information and documents created for the dominant purpose of obtaining or providing legal advice, or in contemplation of legal proceedings, do not have to be provided to an inspector (WHS Act, s 269). The same does not hold true, however, for the privilege against self-incrimination. The model WHS Act does not excuse a person from answering a question or providing a document or information on the grounds that the answer, document or information may incriminate the person or expose them to a penalty. However, the answer, document or information provided by the person is not admissible as evidence against that person in civil or criminal proceedings (other than proceedings for giving false or misleading information) (s 172).[8]

Where an inspection reveals evidence of a contravention of the OHS laws, the inspector has three broad options:

1. Encourage or assist compliance through the provision of information, guidance and advice.
   In support of this, all OHS regulators have adopted the *Framework for a Common Approach to Inspection Work* (HWSA, 2011). Consistent with regulators' overarching strategy of improving OHS through an effective mix of encouragement, support and deterrence,[9] the framework emphasises that inspections are about more than securing compliance – they extend to building duty holders' capability and willingness to comply with the law and to assisting workplace parties to effectively manage OHS issues (see Bluff & Gunningham, 2012; Windholz, 2012).

2. Direct compliance by issuing an improvement or prohibition notice.
   An improvement notice requires a person to remedy a contravention of the OHS laws by the date specified in the notice. An inspector can issue an improvement notice when he/she reasonably believes a person is contravening the WHS Act, or has contravened the Act in circumstances that make it likely that the contravention will continue or be repeated (s 191). Where an inspector reasonably believes the contravention involves a serious risk to the health or safety of a person, he/she can issue a notice prohibiting the person on whom the notice is served from engaging in the activities giving rise to the risk until the inspector is satisfied that the risk to health and safety has been remedied (s 195). If a person fails to take reasonable steps to comply with a prohibition notice, the regulator may take any remedial action

[8] Note that s 172 of the model WHS Act has not been consistently adopted in all jurisdictions. For example, the privilege has been retained in SA.

[9] This strategy, sometimes referred to as "constructive compliance," is most explicitly detailed in WorkSafe Victoria's compliance and enforcement policy (WorkSafe Victoria, 2005).

considered reasonable to make the workplace safe, and recover the costs of doing so from the person to whom the prohibition notice was issued (WHS Act, ss 211-213).

3. Escalate the matter with a view to sanctioning non-compliance.
   This usually involves a more comprehensive, lengthy and intrusive investigation. Depending on the investigation's outcome, the regulator can either take enforcement action – for example, by issuing an improvement or prohibition notice, applying to the court for an injunction (ss 214-215) or accepting an enforceable undertaking from persons concerned with the contravention (ss 216-222) – or initiate a prosecution for breach of the WHS laws (s 230).[10] Prosecutions are criminal proceedings in respect of which the state bears the onus of proving all elements of the offence beyond a reasonable doubt.[11] Upon conviction, the court has a wide range of sentencing options available, including adverse publicity orders (s 236), restoration orders (s 237), orders requiring the offender to undertake a specified WHS improvement project (s 238),[12] injunctions (s 240), training orders (s 241), financial penalties and, for individuals, imprisonment for the most serious breaches of the duty of care (ss 30-33). Indeed, the maximum penalties under the model WHS Act nearly double the highest fines previously available. The maximum penalty for a corporation is $3 million, and for an individual $600,000 and/or 5 years' imprisonment. Imprisonment also may be imposed for assaulting an inspector (s 190). For further discussion of the sanctions that can be applied to breaches of the OHS laws, see Sherriff and Tooma (2010, pp. 106-112) and Johnstone and Tooma (2012, pp. 224-244).

The three options, and the enforcement tools available within each, are summarised in Figure 1.

[10] Union prosecutions previously authorised under the NSW and ACT Acts are not permitted under the model WHS Act. However, NSW has deviated from the model WHS Act and provides for a limited union right to prosecute (Work Health and Safety Act 2011 (NSW), s 230). These provisions are not as broad as existed under previous NSW laws, and may ultimately prove illusory given the procedural hurdles that must be overcome before a union can commence a prosecution. Under the NSW Act, unions can only commence a prosecution for less serious offences, and only when the regulator refuses to take the advice of the Director of Public Prosecutions to bring proceedings.

[11] The model WHS Act does not adopt the reverse onus of proof provisions that previously existed in NSW and Queensland that required the duty holder to prove a lack of reasonable practicability once the prosecution had proved the other elements of the offence.

[12] The court also can adjourn proceedings without recording a conviction on condition that the offender gives a court-ordered WHS undertaking to comply with specified conditions (s 239).

Figure 1: WHS compliance pyramid (SWA, 2011e)[13]

Based on the *National Compliance and Enforcement Policy* (SWA, 2011e) developed cooperatively by all OHS regulators, each jurisdiction has a policy that guides its choice of options and enforcement tools. These policies adopt a risk-based and responsive compliance and enforcement strategy underpinned by the principles of consistency, constructiveness, transparency, accountability and proportionality. Pursuant to the policies, inspectors and regulators seek to match the most appropriate enforcement tool with the seriousness of the contravention, the culpability of the offending duty holder, and the level of risk and harm.

Importantly, many enforcement decisions made by an inspector or OHS regulator are subject to review, either internally by an internal reviewer or externally by the relevant jurisdiction's designated external review body. For example, a PCBU, a worker whose interests are affected by a decision, or an HSR representing that worker, can apply for review of a decision to issue (or not to issue) an improvement or prohibition notice, and of the terms of any notice issued. (For a list of reviewable decisions and the persons eligible to apply to have a decision reviewed, see the jurisdictional note for s 233 in the Appendix of the WHS Act.) For serious offences under the Act, application can be made to have certain decisions not to prosecute reviewed by the Director of Public Prosecutions (s 231).

[13] Note that the pyramid is not comprehensive; for example, missing is the ability in some jurisdictions for inspectors to issue infringement notices or on-the-spot fines.

The enforcement powers of regulators and inspectors pose a number of issues for OHS professionals. Firstly, OHS professionals need to be cognisant of their own liability. As noted above, a PCBU must ensure, so far as is reasonably practicable, that the health and safety of persons is not put at risk from work carried out as part of the conduct of the business or undertaking. This can include OHS professionals and the information, guidance and advice they provide to their clients.[14]

Secondly, OHS professionals can be called upon to answer questions relating to their knowledge of the circumstances of any contravention of the OHS laws by their clients, and to any information, guidance and advice they may have provided to their clients that is relevant to the duties alleged to have been breached.

Thirdly, OHS professionals whose clients are the subject of enforcement action must be cognisant of the delicate balance that needs to be struck between cooperating with the regulator and its inspectors (and thus maximising the prospects of any contravention being addressed through assistance, and minimising the risk of sanctions) and protecting their client's legal rights. This chapter's examination of the principles of OHS laws generally, and of how they are enforced in particular, is introductory at best. Clients the subject of enforcement action should be advised to seek professional legal advice.

4 Implications for OHS practice

It is appropriate to explore the issue of OHS professionals being suitably qualified to provide advice to PCBUs and/or officers. Being suitably qualified within the context of interpreting legal requirements affecting an organisation can be defined as the OHS professional having relevant "knowledge, skills and experience to provide advice" (WorkSafe Victoria, 2008). All OHS advice has legal implications, particularly in terms of a PCBU achieving compliance with the duty of care. This chapter has outlined the basic principles at the foundation of current Australian OHS laws. While OHS professionals do not require legal qualifications, they have to invest the time and effort to understand the current state of knowledge of those principles. This may involve formal education, attendance at relevant seminars and/or discussions with legal professionals.

The OHS professional employed within an organisation needs to be fully knowledgeable of the hazards and associated risks occurring within that organisation. Relevant industry experience will provide understanding of what is reasonably practicable to control those risks. Apart from an understanding of the legislation, the OHS professional needs knowledge of advisory materials such as codes of practice, standards, guidance notes from regulators, etc., that contribute to an understanding of what is reasonably practicable. However, materials

[14] The national review panel on whose recommendations the model WHS Act is largely based, recommended that OHS professionals and others providing OHS services owe a separate duty of care (Stewart-Crompton et al., 2008, Rec. 37). This recommendation was not accepted by the Workplace Relations Ministers' Council which considered it unnecessary as such providers are covered by the primary duty applying to PCBUs (WRMC, 2009).

such as codes of practice are often topic-specific and, as such, may not cover all context-related risks in any particular situation. The OHS professional has to ensure that all hazards have been identified and associated risks appropriately controlled.

The OHS professional needs to communicate appropriately to all relevant stakeholders to achieve the most acceptable OHS outcome commensurate with the relevant legislation and the OHS maturity and capability of the organisation.

Critically, the OHS professional must recognise the limits of their competence in the provision of advice and identify when more detailed advice from an appropriate legal professional is required, particularly when a serious incident has occurred.

5 Summary

As a companion to *OHS Body of Knowledge* chapter 8 – *Socio-political Context: OHS Law and Regulation in Australia* – this chapter examined the historical development of OHS law, and the key principles and concepts underlying current OHS law in Australia.

The chapter identified the codification of common law duties of care into statutory OHS law. It discussed the scope of 'work,' and the concept of duty of care was given extensive treatment in terms of the duty owed to workers and others. The duty may be owed by a range of duty holders and is qualified by the extent to which the duty holder has control over relevant matters. These qualifications are based upon what is reasonable for the duty holders. For a PCBU, the qualification is what is 'reasonably practicable', which has been defined.

'Reasonably practicable' is consistent with good governance by the officers of an organisation. Under the WHS Act, officers have positive duties to exercise due diligence on WHS matters, which should ensure compliance with WHS legislation.

The chapter concluded by examining implications for OHS practice. Officers may not have sufficient technical knowledge covering OHS law and required improvement actions and, so may require competent advice from OHS professionals and others on these matters. However, OHS professionals can be liable for the advice they provide, and can be questioned about their knowledge of potential contraventions of OHS laws. To be competent in their duty, it is critical that OHS professionals understand the principles underlying OHS law and are able to identify circumstances when expert legal advice needs to be obtained.

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