

GUIDANCE NOTE

General duty of care in Western Australian workplaces

2005

**commission
for occupational
safety and health**

GUIDANCE NOTE
General duty of care
in Western Australian
workplaces

2 0 0 5

Foreword

The *Occupational Safety and Health Act 1984* established the Commission for Occupational Safety and Health, which comprises representatives of employers, unions, government and experts. The Commission has the function of developing the legislation and supporting guidance material and making recommendations to the Minister for implementation. To fulfil its functions, the Commission is empowered to establish advisory committees, hold public enquiries and publish and disseminate information.

The Commission's objective is to promote comprehensive and practical preventative strategies that improve the working environment of Western Australians.

This guidance note has been developed through this tripartite consultative process, and the views of employers and unions along with those of government have been considered.

The following information is provided as background to understanding this guidance note.

The Act

The *Occupational Safety and Health Act 1984* provides for the promotion, co-ordination, administration and enforcement of occupational safety and health in Western Australia.

With the objective of preventing occupational injuries and diseases, the Act places certain duties on employers, employees, self-employed persons, manufacturers, designers, importers and suppliers.

In addition to the broad duties established by the Act, it is supported by a further tier of statute, commonly referred to as regulations, together with lower tiers of non-statutory codes of practice and guidance notes.

Regulations

Regulations have the effect of spelling out the specific requirements of the legislation.

Regulations may prescribe minimum standards. They may have a general application or they may define specific requirements related to a particular hazard or a particular type of work.

Regulations may also be for the licensing or granting of approvals, certificates, etc.

Codes of practice

A code of practice is defined in the Act as a document prepared for the purpose of providing practical guidance on acceptable ways of achieving compliance with statutory duties and regulatory requirements.

- ▽ should be followed, unless there is another solution which achieves the same or better result; and
- can be used to support prosecution for non-compliance.

Guidance notes

A guidance note is an explanatory document issued by the Commission providing detailed information on the requirements of legislation, regulations, standards, codes of practice or matters relating to occupational safety and health.

Disclaimer

Information in this publication is provided to assist you in meeting your occupational safety and health obligations. While information is correct at the time of publication, readers should check and verify any legislation reproduced in this publication to ensure it is current at the time of use.

Changes in law after this document is published may impact on the accuracy of information.

The Commission for Occupational Safety and Health provides this information as a service to the community. The information and advice provided is made available in good faith and is derived from sources believed to be reliable and accurate at the time of publication.

Authority

Issued by the Commission for Occupational Safety and Health under the *Occupational Safety and Health Act 1984*.

Purpose

To explain the general duty in sections 19, 20, 21, 22 and 23 of the *Occupational Safety and Health Act 1984*.

Application

To be read in conjunction with the *Occupational Safety and Health Act 1984*; and the Occupational Safety and Health Regulations 1996.

Preface

This guidance note provides information and assistance to employers and employees on the 'general duty of care' provisions of the Western Australian *Occupational Safety and Health Act 1984*.

The duty of care provisions of the *Occupational Safety and Health Act 1984* are the starting point from which all other safety and health measures begin. This guidance note explains and clarifies the scope of the duties of care in the Act to assist people at work to understand their responsibilities.

All parties in a workplace – employers, employees and self-employed persons – have some responsibility for the safety and health of those at the workplace.

This duty of care also extends to those who control workplaces, design and construct buildings or manufacture and supply plant.

Better understanding of the laws helps everyone in the workplace contribute towards achieving a safe and healthy workplace environment.

Guidance notes are developed within the tripartite setting of the Commission for Occupational Safety and Health, with input from representatives of employer organisations, trade unions and the State Government.

The development process is also an example of the State Government's belief that employers and employees should work together to determine practical ways of improving the work environment.

This guidance note has been approved for use in Western Australian workplaces.

Contents

Introduction	1
Achieving the objects of the Act	3
The legislative framework in Western Australia.....	4
The general duties	5
An overview	5
Similarity to common law	7
The ‘reasonable person’	8
The meaning of ‘practicable’.....	9
Health as well as safety	11
The general duties and regulations.....	11
Working without regulations	13
Codes of practice	14
The general duties and standards.....	16
Standards not referred to in regulations	16
Workplaces covered by the general duties	17
A matter of control	17
Overlapping obligations	18
Duties of employers (towards their employees)	19
Meaning of ‘employer’.....	20
State government agencies.....	20
Safety and health policies	21
Other duties	21
Employer’s duty: basic principle	22
Working environment.....	22
Particular duties	22
Safe systems of work.....	22
Foreseeability.....	24
Identification of hazards, assessment and control.....	25
Information, instruction, training and supervision	26
Consultation and co-operation	32
Workplace policies and procedures	33
Safety and health representatives	33
Working together.....	34
Provision of personal protective clothing and equipment.....	34
Safe plant and substances	36
Monitoring exposure to hazards.....	37
Reporting of injuries and diseases.....	37
Duties of employees	38
Meaning of ‘employee’.....	39
Employee’s general duty: basic duty	39
The extent of the duty.....	40
Particular duties	40

Contractors, sub-contractors, labour hire and other alternative working arrangements	42
Contractors and sub-contractors	42
Premises.....	43
A matter of control	43
Labour hire arrangements.....	44
Other labour arrangements	45
Reporting requirements.....	46
Reporting of injuries and diseases to the Commissioner	46
Notification of hazard to person having control of workplace	47
Duties of employers and self-employed persons (towards themselves and others)	48
Duties of employers and self-employed persons: basic principle.....	49
Protecting non-employees	49
Protecting an employee's family.....	50
Duties of employers to maintain safe premises	51
Duties placed on certain bodies corporate	52
Duties of persons who have control of workplaces.....	53
Duties of persons who have control of a workplace: basic principle	54
A matter of control	55
Written contracts	55
Premises covered.....	55
Safe entry and exit	55
Duties of manufacturers, suppliers and others	56
Safe use of plant.....	57
Duties of erectors and installers.....	58
Substances at workplaces.....	58
Information on safety and health.....	59
Short and long term effects.....	59
Material safety data sheets.....	59
Adequate information that is up to date	59
Who provides the information?	60
Safe buildings and structures.....	60
Offences and penalties	61
General	61
Gross negligence	61
Directors and other officers of a body corporate	62
Appendix 1 - Hazard identification, risk assessment and risk control.....	63
Hazard identification, risk assessment and risk control.....	64
Identifying hazards.....	64
Analysing and assessing the risks.....	66
Reducing the risk	67
Workplace hazard control.....	69
Control through personal protective equipment.....	70
Review of control measures.....	71
Appendix 2 - Other sources of information.....	73

Introduction

This document provides a detailed discussion of the 'general duty of care' provisions in the Western Australian *Occupational Safety and Health Act 1984*.

Under the Act, all parties involved with work have responsibilities for safety and health at work. This includes employers, employees, self-employed persons and others, such as people who control workplaces, design and construct buildings or manufacture and supply plant.

The duties under the Act are expressed in broad terms, for example:

- an employer must, as far as practicable, provide a work environment in which employees are not exposed to hazards;
- employees must take reasonable care for their own safety and health, and that of others, at work; and
- self-employed persons must, as far as practicable, ensure the work does not adversely affect the safety and health of others.

Such wide ranging duties are called 'general duties' or 'general duty of care' – the latter reflecting that a 'duty of care' is owed in law by one person to another.

**All parties involved with
work have responsibilities for
safety and health at work.**

Safety and health at work

The *Occupational Safety and Health Act 1984* aims to:

- **promote and secure the safety and health of people at work;**
- **protect people at work from hazards;**
- **assist in securing a safe and hygienic working environment;**
- **eliminate, reduce and control hazards;**
- **encourage co-operation and consultation between employers and employees;**
- **provide for the formulation of policies and for the co-ordination of the administration of laws relating to occupational safety and health; and**
- **promote education and awareness of occupational safety and health.**

Source: section 5, *Occupational Safety and Health Act 1984*; and

Achieving the objects of the Act

The *Occupational Safety and Health Act 1984* sets objectives to promote and improve occupational safety and health standards. General duties are laid down in the Act, and are supported by other requirements in the Act and regulations.

The Act imposes a general duty of care to protect persons at work from hazards and maintain safe and healthy workplaces.

The Act places emphasis on workplace consultation between employers and employees, and safety and health representatives, if the workplace has any.

The general requirement for employers to consult and co-operate with safety and health representatives and other employees is a part of the employer's general duty under the Act.

Similarly, employees are required to co-operate with employers in safety and health matters so that employers are able to meet their responsibilities.

The Act also provides for the election of employee safety and health representatives and the formation of workplace safety and health committees. Safety and health committees are made up of employer representatives and safety and health representatives, or employee representatives if the workplace has no safety and health representatives.

The Act encourages employers and employees to resolve safety and health issues in a spirit of cooperation, using procedures developed through consultation at each workplace.

The Occupational Safety and Health Regulations 1996, made under the Act, describe some of the requirements, which apply to specific work situations.

Reference is also made in the legislation to codes of practice issued by the Minister and to standards produced by Standards Australia or jointly by Standards Australia and Standards New Zealand and the Australian Safety and Compensation Council, formerly the National Occupational Health and Safety Commission.

The Act provides a framework where consultation, cooperation, regulations, codes of practice, workplace standards and procedures to resolve issues support the general duty of care. The general duty of care is the guiding principle for all other parts of the Act.

The legislative framework shown below was established to achieve the objectives of the Act.

**The Act places emphasis
on workplace consultation
between employers and
employees.**

The legislative framework in Western Australia

How can I meet my obligations?

Under the Act, there are two types of instruments to help you meet your workplace health and safety obligations – regulations and codes of practice.

If there is a regulation about a risk, you must comply with the regulation.

If there is a code of practice about a risk, you must either:

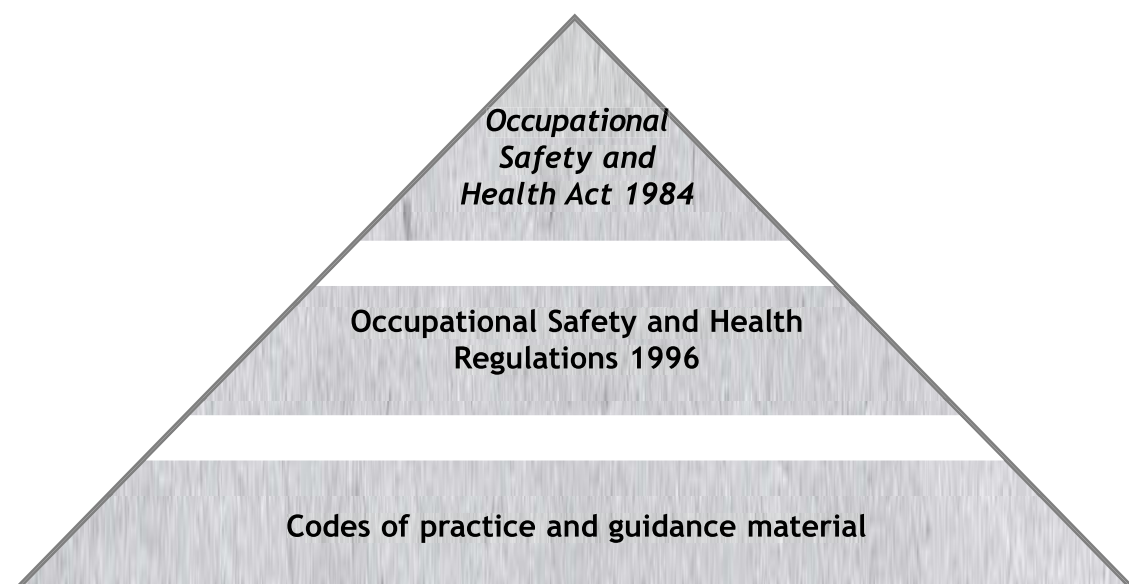
- do what the code says; or
- adopt and follow another way that gives the same level of protection against the risk.

If there is no regulation or code of practice about the risk, you must choose an appropriate way and take reasonable precautions and exercise proper diligence to ensure you meet your obligations.

Note:

There may be additional risks at your workplace which have not been specifically addressed. You are required under the Act to identify and assess these risks and ensure that control measures are implemented and reviewed to prevent or minimise exposure to these risks.

This guidance note should be read in conjunction with the *Occupational Safety and Health Act 1984*, and the relevant Australian Standards, both of which assist in the discharge of legal workplace health and safety obligations.



The general duties

An overview

'General duty of care' and 'general duties' are terms used to refer to the duties that the Act places upon people to ensure their own safety at work and that of others who are at the workplace or who might be injured by the work. These general duties are aimed at preventing anyone being killed, injured or contracting an illness because of work or activities at a workplace, including using plant or equipment.

The following people have general duties under the Act:

- | | |
|---|---|
| <ul style="list-style-type: none">• Employers• Employees• Self-employed people• Principals (people who engage contractors in the course of their trade or business)• Contractors and persons engaged or employed by the contractor• People who have control of workplaces or the access to or egress from workplaces• Designers, manufacturers, importers or suppliers of plant or substances to be used at workplaces• Erectors or installers of plant for use at a workplace | <ul style="list-style-type: none">• Designers or constructors of buildings or structures for use at a workplace• Agents who are in the business of hiring out workers (labour hire organisations) and their clients (host employers)• Workers who are hired out to a host employer by a labour hire company• People who are in a working relationship that mirrors a contract of employment but is not a contract of employment• Corporate bodies that engage workers under one of the labour relationships covered by the Act• Government of Western Australia• People employed by the Government of Western Australia |
|---|---|

Examples of general duties

- Employers must provide a workplace where employees are not exposed to hazards.
- Employers must provide a safe system of work.
- Employees must take reasonable care for their own safety and health and that of others affected by their work.
- Employers and self-employed people must, as far as practicable, look after their own safety and health and ensure that their work does not affect the safety and health of others.
- Designers, manufacturers, importers and suppliers must provide plant which is safe to install, maintain and use at workplaces.
- All plant must be installed or erected so it can be used safely.
- Safety and health information must be supplied with all plant and substances used at work.
- Employees and safety and health representatives must consult and co-operate in matters related to safety and health at work.
- Employers must provide employees with information, instruction, training and supervision to allow them to work in a safe manner.

Source: *Occupational Safety and Health Act 1984*

Similarity to common law

The law described in this document is called statute law. Statute law is developed through the process of Government and includes Acts and their supporting regulations. Statute law is enforceable and breaches may result in prosecution.

There is another body of law called common law, which has developed as a result of civil actions. This occurs when a person believes that he or she has been wronged by another party and takes that party to court, seeking justice.

The general duties of care in the *Occupational Safety and Health Act 1984* are based on principles built up under common law. Because of this similarity, it is important not to confuse common law and statute law. In statute law, the requirements are written down in the legislation, which is considered by Parliament. Common law is built up over time through decisions made by the courts.

The courts have determined the common law duty to mean that all employers must take reasonable care for the safety of their employees. This assumes that control of working conditions rests largely with the employer, and consequently responsibility for occupational safety and health also rests largely with the employer.

Sometimes this common law duty is expressed in categories such as safe work practices (eg use of appropriate hand tools for the task), safe place of work (eg equipment is well laid out and lighting is suitable for the task) or safe system of work (eg tagging procedures exist for maintenance of equipment), but the overriding general duty always remains.

In common law, an employee may claim damages through a civil court for injuries arising from an employer's failure to take reasonable care. These are commonly called 'negligence claims'. The courts recognise that the actions of an employee may contribute to an injury and may reduce the size of a damages payout for 'contributory negligence'.

Under common law, there must be some damage to a person or property before action can be taken.

Under the *Occupational Safety and Health Act 1984* there is no need for an injury to occur before enforcement action can be taken to have an unsafe situation fixed. The focus is on prevention of such unsafe situations, because the duties are enforceable.

Under the Act, the courts may impose fines, or a prison term if the offence involves gross negligence, for breaches of the legislation, but there are no payouts for negligence to injured parties.

**It is important not to confuse
common law and statute law.**

The 'reasonable person'

In common law, each case is decided on its merits. One of the factors considered by the courts is whether the action taken by the employer is reasonable in any particular case. They consider the way a hypothetical 'reasonable person' might behave in each situation, to determine the standard of care which should apply in any particular case. It is based on the values of the society of the day and, in the end, will involve a value judgment.

There is no legal definition of how a reasonable person would behave, and the final decision would depend upon the facts of each situation.

For employers, there is emphasis on the increased level of care that would be considered reasonable by today's standards. In a High Court decision, the following comment was made regarding the employer's obligation:

"...what reasonable care requires will vary with the advent of new methods and machines and with changing ideas of justice and increasing concern with safety in the community ... "What is considered to be reasonable in the circumstances of the case must be influenced by current community standards."

Source: Bankstown Foundry case final appeal: Mason, Wilson and Dawson JJ (160 CLR 301)

The employer's position is covered very well in the following summary:

- *"The overall test is the conduct of a reasonable and prudent employer taking positive thought for the safety of his workers in light of what he knows or ought to know;*
- *where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it unless in the light of common sense or newer knowledge it is clearly bad;*
- *where there is developing knowledge, he must reasonably keep abreast of it and not be too slow to apply it;*
- *where he has in fact greater than average knowledge of the risks, he may therefore be obliged to take more than the average or standard precautions."*

Source: a statement by Swanwick J. Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd (1968) 1 WLR 1776

Each case is decided on its merits and the courts determine whether the action taken by the employer is reasonable.

The meaning of ‘practicable’

Some of the general duty provisions in the Act are qualified by the words ‘so far as is practicable’.

This applies to general duties for employers, self-employed people, people with control of workplaces, designers, manufacturers, importers, suppliers, erectors and installers.

These people are expected to take measures that are practicable. ‘Practicable’ has a particular meaning in the Act. The definition can be found in section 3(1) (with other definitions) and is explained in more detail below.

If something is practicable, it is ‘reasonably practicable’, taking into account:

- the severity of any injury or harm to health that may occur;
- the degree of risk (or likelihood) of that injury or harm occurring;
- how much is known about the risk of injury or harm, and the ways of reducing, eliminating or controlling the risk; and
- the availability, suitability and cost of the safeguards.

In other words, to be practicable, something must not only be capable of being done, it must also be reasonable in light of the factors mentioned above. The risk and severity of injury must be weighed up against the overall cost and feasibility of the safeguards needed to remove the risk. Only those factors listed above are relevant, and a factor cannot be ignored unless, after considering what a reasonable person at the time would have known, the factor is clearly irrelevant.

Each factor is considered in light of what a reasonable person in the position of the person who owes the duty would have known.

Example:

If the person who owes the duty did not, at the relevant time, know that it was possible to use a fall safety system to remove or reduce the risk of a fall and the seriousness of any injury caused by a fall, but a reasonable person in their position would have known that a fall safety system could be used, the fact that the person who owes the duty did not know how to reduce the risk is not relevant. What is relevant is that a reasonable person in their position would have known of a way to reduce the risk.

Common practice, availability of information and knowledge throughout the relevant industry are taken into account when judging whether a safeguard is '**reasonably practicable**'. Individual employers can not claim that they do not know what to do about certain hazards if those hazards are widely known by others in the same industry, and safeguards are in place elsewhere.

It is also important to remember that it is what a reasonable person would or should have known about each of the factors at the time concerned that is relevant, and not what a reasonable person might have learnt after that time.

Example:

If a reasonable person at the relevant time would not have known that a particular chemical was a hazard, because that has only since become well known, the fact that the chemical is now known to be hazardous is not relevant.

The cost of putting safeguards in place is measured against the consequences of failing to do so. It is not a measure of whether the employer can afford to put the necessary safeguards in place.

While cost is a factor, it is not an excuse for failing to provide appropriate safeguards, particularly where there is risk of serious, or frequent but less severe, injury.

Example:

Exposed mechanical gears on rotating equipment are hazardous. Clothing, hair, hands or fingers can get caught, causing serious injuries.

It can be argued that setting up machines with suitable guarding is costly and sometimes inconvenient. However, industry has shown that mechanical gears can be easily guarded without adversely affecting the operation of the equipment.

What is considered reasonable in any particular case will depend on the specific circumstances. The concept is very similar to the discussion of 'reasonable person' under the section 'Similarity to Common Law'. The difference is that the Act provides specific guidance by listing the factors that must be taken into account.

Health as well as safety

A hazard means anything that may result in injury or harm to the health of a person. In providing an environment where employees are not exposed to hazards, employers must consider health as well as safety.

Injuries could result from the traditional range of physical safety issues such as falls, strains, being hit by objects and electric shock.

'Health' is a broader concept. It includes work related injuries and diseases, such as industrial deafness, dermatitis, occupational overuse injuries, asbestosis and occupational cancers. It could also include more general health problems like heart disease, high blood pressure and stress where the work environment and procedures could be shown to be contributing factors.

The general duties and regulations

The Act is supported by regulations which specify more detailed requirements. Like the Act, regulations are enforceable and breaches may result in prosecution and fines.

**The overriding responsibility
is to comply with the general
duties in the Act.**

Where a regulation exists, the regulation must be complied with as a minimum requirement.

Whenever a hazard poses a risk of harm or injury to persons at work, the general duties as set out in the Act and any relevant regulations should be taken into account.

Example:

A person must not remove or alter a scaffold or any part of a scaffold at a construction site without the authority of the main contractor (regulation 3.73).

This is a requirement that is not qualified by the phrase 'so far as is practicable', and it must be complied with at all relevant workplaces (in this case construction sites) covered by the Act.

While regulations must be complied with, the overriding responsibility is to comply with the general duties in the Act.

Compliance with a regulation does not necessarily mean that the whole of the general duty of care has been complied with.

Example:

An employer could provide eye protection in accordance with relevant regulations but would not fulfill all the requirements of an employer's general duty unless there was adequate information, instruction and training in the use of the eye protection. Further, the employer must provide adequate supervision to ensure the eye protection is properly used.

The employer also has a duty to take all practicable steps to eliminate, reduce or control any hazards which could cause eye injuries. The general duty includes the provision of protective equipment but only where it is not practicable to avoid the presence of hazards.

When eye protection is provided and employees have been properly instructed in its use, the employees must use the eye protection and ensure that it is not misused or damaged. This forms part of the employee's duty of care under the Act and can be enforced even though it is not specifically stated in the regulations.

Through a process of consultation between employers, safety and health representatives and employees workplaces may achieve better than the minimum requirement set in regulations, and are encouraged to do so.

Working without regulations

Where hazards exist and there are no relevant regulations, employers still have a duty to eliminate, reduce or control the hazards.

Example:

Safe work practices to reduce the risk of personal attack and violence in the workplace are not covered by specific occupational safety and health regulations. Even so, all of the general duty provisions of the Act apply to workplaces such as prisons, psychiatric hospitals, banks, chemist shops and service stations where there is an increased risk of serious injury from an attack.

To comply with the general duty, employers, in consultation with employees, could consider:

- systems of work which reduce the risk of attack (eg improving money handling procedures);
- information and training for employees, including action to be taken in an emergency;
- consultation with safety and health representatives and committees or other employees to review safe work practices;
- protective measures such as physical security, lighting and other deterrents;
- adequate communication means, such as twoway radios for mobile patrols; and
- safe handling, storage and transportation of substances such as drugs, which could be the target of a hold-up or theft.

Consultation and co-operation are encouraged so that employers, safety and health representatives and employees can develop safety and health procedures which suit their particular work situations. It would be appropriate for these procedures to be developed through the safety and health committee where one exists.

Codes of practice

Guidance on meeting the general duty provisions of the Act may be found in codes of practice dealing with specific matters. Codes of practice provide practical information on how to achieve safety and health standards at the workplace.

The preventive strategies outlined in a code of practice are not necessarily the only acceptable ways of achieving the required standard to which the code refers. It is acceptable to use an alternative that achieves the same level of safety.

Because codes of practice are recommended by the Commission for Occupational Safety and Health (the Commission), they include policies and practices jointly developed by Government, employers and unions.

Codes of practice are developed with the general duties in mind and, in most cases, compliance with a code of practice would achieve compliance with general duty provisions in the Act, in relation to the subject matter of the code. Like regulations, codes of practice deal with particular issues and do not necessarily cover all hazards which may arise. The general duties require an employer to consider all potential hazards associated with the work, not only those for which regulations and codes of practice exist.

A code of practice applies to anyone who has a duty of care in the circumstances described in the code. This may include employers, employees, self-employed persons, manufacturers, designers, suppliers and so on.

For example, the code of practice on Legionnaires' Disease, amongst other things, contains information which is applicable to persons with responsibility for a workplace's air conditioning system.

In Western Australia, a code of practice does not have the same legal force as a regulation, and failure to comply with a code of practice is not, of itself, an offence. However, a relevant code of practice may be considered as evidence in any court proceedings under the Act or regulations. The Act or regulations may be complied with either through observing the code of practice or by another equally effective means.

An inspector may refer to a code of practice when writing an improvement notice and may offer the person to whom the notice is issued a choice of ways in which to comply. Failure to comply with an improvement notice is an offence.

A code of practice applies to anyone who has a duty of care in the circumstances described in the code.

Example:

The code of practice on *The management of HIV/AIDS and hepatitis at workplaces* states: 'Where there is a high risk of contracting hepatitis B at work, a vaccination protocol should be included in a policy for prevention and control of infectious disease for the workplace and where appropriate, vaccination should be available free of charge. Employees should always be advised to discuss vaccinations with a medical practitioner.' There are no specific regulations dealing with vaccination or other measures to protect against cross-infection.

An inspector may issue an improvement notice to the employer at a workplace where unvaccinated employees have an increased risk of infection with hepatitis B. The improvement notice would state that there was a breach of the employer's general duty under the Act and note that employees exposed to a hazard were not provided with adequate protection.

The notice could refer to the code of practice on *The management of HIV/AIDS and hepatitis at workplaces* and direct the employer to provide vaccinations or take other measures to eliminate, reduce or control the risk of infection.

To comply, the employer could provide the vaccinations or could consider re-organising the system of work so that unvaccinated employees do not come into contact with the source of infection.

While acceptable work practices recommended in a code of practice are not compulsory, the employer still has a legal responsibility to provide a safe system of work. In order to comply with the provisions of the Act or regulations, the hazard must be addressed in some other way that achieves equal or better levels of safety if the code is not applied.

The general duties and standards

In Australia there are a number of national bodies with a common interest in establishing industry standards that apply to a wide range of workplaces.

The Australian Safety and Compensation Council, formerly the National Occupational Health and Safety Commission, may establish standards, referred to as 'National Standards'.

Standards Australia is a technical body which establishes standards referred to as 'Australian Standards' (AS) and 'Australian Standards/New Zealand Standards' (AS/NZS).

A standard does not by itself create a legal requirement. However, where the legislation adopts such a standard it has the force of law.

An example of a National Standard that is law in Western Australia is the adopted National Exposure Standards for Atmospheric Contaminants in the Occupational Environment [NOHSC: 1003 (1995)], which is referred to in regulations.

An example of an Australian Standard adopted in law in Western Australia is AS/NZS 1801:1997 Occupational protective helmets.

In the regulation dealing with the acceptance of the design of plant, the Commissioner may decide that the plant should meet particular requirements, such as specifications set in an Australian Standard, before the design is accepted.

Standards not referred to in regulations

If an Australian Standard, a joint Australian/New Zealand Standard or a National Standard is not referred to in the regulations or an approved code of practice, it has no legal significance under the Western Australian *Occupational Safety and Health Act 1984*, except perhaps as a guide to what is reasonable in that industry.

In complying with the general duties, these standards may be used as a guide.

The application of an Australian, a joint Australian/New Zealand or a National Standard varies according to their relevance to Western Australian industry. Common practice in an industry should be taken into account. If the majority are working to a particular standard that is not set in regulations, but which clearly complies with general duty requirements and achieves safe work practices, then it is likely that others would be expected to apply the same standard.

Inspectors may cite a breach of general duties in an improvement notice and refer to a particular standard in the directions of the notice.

Workplaces covered by the general duties

A workplace is defined as any place where employees or self-employed persons work or are likely to be in the course of their work. The definition includes such places as aircraft, ships, vehicles, farms, forests, buildings and other structures. It is not limited to traditional workplaces such as factories, shops, warehouses and construction sites.

The Act applies to all workplaces in Western Australia except those listed in section 4 of the Act. The exclusion includes mines, or certain petroleum sites, although coverage can be extended to these workplaces by an agreement between the Minister responsible for occupational safety and health and the Minister responsible for mines.

Workplaces under the control of the Commonwealth Government are covered by other occupational safety and health laws, not by the Western Australian Act.

A matter of control

An employer's responsibility is limited to those aspects of the employment where the employer is capable of exercising some control.

The definition of a workplace in the Act is very broad and could apply to places such as streets where the employed person is a driver or delivery person, or a public oval where the employee is a teacher supervising school sports.

In the example of the delivery person, an employer could have control over the maintenance of the vehicle and the system of work, but would be unlikely to have any control over the streets, buildings or sites where the goods were to be delivered. Similarly, an employer would have little control over the public oval in the second example.

In the same way, an employer may not have any control over public transport used for interstate or international travel or over hotels or other workplaces outside Western Australia where employees could be in the course of their work. (Note that where an employee undertakes work in another State, the employer may have duties under that State's legislation.)

Overlapping obligations

The following sections of this guidance note refer to duties of specific persons under the Act. In some cases a person will have duties under more than one section of the Act. For example, an employer will have duties under section 19, Duties of employers, and section 21, Duties of employers and self-employed persons.

An employee who has management responsibilities as part of his or her job has the duties of an employee under the Act, however there may be occasions when he or she will represent the interests of the employer in occupational safety and health.

Duties of employers (towards their employees)

General duties

Employers must, so far as is practicable, provide and maintain a working environment where their employees are not exposed to hazards.

General duties include:

- **safe systems of work;**
- **information, instruction, training and supervision;**
- **consultation and co-operation;**
- **provision of personal protection; and**
- **safe plant and substances.**

Source: section 19, Occupational Safety and Health Act 1984

- **reporting of fatalities, injuries and disease**

Source: section 23J, Occupational Safety and Health Act 1984.

Meaning of ‘employer’

An ‘employer’ is a person who engages workers under a contract of employment, apprenticeship or traineeship scheme.

The meaning of ‘employee’ is discussed further in the section titled ‘Duties of employees’.

In situations where employees are at workplaces in Western Australia and their employers reside elsewhere in Australia or overseas, the employers must still comply with the legislation.

Example:

A large international company has a head office in Sydney and a branch in Western Australia. All staff at the branch, including the State Manager, have contracts of employment issued from the Sydney office.

In law, the company has a corporate identity and is the ‘employer’ of all staff in Western Australia. The company therefore has an obligation to comply with all of the employer’s duties under the *Western Australian Occupational Safety and Health Act 1984*. The company must also comply with all other occupational safety and health provisions that apply in Western Australia.

The fact that the company is based outside of Western Australia does not limit this obligation.

The employer’s duty also applies to people who engage labour in ways other than by a contract of employment, where the Act specifically says so. (Refer to sections 23D, 23E and 23F dealing with contractors, paid work in circumstances similar to a contract of employment and labour hire arrangements respectively – for information on these provisions, see the section on ‘Contractors, sub-contractors, labour hire and other alternative working arrangements’ later in this document).

State government agencies

The *Western Australian Occupational Safety and Health Act 1984* applies to State Government agencies including departments, trading concerns, instrumentalities and statutory bodies.

The employer may be the State of Western Australia (the Crown), a person specified in an Act of Parliament as the employer, or a body corporate established by State legislation.

Chief Executive Officers of State Government agencies, employed under the *Public Sector Management Act 1994*, have functions under that Act pertaining to the implementation of occupational safety and health law, standards and programs.

Like others who have duties under the *Western Australian Occupational Safety and Health Act 1984*, the Crown and its employees may be prosecuted for failure to comply with the Act.

Safety and health policies

The Act does not require a written agreement on safety and health policies. However, it is good practice to obtain written confirmation of agreed safety and health policies and the way they are to be implemented as a basis on which to proceed.

Other duties

Duties under the legislation may overlap. For example, where a contractor is self-employed, he or she has duties under section 21, 'Duties of employers and self-employed persons', covered later in this guidance note. If the contractor is also a 'principal' engaging contract labour, the duties of section 19 will also apply.

Similarly, an employer who is engaged by a 'principal' retains all the normal responsibilities as an employer under sections 19 and 21.

Employer's duty: basic principle

The employer's duty under section 19 of the Act is to provide and maintain, so far as is practicable, a working environment where employees are not exposed to hazards. Employers have additional duties under section 21 of the Act and these are covered in detail later in this guidance note.

Working environment

The focus of the general duty is on the 'working environment'. The term is not defined in the Act, but it would be taken to include:

- the workplace itself: the building, structure, ship, aircraft, vehicle, etc;
- all plant at the workplace;
- the work process, including what is done and how;
- work arrangements, including the effects of shiftwork and overtime arrangements;
- the physical environment, including lighting, ventilation, dust, heat, noise, etc; and
- the psychological environment, including overcrowding, speed of process and other stress factors.

Access to and egress from the workplace is discussed separately later in this guidance note.

Particular duties

There are some specific duties in the Act that relate to the employer's general duty to ensure that employees are not exposed to hazards at work. These are described in more detail as follows.

Safe systems of work

Employers are required to provide and maintain workplaces, plant and systems of work so that, so far as is practicable, employees are not exposed to hazards.

The emphasis here is on the co-ordination of all work activity so that one part does not endanger a person who is working in or on another part. This system of work should take into account the layout of the workplace, the storage and handling of all materials and the location and movement of all people on site.

The following matters need to be considered:

- **Planning of the work.** Consideration needs to be given to effective planning of all aspects of the work, from the physical process to the individual tasks carried out by employees. Impact on safety and health needs to be considered for those indirectly affected by the work, as well as those directly involved.
- **Equipment and appliances.** Are these appropriate for the job? Items which are too small, not strong enough, awkward to handle etc may become hazardous when used for the task. Everyone involved with the task needs to know about the equipment to be used, as well as the task itself.
- **People.** The people carrying out the task need to have appropriate information, instruction, training and supervision.
- **Plans and procedures for dealing with hazards problems or mishaps.** Some may be foreseeable and therefore be prevented. Plans also need to be in place for dealing with the unforeseen (see section dealing with foreseeability on following page).

A safe system of work implies that all aspects of the work have been considered as an integrated whole. While the work may be broken into tasks for the purpose of hazard identification, it is necessary to consider the effects of all components on each other.

Examples:

Safe systems of work would ensure that:

- workers are relocated elsewhere in an excavation while a crane lifts materials over their work area;
- a workplace is designed with a one-way circuit to avoid industrial lift trucks reversing towards workers on site;
- a product is packaged to avoid strain injuries when the packages are handled; and
- data entry operators are given other clerical duties to limit the time spent at keyboards and to reduce the risk of occupational overuse injuries.

Any relevant regulations must be complied with. Regulations may only address part of the work, so compliance with a regulation does not necessarily ensure a safe system of work as required by the employer's general duties.

Example 1:

Certain regulations apply to spray painting. The regulations cover specific aspects of the spray painting process, including the requirement to carry out spray painting in a booth.

A safe system of work would require compliance with these regulations and further consideration of other factors such as the proximity of other workers to the spray painting process, information on spray painting hazards, fire precautions, storage and handling of hazardous substances, isolation of areas where workers may be eating or drinking, provision of washing facilities, and provision and cleaning of personal protective clothing and equipment.

Example 2:

All dangerous parts of an hydraulic press must be securely fenced or guarded or set up in accordance with regulations. To ensure a safe system of work, other factors, such as safe storage and movement of the metal sheets pressed on the machine, good housekeeping to keep the floor clear of debris, maintenance procedures and operator training and supervision, should all be carefully planned to protect the operator and all other people on site.

The provision of information, instruction, training and supervision and the provision of personal protective clothing and equipment, as specified under the general duties for employers, are an integral part of a safe system of work and are not dependent upon specific mention in the regulations.

Foreseeability

Some risks cannot be predicted, and may only be identified with the benefit of hindsight, after injury or harm has occurred. The Act only requires that measures be taken to avoid a risk that a 'reasonable person' should have foreseen at the time.

When the likelihood of injury or harm to health can be predicted, it is 'foreseeable' and employers have a duty to take preventative action.

Unintended consequences or mistakes do occur. Employers need to consider the possibility of these occurring and take steps to avoid hazards.

When considering the potential for unintended consequences or mistakes, employers should take into account the risks of danger through inattentive work or work carried out without suitable instruction and training. Inadvertent acts by employees could result in injury to themselves and others and, in situations where an employer can foresee that misjudgment or inattention is likely, the system of work should minimise these risks.

Experience in similar workplaces can alert employers to the sorts of problems that may occur in their own workplaces.

Example:

Unguarded or inadequately guarded brake presses have been responsible for many hand and finger amputations. It is insufficient to rely on the operator's skill and vigilance to prevent injury, because it is foreseeable that the operator could become momentarily distracted or for some other reason place his or her hand in the path of the descending ram. Action (ie practicable measures) must be taken to prevent this foreseeable injury. In such cases, guards that either prevent body parts entering the danger zone (physical guards) or prevent operation of the machine when a body part is in the danger zone (eg light guards) provide the protection required.

Identification of hazards, assessment and control

Employers should apply the following three step process to ensure employees are provided with a safe and healthy work environment. These steps are:

- identify any hazards associated with the work;
- assess the risk of injury or harm to health associated with each hazard; and
- consider and apply the means by which the risk may be eliminated, reduced or controlled.

The details of this process are explained further in Appendix 1.

Information, instruction, training and supervision

The Act requires employers to provide employees with the necessary information, instruction, training and supervision to carry out the work safely.

All information, training and instruction should be provided in a way that all employees at the workplace can understand. Where employees do not speak English or are unable to read English, employers should find an alternative method of providing information and training. This would apply to employees with a non-English speaking background and to workers who for physical, intellectual or cultural reasons are unable to read or hear. Methods which may be used include:

- organising information to be provided for people in groups with the same language;
- using interpreters;
- audio visual aids;
- provision of written information;
- using graphics;
- using short, simple English phrases;
- demonstrating points; and
- access to computer based information through the Internet.

Checks should be made to ensure all information, instruction and training is understood.

Information

Employers are required to provide information to employees as is necessary to enable them to perform their work in such a manner that they are not exposed to hazards. For example, visual warning signs, posters, booklets, brochures and other written or electronic materials could be provided under this duty.

The regulations specify documents which must be made available to employees at the workplace, including copies of the Act, regulations, relevant Australian Standards, Australian/New Zealand Standards, NOHSC standards and relevant codes of practice and guidance notes issued under the Act.

Under section 35 of the Act, an employer should provide safety and health representatives with information on any hazards that may arise and other information relating to the safety and health of employees at the workplace. To comply with the general duty, the employer should ensure that there is a system for safety and health representatives to receive and distribute relevant information and make it readily available to all employees.

Safety and health representatives are not entitled to have access to an individual employee's medical information without the employee's consent.

Employers are not required to reveal trade secrets to safety and health representatives.

Information does not always have to be written. Other forms of information which could be used include electronic media, safety videos and tapes. A briefing or handover at the beginning of each shift is a useful way of transferring safety information from person to person.

Instruction and training

Instruction and training should be relevant to the safety and health of employees in the workplace and should take the functions of each employee into account.

The position of employees as managers or supervisors would also affect the nature of the training provided. They may have management, or control, of some parts of the work process with other employees under their supervision. This level of responsibility would require more comprehensive training in the administration of safety and health and the organisation of systems of work so employees are not exposed to hazards.

The training and instruction given should include:

- safety and health induction training;
- industry based training (ie accredited or certificated courses);
- hazard specific training;
- on-the-job training; and
- in-house programs.

External training courses have been established to provide a service to some industries and some of these courses have been accredited by the Commission for Occupational Safety and Health. Both accredited and non-accredited training courses may be used to fulfill the general duty to provide training.

Employers may also provide in-house training using their own employees as trainers, or using specialist trainers. In-house training may provide an opportunity for management and appropriate employees to share the delivery. Induction training is one example of safety and health training which should be organised for each new employee. It is often set up as an in-house training program.

Induction training

Induction programs are essential for new employees. Induction can be the first experience or initiation for a person new to the job or particular work environment.

Information given during an induction should include:

- introduction to people with occupational safety and health responsibilities at the workplace;
- workplace policies and procedures;
- how to identify hazards;
- reporting of hazards;
- how to carry out the job in a safe and healthy manner;
- information on hazardous work practices;
- details of any isolation or tagout procedures (where applicable);
- reporting of accidents or incidents;
- selection, use, fitting, storage and maintenance of personal protective equipment;
- where to obtain occupational safety and health information;
- information regarding safety and health committee meetings; and
- emergency evacuation procedures.

On-the-job training

Employee on-the-job training might include:

- showing the employee the task and a safe way of doing it;
- explaining the reasons, steps, key points and safety considerations;
- having the person practise;
- giving feedback on the practice; and
- correcting errors as they occur.

Industry or in-house training

Training delivered on an industry or 'in house' basis should cover areas such as:

- hazards;
- operation of all relevant equipment;
- work procedures to minimise exposure to hazardous substances;
- safe systems of work to prevent an accident or injury;
- safe operation and maintenance of plant or equipment;
- work procedures relevant to the job being performed;
- any isolation or tag-out system, including persons authorised to use it;
- correct selection, use, care, fitting, storage and maintenance of personal protective equipment;
- correct use, care, maintenance and storage of tools and equipment;
- electrical safety;
- fire prevention and precautions;
- procedures in the event of an emergency such as an accident, rescue or fire;
- maintaining agreed record keeping procedures and systems; and
- hazard and accident reporting systems.

Training for safety and health committee members is another area which could be covered by in-house training.

The general duty requires training to be provided but it does not specify the exact form of the training. As training is a safety and health matter, employers are bound by the general duty to consult with safety and health representatives and other employees at the workplace regarding their training needs. The type of training that suits each workplace may vary from place to place and should be determined following consultation with employees and safety and health representatives.

Training programs

An effective training program should have at least the following features:

- adoption of adult learning principles;
- an analysis of training needs which identifies the tasks to be performed and the hazards associated with those tasks;
- where appropriate, the level of competency to be achieved as a result of training;
- entry standards and induction programs;
- learning objectives and desired outcomes;

- selection of training media;
- evaluation of the training program in the context of learning outcomes;
- evaluation of results in relation to their usefulness to the industry; and
- recognition of skills attained where applicable (ie accreditation or certification).

Certification or accreditation

There are occasions when a person is required to obtain formal accreditation or certification for some operations.

Employers must ensure that people undergoing training for accreditation or certification are adequately supervised during training.

Where accreditation or certification is required, employers should ensure that it is current and relevant to the operation. Persons holding formal accreditation or certification should ensure any re-assessments or re-testing should be completed when required.

Instruction to experienced employees

Employers should continue to provide information, instruction and training to employees who are experienced in the work they are carrying out and have previously had relevant safety and health training. An employer should not assume that an experienced person does not need to be instructed about the obvious. The employer's duty to instruct and warn employees covers all employees, including experienced ones.

Further training or re-training is needed when:

- new methods, equipment, policies or procedures are introduced;
- the type of operation or environment changes;
- the particular job requirements change; and
- new laws come into effect.

Supervision

Employers must provide adequate supervision to ensure employees are not exposed to hazards and take reasonable care of their own safety and health and the safety and health of others.

Employers should:

- ensure that people in supervisory positions have the skills, knowledge and authority to undertake this role;
- ensure that employees are adequately supervised;
- include sufficient monitoring of the work to ensure agreed safe work practices are being followed; and
- ensure that personal protective equipment, such as respirators, garments, eye and hearing protection are used and kept in reasonable condition.

Special consideration must be given to the requirement for supervision of employees working on their own or working in an isolated area, for example, timber workers, exploration geologists and surveyors. As supervision of employees in these circumstances is limited, the employer must ensure that employees have suitable access to amenities and can easily communicate with the employer to obtain instructions and emergency assistance.

An employer is expected, through supervision, to ensure that employees are following safe work procedures and working in a manner consistent with the instruction and training provided. It is not sufficient to introduce safe procedures without monitoring their implementation to ensure that they are adopted and are effective. Failure to act to rectify

unsafe behaviour, or failure to implement an adequate system of supervision to ensure the work is undertaken in a safe manner, would not satisfy the employer's general duty.

Employers have the major responsibility under the Act. In most cases, employers must provide a safe system of work with adequate information, instruction, training and supervision before employees can take reasonable care for their own safety and health at work.

Consultation and co-operation

One objective of the Act is to foster co-operation and consultation between employers and employees. Employers are required to consult and co-operate with safety and health representatives, where they exist in the workplace, and with other employees on occupational safety and health matters.

Consultation and co-operation between employers and employees is the key to providing and maintaining a safe and healthy workplace.

Participation of employees is important, as they are most likely to know about risks associated with their work. Safety and health representatives, where they exist, have an important role in this consultation.

Employer and employee involvement in identifying hazards and assessing and controlling the risks will help ensure employees have a commitment to this process and any changes that result.

Further information on consultative processes and structures can be found in other Commission publications.

Workplace policies and procedures

Policies and procedures may need to be developed and implemented, in consultation with employees and the safety and health representative, if there is one.

These require effective planning and should include:

- consultative mechanisms;
- safe work practices;
- accident investigation procedures (including involvement of the safety and health representative);
- induction and training programs;
- dealing with unique characteristics of the work;
- policies and procedures to monitor performance and to review control measures;
- resolution of issues procedures;
- means of access to additional hazard specific information;
- emergency evacuation procedures in the event of an accident, rescue or fire; and
- record keeping.

The Act provides for a formal mechanism for consultation and co-operation through safety and health representatives and committees. This workplace consultation is an important feature of the Act.

Safety and health representatives

Where an employer intends to make changes which may reasonably be expected to affect the safety or health of employees, the employer is required to consult safety and health representatives (if any) before the changes are implemented. This is covered in section 35 of the Act, which describes certain duties of employers in relation to safety and health representatives.

This consultation gives employees an opportunity to review the intended changes so they can apply their experience and expertise to identify any safety and health problems. For this reason, it is preferable for this consultation to occur in the planning phase. Even where programs are designed to improve the working environment and conditions, there must be consultation before they are introduced.

This requirement is in addition to the requirement under section 19 to consult and co-operate with the safety and health representatives and other employees on safety and health at the workplace.

Employers should ensure there is a system in place for safety and health representatives to properly canvas the views of other employees.

Employers may talk directly with employees on safety and health matters however, under section 35, they must also consult with safety and health representatives on changes likely to affect employee safety and health.

Employees may ask for the safety and health representative to be present during any interview with the employer on occupational safety and health.

Working together

The general duty under section 19 requires the employer to co-operate with safety and health representatives and other employees at the workplace on safety and health matters. This means that employers and employees should actively work together with the common aim of improving standards of safety and health in each workplace.

Safety and health committees provide a means for consultation and co-operation, and establishment of these committees is encouraged. Under section 36 of the Act, any employee who works at a workplace may request the employer to establish a safety and health committee. Alternatively an employer may initiate the establishment of a safety and health committee

In workplaces where there is no safety and health representative or safety and health committee, the employer still has a duty to consult and co-operate with employees.

The legal responsibility for safety and health decisions at a workplace rests with the employer. The consultation process should help employers to reach decisions which take into account information and recommendations provided by employees or the safety and health committee in the workplace.

Also in the spirit of working together, section 23K of the Act requires the employer to investigate and to report back to the employee on intended action to be taken, when the employee reports to the employer either an unsafe situation that the employee cannot correct, or injury or harm to a person. This feedback loop serves to ensure open communication on safety and health concerns at the workplace, as well as ensuring concerns are investigated.

Provision of personal protective clothing and equipment

In some work situations, it may not be possible to totally avoid certain hazards. This might include periods while a workplace or work process is redesigned. In such cases, employers must protect employees from the hazards by providing adequate personal protective clothing and equipment.

The employer must provide, and where necessary replace or repair, to the manufacturer's specifications, all personal protective clothing and equipment, free of charge to the

employee. Ownership of the personal protective clothing rests with the employer.

Personal protective clothing and equipment may include, for example, items such as safety goggles when there is a risk of eye injury; steel-toed boots when there is a risk of toe injury; and safety helmets when there is a risk of head injury.

The provision of 'protection' under this section may also include other items, such as hats to protect against skin damage.

Employers should consider the individual needs of each employee. For example, employees with disabilities may require additional protective clothing and equipment for use at work.

**Personal protective clothing
and equipment must be
provided when hazards
cannot be avoided.**

Safe plant and substances

The employer's duty specifically refers to plant and substances at workplaces.

The word 'plant' is defined in the Act, but 'substance' is not. Definitions of 'substance' and 'hazardous substance' are included in the Occupational Safety and Health Regulations 1996. Where words are not defined in the Act or in the *Interpretation Act 1984*, the common dictionary definition is usually used. However, with the word 'substance', the definition has been the centre of much attention throughout Australia because of the focus on hazardous substances legislation.

'Plant' is defined as "any machinery, equipment, appliance, implement or tool and any component or fitting thereof or accessory thereto". Plant may include items such as cranes, forklift trucks, heavy industrial machinery, gas bottles, robotic arms, computers, microwave ovens, electrical tools and appliances, as well as hand held tools. Plant may also include scaffolding, ladders and other equipment used on a construction site.

'Substance' means any natural or artificial entity, composite material, mixture or formulation, other than an article.

The employer must ensure that employees are not exposed to hazards arising from:

- the use, cleaning, maintenance, transportation and disposal of plant; and
- the use, handling, processing, storage, transportation and disposal of substances.

The OSH regulations define **'Hazardous substance'** to mean a substance –

- (a) entered in the National Commission's List of Designated Hazardous Substances [NOHSC: 10005 (1999)]; or, if not in that list
- (b) is determined to be a hazardous substance, under the National Commission's Approved Criteria for Classifying Hazardous Substances [NOHSC: 1008 (1994)].

Reference, in the Act, to plant and substances reminds employers that their duties to provide and maintain a safe system of work and to provide information, instruction, training and supervision apply to all plant and substances at the workplace.

Where hazards cannot be eliminated, employers have a duty to reduce or control them. Personal protective clothing and equipment must be provided when hazards cannot be avoided.

Employers are required to take measures that are practicable and reasonable, and the duty extends to all matters under their control.

Once again, the emphasis is on health as well as safety. Injuries caused by mechanical equipment are usually quite obvious. Workplaces should have a reporting and recording system which includes details of the location where the accident occurred and the action taken to prevent further similar injuries.

Effects on health may not be so obvious. There is often a delay between exposure to the hazard and the appearance of a related illness or disease.

Monitoring exposure to hazards

Where employees are exposed to hazardous substances, the employer may be required to monitor levels of exposure and conduct health surveillance of employees.

Health surveillance programs must be carried out under the supervision of an appointed medical practitioner.

The monitoring of employees' health should be closely related to the monitoring of the conditions at each workplace.

Reporting of injuries and diseases

Employers are required to report certain cases of injury or disease (including death) affecting employees at the workplace to the WorkSafe Western Australia Commissioner. See the separate section on 'Reporting requirements' later in this guidance note for further detail.

Duties of employees

General duties

Employees must take reasonable care for their own safety and health at work and avoid harming the safety and health of other people through any act or omission at work.

General duties include:

- following the employer's safety and health instructions;
- using personal protective clothing and equipment;
- taking good care of equipment;
- reporting hazards;
- reporting work-related injuries or harm to health; and
- co-operating with employers so that employers are able to carry out their duties under the Act.

Source: section 20, *Occupational Safety and Health Act 1984*

Meaning of ‘employee’

An ‘employee’ is a person who works under a contract of employment, apprenticeship or traineeship scheme under the *Industrial Training Act 1975*.

Voluntary workers and workers who do not receive any payment, such as family members helping in a family business, and students on work experience are not covered by the ‘employee’ definition.

The Western Australian *Occupational Safety and Health Act 1984* covers all employees in State Government agencies including departments, trading concerns, instrumentalities and statutory bodies.

Employees of the Commonwealth Government are covered by other occupational safety and health laws, not by the Western Australian *Occupational Safety and Health Act 1984*.

The employee’s duty also applies to workers in some other working relationships, where the Act specifically says so (sections 23D, 23E and 23F dealing with contractors, paid work in circumstances similar to a contract of employment and labour hire arrangements).

Employee’s general duty: basic duty

The employee's duty under section 20 of the Act is to take reasonable care for their own safety and health at work and to avoid harming the safety and health of other people through any act or omission at work.

This refers to any action by an employee and other things that an employee may forget to do or choose not to do (ie an omission).

The Act does not define what is meant by ‘reasonable care’. It is relevant to consider what a ‘reasonable person’ in the same situation of the employee would do (see earlier discussion on ‘reasonable person’).

The employer has a complementary duty to provide the employee with the information, instruction, training and supervision necessary to enable the employee to properly fulfil his or her duty under the Act. The employee has a duty to act in good faith.

Example:

A forklift operator meeting the required competency standards is expected to operate the forklift in accordance with his or her training. Such training includes instructions not to use the forklift to lift a person, except when using a work platform specifically designed for the purpose of raising people. Such instructions are also usually reinforced in the workplace by the employer’s instructions and procedures. If a forklift operator, who had received such training and instructions, disregarded them and

exposed a person to a hazard by lifting him or her on the tynes of the forklift, this would be an example of failure to take reasonable care to avoid adversely affecting the safety of another person. Employers must facilitate the ability of an employee to meet their duty of care eg in this example, by providing a work box.

The extent of the duty

The employee's basic duty to take reasonable care extends to all employees who fit the definition in the Act. This means the duty applies to all levels from production worker, forklift operator or clerical worker to senior executive or manager.

The employee's duty to avoid causing harm to others may place greater responsibilities on managers and supervisors than on other staff. For managers and supervisors the range of people who may be affected by their decisions on safety and health matters could be quite extensive, depending upon their position and authority.

Example:

A supervisor who directs that a particular task is done in a particular way clearly has responsibilities to the employees who are directly involved in the performance of the task, and to other employees and members of the public who may be affected by the way in which the task is done.

A specific example of a failure to exercise reasonable care might be where a supervisor, who has identified that a particular piece of plant requires use of a guard in order to be operated safely, one day directs an employee to use the plant without the guard, because the guard has been taken off to be repaired.

Particular duties

Under section 20 of the Act, the employee also has some specific duties. The employee must:

- follow the employer's instructions provided for safety and health reasons;
- use personal protective clothing and equipment that has been provided by the employer in accordance with the employer's duties in section 19. This duty is dependent upon the employer providing proper instruction in its care, use and storage;

- take good care of equipment provided in the interests of safety and health. In particular, the employee must not misuse or damage the equipment. Under this section it would be an offence to deliberately render fire-fighting equipment inoperative or to remove guards from dangerous machinery for no good reason.

This point applies when employers have provided the necessary information, instruction and training in safety and health matters, and an employee's actions to misuse or damage are quite deliberate;

- report hazards that the employee cannot correct. The requirement is to report to the employer, however there could be a system in the workplace where employees report to their immediate supervisor or area manager. Where that person is also unable to correct the hazard, it should be reported to a more senior management person.

Any procedure that sets up a chain of command or delegates the task of receiving hazard reports should ensure there is prompt action to fix the problem or refer it on to someone who can address it. The legal responsibility to ensure that employees are not exposed to hazards rests with employers. In addition, supervisors who do not follow an agreed reporting procedure could be affecting the safety and health of other people through an omission at work, and may be failing to comply with their duties as employees;

- report injury or harm to health that is connected with the work activity. This applies to physical injuries and to the early symptoms of illness or disease that may be connected with work.

For this reporting to occur, employees should have received information from the employer about the early symptoms of which employees should be aware. For example, keyboard operators should be aware of the symptoms of occupational overuse injuries; and

- co-operate with the employer to allow the employer to carry out his or her duties under the Act. This complements the employer's duty and means that employees should actively work with employers with the common aim of improving safety and health at the workplace. This duty means that employees are required to follow directions given by the employer in the interests of safety and health.

Contractors, sub-contractors, labour hire and other alternative working arrangements

If the application of the Act were limited to people who are by definition employers and employees, a whole section of the workforce would miss out. Many workers are engaged under arrangements that fall outside the traditional employment relationship. These alternative arrangements include work undertaken by contractors and labour hire arrangements.

Sections 23D, 23E and 23F of the Act capture these alternative working relationships and ensure that the general duties of care of the employer, under section 19, and of the employee, under section 20, apply to the relevant people in the working relationship.

The duty to report a notifiable injury or disease to the Commissioner (section 23I) also applies to the person with the employer's duty in such relationships.

These relationships are discussed in more detail below.

Contractors and sub-contractors

Standing on its own, the employee definition would not cover contractors or sub-contractors. However, section 23D of the Act, deals with this situation. Where a person uses a contractor to carry out some of the work associated with the trade or business, that person (called the 'principal') then becomes the employer of the contractor, the contractor's employees and any sub-contractors. The principal has the same duty of care to these people as he or she would have to his or her own employees.

Contractors having their own employees must continue to carry out the duties of employers under section 19 of the Act. The duties of the Act overlap in these circumstances. Both the contractor and the principal have duties to the contractor's employees.

The duty under section 23I to report certain injury or disease occurrences also applies to both the principal and the contractor.

Contractors and contractors' employees (or people engaged by a contractor) working for a principal have the duties of an employee under section 20 in relation to the work for the principal.

Note that a contractor may have both the duties of an employer (in relation to his or her own employees) and the duties of an employee (in relation to the work for the principal).

In a large workplace there could be many contractors and sub-contractors, and the legal relationships may become very complex.

Premises

The principal/contractor relationship is the only alternative working relationship where the employer's duty under section 23G of the Act applies (see under Duties of employers to maintain safe premises). Where a principal provides a contractor or contractor's employees with residential accommodation, the principal has a duty to ensure that the premises are safe (this duty is very limited and applies only in limited circumstances).

A matter of control

The duties of principals applies only in relation to matters over which the principal has control or is capable of controlling. There are situations where this control is shared by employers and contractors.

Example:

A principal, say on a building site, who engages an electrical contractor to work at height would have a duty to protect the contractor from the hazard of falling from that height. The principal would have to ensure appropriate systems and controls are implemented, and ensure installation of the necessary structures to ensure that adequate fall protection was in place. These are clearly matters over which the principal has the capacity to exercise control. However, in relation to the aspects of the electrical work for which the principal has no expertise, the principal would not have the capacity to control the way in which the work was done.

In a large workplace there could be many contractors and sub-contractors, and the legal relationships may become very complex. Contractors could be employed by a principal and also be principals in their own right if they use other contractors to carry out some of their own work.

These legal arrangements apply to contractors and sub-contractors in all workplaces covered by the Act.

Principals cannot use a contract for the purpose of handing over their responsibilities under the Act to contractors, agents or other persons. It is important that principals determine which matters are, or are not, within their capacity to exercise control. The Act does not provide any guidance on this point.

While a contract cannot 'hand over' responsibility for occupational safety and health from one party to another, contract provisions dealing with safety and health can be useful in clarifying the requirements that will apply to a particular site. For example, a 'principal' may have a policy that no children are allowed on the site, and this policy could be written into every contractor's agreement to undertake work on the site.

A good basis for contractor arrangements is to ensure that the same safety and health policies set for employees are applied to contractors and their employees.

The important thing to remember when writing occupational safety and health requirements into contracts is that the contract must reflect the reality of who has the capacity to exercise control over a particular matter. For example, a contract that makes an electrical contractor, with no scaffolding expertise, responsible for the scaffolding supplied and erected by the principal would not reflect reality (in terms of capacity to control). Not only would such a provision be invalid, it would also be misleading.

Some occupational safety and health matters need to be dealt with by both parties to the contract. In other words, the duties overlap. Fall protection and the use of harnesses is a good example of where this may occur. The principal may have control over the installation of anchorage points for fall arrest systems and the implementation and enforcement of policies that a fall arrest harness is to be worn and attached. The contractor may have no control over the anchorage points, but would have control over wearing and attaching his/her harness and that of any employees. Supply of harnesses to the contractor's employees is the responsibility of both the principal and the contractor, and it would not be acceptable for each to leave it to the other.

Principals, employers, contractors or subcontractors who are unsure of the contractual arrangements and their responsibilities under the Act should seek professional advice as to the legalities of their contracts.

Labour hire arrangements

Provisions dealing specifically with labour hire arrangements are covered in section 23F of the Act.

Labour hire refers to arrangements when a host organisation or person (the client), in the course of trade or business, engages workers from an organisation which specialises in providing labour (the labour hire agency or agent). These workers are deemed to be employees. The arrangement is characterised by:

- an agreement for remuneration between the client and the agent regarding supply of a worker;
- an agreement (which may be a contract of employment) between the agent and the worker; and
- the lack of a contract of employment between the client and the worker.

An agent is a person who carries on a business which provides workers (who can be employees or contractors) to carry out work for clients of the person. This includes a group training organisation under the *Industrial Relations Act 1979*. Workers are usually employed and paid by a labour hire agency or agent which requires them to perform their tasks or functions for a client, usually under that client's direction.

Both the agent and the client have the same general duties of care as those applicable to an employer under section 19 of the Act, in relation to those matters over which each has the capacity to control. The duty under section 23I to report certain injury or disease occurrences also applies to both the agent and the client.

In broad terms an employer must, as far as practicable, provide a work environment in which employees are not exposed to hazards. While it is recognised that the agent does not have day to day control of the work at a client's workplace, the agent's responsibilities do not stop simply because the work is not carried out at the agent's workplace.

There is much the agent can do to provide for the worker's safety and health, such as:

- verifying and matching training, skills and experience of the worker to the needs of the task;
- providing a general induction and making arrangements with the client to ensure that specific induction is provided in relation to the tasks to be undertaken and the plant to be used;
- ensuring that systems are in place to ensure that the client advises of any change to duties or change to the workplace; and
- ensuring the worker is aware of his or her rights and responsibilities.

The client usually has day to day control of the labour hire worker so there is much the client can do to ensure a safe working environment, such as:

- implementing safe systems of work;
- ensuring the workplace plant and equipment is safe;
- providing specific induction in relation to the tasks to be undertaken and the plant to be used;
- providing adequate on-site supervision; providing information and training to make sure the worker knows how to carry out his or her activities; and
- notifying the agent if any change is being considered.

A worker in a labour hire arrangement has the same general duties of care as those applicable to an employee under section 20 of the Act.

Other labour arrangements

The Act contains provisions (section 23E) designed to capture any other alternative working relationship where the work is directed and controlled by person in a manner similar to that under a contract of employment, but a contract of employment does not exist. The provisions are limited to arrangements that are not covered by section 23D (principal/contractor arrangements) or section 23F (labour hire arrangements).

An example of the type of person to whom this applies might be a skipper of a boat who has a share fishing agreement with the crew of the boat (and the crew are not employees, contractors or labour hire workers) yet the skipper can tell the crew things such as what work to do and how the work is to be done.

A person who pays workers to carry out work in these sort of circumstances has the employer's general duty of care under sections 19 in relation to matters over which the person can have control. The duty under section 23I to report certain injury or disease occurrences also applies.

Workers in this sort of relationship have the duties of an employee under section 20 of the Act.

Reporting requirements

Reporting of injuries and diseases to the Commissioner

Certain cases of injury or disease affecting employees at the workplace must be reported to the WorkSafe Western Australia Commissioner. This includes all cases resulting in the death of an employee. Injuries and diseases to employees, which must be reported, are listed in the regulations. The regulations cover specified injuries, and certain diseases which are known to be caused by occupational factors. Employers are responsible for the reporting of injuries and diseases affecting their employees, including apprentices and trainees.

This duty also applies to some other working relationships where the Act specifically says so. Where a principal engages contract labour, the principal also has a duty to report accidents and diseases affecting contractors and their employees. Other people who need to report cases of injury or disease are agents and clients in labour hire arrangements (section 21F), and a person who pays and directs a person to carry out work in a manner that is similar to a contract of employment (section 21E).

The above provisions also apply where the injury or disease is incurred at residential premises to which section 23G applies (see under 'Duties of employers to maintain safe premises').

The Act also allows regulations to be written to require employers and self employed persons to report certain injuries incurred to non-employees in connection with the business or bystanders.

All accidents should be reported to the employer immediately, so an investigation can be conducted if necessary. It may take longer to report an accident at a remote worksite, nevertheless it should be reported to the employer within 24 hours.

Reporting of all incidents or 'near misses' to the employer is also important. Recording of these incidents provides valuable data to improve safety and health, and allows for steps to be taken to prevent injury.

Notification of hazard to person having control of workplace

Employers and self-employed persons are required to inform the person in control of the workplace of any hazards of which the employer/self-employed person becomes aware and which are the responsibility of the person in control of the workplace to rectify (section 23L). The duty also applies in relation to the means of access to and egress from the workplace. The duty is limited by practicability.

This duty was introduced in acknowledgement that employers and self-employed persons at a workplace are likely to become aware of hazards before the person in control of the workplace does, particularly where the latter party does not physically work at the workplace.

Duties of employers and self-employed persons (towards themselves and others)

General duties

Employers and self-employed people must, so far as is practicable, avoid harming the safety and health of other people. Self employed people must also take reasonable care to protect their own safety and health at work.

Employers must also ensure that, so far as is practicable, other people are not harmed by the work undertaken by their employees.

Source: section 21, Occupational Safety and Health Act 1984

Duties of employers and self-employed persons: basic principle

Under the Act, a self-employed person means a person who works for gain or reward other than as an employee, regardless of whether he or she employs any other person. Therefore, by definition, the term self-employed person includes an employer (where the employer is an individual, not when the employer is a corporation).

Duties under section 21 of the Act require self-employed people to take reasonable care for their own safety and health at work.

In addition, employers and self-employed people must, so far as is practicable, avoid harming the safety and health of other people.

In the case of an employer, he or she must also ensure, as far as practicable, that the work of his or her employees or others under their control does not harm others.

The duties of employers under section 21 apply to both employers who are individuals and those that are corporations.

Section 19 of the Act establishes a duty for employers in relation to their employees. Section 21 extends the general duty for employers towards people other than their own employees, who may be adversely affected by the work. The section also extends this duty to self-employed people.

Protecting non-employees

The non-employees covered under section 21 include groups such as customers, hospital patients, visitors to the workplace including police, inspectors and other government officials, clients, salespersons, persons attending meetings, voluntary workers, students, an employee's family and any other person who may be affected by the work activity.

The main point here is that it is not confined to the workplace. The duty refers to harm that may occur as a result of the work undertaken by the employees.

Employers are required to take measures that are practicable and all of the points raised in the discussion on 'the meaning of practicable' should be taken into account.

Example:

It is reasonable to expect that members of the public who pass by a construction site would not be exposed to the risk of injury from objects dislodged or dropped during crane lifting operations.

The employer with overall control of the site would be expected to bear the cost of setting up the site so all crane lifts could occur on the site rather than over the footpaths and public roadways. If it were not practicable to confine all lifts to the site, the employer would be expected to establish other safeguards necessary for the protection of the public.

Protecting an employee's family

Work activity involving hazardous substances has the potential to harm members of an employee's family. The safety and health policies and procedures should ensure that employees are not transporting substances, such as contaminated dust or fibres, to their homes on work clothes, in vehicles, etc.

Where hazardous substances, such as paint stripper, solvents and rust removers are stored in a work vehicle which may be at the family home, procedures should ensure that children do not have access to the substances. The system of work should include the provision of information on which substances may be harmful, proper storage in the vehicle to prevent spillage, locks to ensure that substances are secure, training on action to be taken in an emergency and regular checks that safe work practices are followed.

The same applies to plant, such as power tools or hazardous substances, which are taken to the family home at the end of each working day. At workplaces where the family lives on site, on farms for example, every employer or self-employed person has a duty to ensure that children and other family members or visitors are not injured or harmed by the work activity or the hazards that may be present.

Duties of employers to maintain safe premises

General duties

Section 23G of the Act contains provisions requiring an employer to, as far as practicable, ensure that residential premises provided in connection with work are maintained so that the employee occupying the premises is not exposed to hazards. The duty applies only in limited circumstances, that is, where the following conditions apply:

- the residential premises are owned or under the control of the employer;
- the occupancy of the premises is necessary for the purpose of the employment because there is no alternative accommodation reasonably available in the area concerned;
- the accommodation is outside a city or town (including 'cities' such as Bunbury); and
- there is no written agreement containing terms that might reasonably be expected to apply to the letting of residential premises (such as a lease or tenancy agreement).

If the obligation applies to the premises then it also applies to land and outbuildings that are intended to be used in connection with the premises (for example separate laundry facilities or outside showers).

Principals in a principal/contractor arrangement also have the duties of an employer in relation to residential premises.

Duties placed on certain bodies corporate

General duties

While section 21 of the Act provides protection to people such as customers, visitors and passers-by, sometimes a business is operated by a body corporate that is not an employer. Section 21 does not apply to such bodies. Section 21B covers this potential gap in coverage.

Section 21B applies to a body corporate that, in the course of trade or business, engages labour under one of the alternative labour arrangements covered in the Act, ie principal/contractor arrangements (section 23D), labour arrangements that mirror a contract of employment (section 23E), and labour hire arrangements (section 23F). If the body corporate is not covered by one of these three sections, then section 21B does not apply. For example, this section does not cover a body corporate that engages solely volunteer labour.

Where covered by this section, the body corporate must, as far as practicable, ensure that the safety or health of a person is not adversely affected by the work of the body corporate or a person carrying out work under the direction of the body corporate.

This duty provides protection to customers, visitors, passers-by and anyone else whose safety or health might be adversely affected by the work.

Duties of persons who have control of workplaces

General duties

People who have, to any extent, control of a workplace must ensure, so far as is practicable, that the workplace and all entrances and exits are safe so that people may enter, leave and use the workplace without exposure to hazards.

Source: section 22, *Occupational Safety and Health Act 1984*

Duties of persons who have control of a workplace: basic principle

Duties under section 22 of the Act require people who have any extent of control of a workplace to ensure, so far as is practicable, that the workplace and all access ways used to enter and exit are kept clear and in good condition so that people who use the workplace are not exposed to hazards. The duty only applies if the person has control of the workplace in connection with a trade, business or undertaking of theirs.

The section applies to a person who has any control of:

- a workplace where persons who are not employees of that person are likely to be in the course of their work; and
- the means of access to and egress from a workplace.

This includes owners, lessors, etc of premises, who may have no involvement with the work activity carried on by employers or others at the premises, but who have retained some control over the premises. These areas of control may include the lifts, stairways, corridors, entrances, carparks and common foyers and gardens shared by tenants.

In many cases, employers will have control over their own premises and these employers will have responsibilities for the means of access and egress to and from the premises. In this case, the employer must also ensure that anyone else's employees are not exposed to hazards on the premises. The employer's duty to provide his or her own employees with a safe working environment still applies.

The definition of 'workplace' also includes aircraft, ships and vehicles, where the employer or owner may not be able to exercise direct control over the operator or driver.

An employer may have duties under section 22 as well as section 19. For example, an employer who has control of the means of access or egress to the workplace has additional duties to ensure these areas are safe.

There may also be situations where two or more people share the control of the same workplace or areas within it.

Duties under section 22 do not apply to 'a person whose duties are set out in section 20', that is, an employee. However, in many cases an employee such as a manager will, as part of his or her job, exercise control over a workplace or its entrances and exits on behalf of the employer. In this situation the manager has responsibilities as an employee (section 20) to carry out the functions of his or her job in a way that does not harm others. The manager must exercise a level of care which is reasonable given his or her job function, authority and level of control.

A matter of control

Section 22 duties are limited to the areas that are under the person's control, and it is important that the areas of control are clearly defined in contracts between the parties. Refer to the section on 'contractors and sub-contractors' for a further discussion on the issue of control.

People who have, to any extent, control of a workplace are required to take measures that are practicable. All of the points raised in the discussion on 'the meaning of practicable' would apply.

Written contracts

It is recommended that a written record of safety and health policies and procedures is provided as part of tenancy contracts and contracts to carry out maintenance, cleaning, gardening or other contract work at a workplace. The record should specify safe methods of work and safety standards required of all people associated with work in the building or on the work site.

Note that a person cannot contract out of his or her responsibilities under the Act.

Where regulations apply, they must be complied with as a minimum requirement.

Premises covered

This section of the Act applies to persons who have control of a workplace, or the means of entering or leaving it, in connection with the person's trade, business or undertaking. It applies whether or not the business or undertaking is carried out for profit. A householder in control of domestic premises would not be covered because there is no connection with the trade, business or undertaking of the householder.

Safe entry and exit

The duty imposed by section 22 relates to the physical condition of the workplace and all access ways used to enter and exit, including roads, walkways, doorways, lifts, etc. Fire prevention and control and emergency evacuation would be part of the duty to ensure that people at the workplace could exit safely.

In multi-tenanted workplaces, it is the person who has control of access ways, entrances and exits, usually the building manager or site manager, who should ensure that all tenants have information about safe ways to exit in an emergency.

Duties of manufacturers, suppliers and others

General duties

Designers, manufacturers, importers and suppliers of plant for use at a workplace must comply, so far as is practicable, with the following:

- design and construct plant so that people who install, maintain or use it are not exposed to hazards;
- test and examine the plant before it is used;
- provide information; and
- ensure plant is installed or erected so it can be used safely.

Manufacturers, importers and suppliers of substances for use at workplaces must, so far as is practicable, provide information on the results of any testing and other safety and health information relating to these products.

Designers or builders of any building or structure for use at a workplace must ensure, so far as is practicable, that persons constructing, maintaining, repairing, servicing or using it are not exposed to hazards.

Source: section 23, *Occupational Safety and Health Act 1984*

The duties included in section 23 of the Act apply to the following groups of people:

- designers, manufacturers, importers or suppliers of plant for use at workplaces;
- erectors or installers of plant for use at workplaces;
- manufacturers, importers or suppliers of all substances used at workplaces; and
- persons who design or construct buildings or structures, including temporary structures, for use at workplaces.

Safe use of plant

People who design, manufacture, import or supply plant for use at a workplace must, so far as is practicable:

- ensure that the plant is designed and constructed safely, so that people at work who use the plant properly are not exposed to hazards. All plant must be designed and constructed with safety and health in mind, to avoid the risk of injury or harm to health when it is properly used.

Factors to consider may include physical trauma from entrapment or being struck by moving parts, overexertion associated with manual handling, and the generation of fumes, noise, vibration, extremes of temperature and radiation;

- test and examine the plant to make sure it is properly designed and constructed. The testing and examination required may be undertaken by a contractor or agent but the responsibility to test and examine under the Act cannot be delegated or transferred to another person. It is not sufficient to adopt what appears to be 'safe' design or 'safe' construction.

Testing and examination ensures that the original design concept is sound and the materials and work methods used to construct the plant will be able to withstand the pressures which could be applied when it is in use at a workplace. Testing should also ensure that any emissions from the plant are within acceptable limits; and

- ensure that adequate information is provided when the plant is supplied to the workplace. The information must cover the following items:
 - any dangers associated with the plant;
 - plant specifications;
 - the results of the testing required under the Act;
 - safe operating conditions that should be followed to ensure that people who use the plant are not exposed to hazards; and
 - the proper maintenance of the plant.

**All plant must be designed
and constructed with safety
and health in mind.**

Duties of erectors and installers

Erectors and installers of plant for use at a workplace are required under section 23 to ensure that it is done in a way which ensures the plant will be safe when properly used.

Two guidance notes provide further explanation:

- *Plant in the workplace – a guide for employers, self employed persons and employees.*
- *Plant design manufacturers, importers, suppliers and installers of plant.*

Substances at workplaces

Many substances used at work may be hazardous. Provided these hazards are known and understood and appropriate precautions are taken, the substances can be used safely. The key to this is the provision of information about each substance and the precautions for use.

The duty of manufacturers, importers or suppliers of substances used at workplaces is to provide adequate toxicological data. Suppliers of hazardous substances must ensure up to date material safety data sheets (MSDSs) are provided to purchasers of hazardous substances. Suppliers must also ensure containers of hazardous substances are labelled in accordance with relevant standards.

The provision of this information should be a part of each employer's safe system of work to ensure that employees and others are not exposed to hazards.

Employers should ensure that the information is provided to safety and health representatives and other employees at the workplace, in a form which can be readily understood.

Where employers intend to change a substance used at the workplace, and the change may reasonably be expected to affect the safety and health of the employees, employers should consult with safety and health representatives and other employees before the substance is introduced into the workplace. The provision of adequate information is an important part of this consultation process.

The safe system of work may include using alternative substances which are safer, or introducing controls or safe work practices that minimise the risk of exposure. A safe system of work should also prevent transfer of substances to unmarked or inadequately marked containers.

Information on safety and health

Manufacturers, importers and suppliers of substances must provide enough information for employers and employees to know about injury or harm to their health which could occur from the use of each substance at work.

The information should cover the safe use, handling, processing, storage, transportation and disposal of the substance. Details of appropriate first aid should also be included.

Short and long term effects

The effects of a substance may be immediate, such as an acid burn, or may develop over a short time, such as skin allergies, or may take a long time for the symptoms to appear, such as some cancers. The information provided by the supplier should take immediate, short term and long term effects into account.

Material safety data sheets

Material Safety Data Sheets (MSDSs) are used internationally to provide information required to allow the safe handling of hazardous substances and mixtures of hazardous substances in workplaces. The MSDS describes the ingredients, properties and uses of a chemical product or formulation; health hazard information; precautions for use; and safe handling information.

In Australia, MSDSs must be supplied in English and be relevant to Australian conditions. The employer's obligations to provide information to non-English speaking employees is discussed in the section on 'Information' under 'Duties of employers'.

Guidance on the provision of information on hazardous substances is available in a publication entitled, *National Code of Practice for the Preparation of Material Safety Data Sheets* [NOHSC:2011(2003)]. The guidance note, developed by the Australian Safety and Compensation Council, formerly the National Occupational Health and Safety Commission, includes a format which can be used to present information on hazardous substances.

Adequate information that is up to date

The question of whether information provided is adequate will depend upon the amount of scientific information that is available at that time. Manufacturers, importers and suppliers should be well informed and should keep up with scientific reports and any research and development work on the plant and substances that they provide to workplaces.

Product information should be updated whenever there is a significant change in the information available, or at least every five years.

Who provides the information?

Plant and substances designed, manufactured, imported or supplied for use at workplaces may change hands many times before they reach the workplace. Who then, in this chain of designers, manufacturers, importing agents, wholesalers and retailers, is the person bound by law to provide the information?

The first person that designs, manufactures or imports the plant or substance has a clear duty to provide information. This ensures that the item of plant or substance begins its life with the necessary information.

The person who supplies the plant or substance directly to the workplace where it is to be used also has a clear duty to provide information when the plant or substance is supplied. This would include retail outlets, such as paint shops and hardware shops whose customers include people from workplaces. Where the packaging does not include adequate information, the retailer still has a duty to make the information available for customers from workplaces.

The many agents or wholesalers in Western Australia who may handle plant or substances could also be 'suppliers', even though they may not know exactly where their products are to be used and they may not supply directly to workplaces.

If a workplace already has the plant or substance, employers and employees may request information, and manufacturers, importers and suppliers, (and designers of plant) are bound by law to provide it.

Safe buildings and structures

Persons who design or construct a building or structure for use at a workplace must, so far as is practicable, ensure that the design and construction does not expose people to hazards who:

- construct, maintain, repair or service the building or structure; and
- use the building or structure.

This requirement ensures that a structure is properly designed and constructed so that when it is properly used, persons are not exposed to hazards. It applies to temporary structures as well as those that are permanent.

The duty requires designers and builders to take care they do not introduce hazards to buildings. A person who designs a workplace which is unsafe, for example through having a slippery floor, breaches this requirement.

Offences and penalties

General

Penalties under the Act are tiered in accordance with the seriousness of the offence. A breach of the general duties that causes serious harm or death attracts a higher maximum penalty than a similar breach that does not cause serious harm or death. Offences involving gross negligence, which by definition must also cause serious harm or death, are the most serious of all.

An offence causes serious harm if:

"... it causes any bodily injury to the person, or causes the person to have a disease, of such a nature as to:

- (a) endanger, or likely to endanger, the person's life; or*
- (b) result, or be likely to result, in permanent injury or harm to the person's health."*

(section 3(3) of the Act)

Penalties are also tiered according to whether the offence is committed by a person as an employee, an individual other than an employee, or a body corporate. Penalties for employees are lower than those applicable to other duty holders, in recognition that employees do not have the same level of control over the work or the work environment as other duty holders under the Act.

Gross negligence

Higher maximum penalties apply to general duty of care breaches where gross negligence is an element of the offence.

An offence is committed in circumstances of gross negligence if –

"(a) the offender –

- (i) knew that the contravention would be likely to cause the death of, or serious harm to, a person to whom a duty is owed under that provision; but*
- (ii) acted or failed to act in disregard of that likelihood;*

and

(b) the contravention did in fact cause the death of, or serious harm to, such a person."

(section 18A(2) of the Act)

The definition of gross negligence is targeted at the most serious offences where a person has been killed or seriously harmed and the offender knew of the likelihood of such an outcome and disregarded it.

The higher penalties for breaches involving gross negligence are consistent with the seriousness of such offences. In particular, the Act makes provision for a possible prison term of up to two years for an individual who is not an employee and is convicted of a general duty of care offence involving gross negligence.

An employee is also subject to a potentially higher penalty where gross negligence is involved, with the quantum of the penalty in keeping with the scale of penalties for employees.

Where an offence involving gross negligence is committed by a body corporate, the offender is subject to a higher monetary penalty. There is also scope (under section 55 of the Act – see below) to pursue a director, manager or other officer of a body corporate convicted of an offence in circumstances of gross negligence.

Offences involving gross negligence arise only from breaches of sections 19(1), 20(1), 20(3), 21(1), 21(2), 21B(2), 22(1), 23(1), 23(2), 23(3), 23(3a), 23A or 23G(2). These are the general duty of care provisions within the Act, excluding some of the more administrative duties such as the reporting of injuries and diseases.

Directors and other officers of a body corporate

The Act (section 55) provides for directors, managers and other officers of a body corporate to be brought to account when the body corporate is guilty of an offence and that offence is committed with the consent or connivance of, or was attributable to the neglect on the part of, the director, manager or other officer of the body corporate. Under such circumstances, the director, manager or other officer concerned may be convicted of the same offence as the body corporate (the relevant penalty being that of an individual).

Directors, managers or other officers of a body corporate are not held responsible for offences by the body corporate simply on account of their position. The director, manager or other officer concerned must have done something (consented or connived) towards the breach or otherwise contributed to it by way of his or her neglect.

If the offence by the body corporate involves gross negligence, a director, manager or other officer of the body corporate can only be guilty of the gross negligence element of the offence where he or she knew that the contravention would be likely to cause the death or serious harm to a person to whom a duty was owed, and disregarded that likelihood. (It is not sufficient that these elements of the offence were proved against the body corporate, the individual director, manager or other officer must also personally have committed these elements of the offence.)

Appendix 1

Hazard identification, risk assessment and risk control

Hazard identification, risk assessment and risk control

Under section 19(1)(a) of the Western Australian *Occupational Safety and Health Act 1984* employers have a duty to ensure, as far as practicable, that employees are not exposed to hazards at the workplace.

Three basic steps should be taken to ensure a safe and healthy workplace. They are based on the concept that the workplace should be modified to suit people, not vice versa. The three steps are:

- identifying the hazards – involves recognising things which may cause injury or harm to the health of a person, for instance flammable material, ignition sources or unguarded machinery;
- assessing the risk – involves looking at the possibility of injury or harm occurring to a person if exposed to a hazard; and
- controlling the risk – by introducing measures which will eliminate or reduce the risk of a person being exposed to a hazard.

It is important to regularly review the steps, especially if there are changes in the work environment, new technology is introduced, or standards are changed.

Employers should consult with safety and health representatives, if any, and employees during these steps.

Identifying hazards

There are a number of ways of identifying potential sources of injury or disease. Selection of the appropriate procedure will depend on the type of work processes and hazards involved.

A hazard means anything that may result in injury or harm to the health of a person.

Procedures may range from a simple checklist for a specific piece of equipment or substance to a more open-ended appraisal of a group of related work processes. A combination of methods may provide the most effective results.

Methods of identifying workplace hazards include:

- Developing a hazard checklist
- Conducting walk-through surveys
- Reviewing information from designers or manufacturers
- Analysing unsafe incident, accident and injury data

- Analysing work processes
- Consulting with employees
- Examining and considering material safety data sheets and product labels
- Seeking advice from specialist practitioners and representatives.

Some hazards are inherent in the work process, such as mechanical hazards, noise, or the toxic properties of substances. Other hazards result from equipment or machine failures and misuse, control or power system failures, chemical spills, and structural failures.

The conclusion of the first step of the risk assessment should result in a list of hazard sources, the particular form in which that hazard occurs, the areas of the workplace or work process where it occurs, and the persons exposed to that hazard.

Hazard	Examples	Outcomes (eg injury or harm)
Manual handling	overexertion/ repetitive movement	sprains, strains, fractures
Falls	falling objects, falls, slips and trips of people	fractures, bruises, lacerations, dislocations, concussion, permanent or fatal injuries
Electricity	electrical current, lightning	shock burns, electrocution
Machinery and equipment	being hit, hitting objects, caught in between, over-turning vehicles	cuts, bruises, dislocations, fractures, amputation, permanent or fatal injuries
Hazardous substances	chemicals such as acids, hydrocarbons, heavy metals	toxic effects, dermatitis, respiratory illnesses, cancers
Extremes of temperature	effects of heat or cold	burns, frost bite, heat stress, heat stroke
Noise	excessive noise	permanent hearing damage
Radiation	ultra violet, welding arc flashes, micro waves, lasers	burns, cancer, damaged eye sight, blindness
Biological	viruses, bacteria, fungi, toxins	hepatitis, Legionnaires' disease, Q fever Tetanus, HIV/AIDS, allergies
Vibration	hands and whole of body	organ, nerve and muscle damage
Psychological stress	intimidation, organisational change, violence, conflict, time pressure	high blood pressure, headaches and migraine, anxiety, depression, absenteeism

The most common hazards in terms of bodily injury or disease are those which result in:

- strain or overuse injuries and disease to back, shoulder, wrist etc;
- cut and abrasion injuries to the eyes, hands, fingers, feet and head;
- impact and crush injuries to the head, feet and fingers;
- burns (by heat, light or chemicals) to the eyes, feet, and skin;
- noise induced hearing loss; and
- toxic effects (short or long term) to respiratory system or skin, resulting in poisoning, cancers or dermatitis.

Analysing and assessing the risks

Risk, in relation to any injury and harm, means the probability of that injury or harm occurring.

A risk assessment of the hazards identified in the first step should result in a list of any potential injuries or harm and the likelihood of these occurring. The potential for fatal injury should be considered for each identified hazard. If hazards are listed, they should be in the order of the most to the least serious, eg from fatal to minor injury.

In assessing risks, consideration should be given to the state of knowledge about the frequency of injury or disease, the duration of exposure to injury or disease sources and the likely severity of the outcomes. Knowledge gained from similar workplaces or similar processes may be relevant to this risk assessment. Matters to be considered include:

- **frequency of injury** – how often is the hazard likely to result in an injury or disease?
- **duration of exposure** – how long is the employee exposed to the hazard?
- **outcome** – what are the consequences or potential severity of injury?

Assessing these three factors will indicate the probability or likelihood of injury or harm occurring to workers involved in a particular work process. It also indicates the likely severity of this harm.

Risk assessment requires good judgment and awareness of the potential risks of a work process. Any person undertaking the risk assessment must have knowledge and experience of the work process. Risk assessment will be more complicated or difficult if the information or data regarding hazards of a work process is incomplete.

In some cases it may be necessary to break down the activity or process into a series of parts and assess each part separately.

An assessment of the risk will help determine the consequences (potential injury or disease) and assist to identify methods to reduce the risk.

Risk assessment should include:

- assessing the adequacy of training or knowledge required to work safely;
- looking at the way the jobs are performed;
- looking at the way work is organised;
- determining the size and layout of the workplace;
- assessing the number and movement of all people on the site;
- determining the type of operation to be performed;
- determining the type of machinery and plant to be used;
- examining procedures for an emergency (eg accident, fire and rescue); and
- looking at the storage and handling of all materials and substances.

This step should provide information regarding which employees face an injury or disease risk, how often, and the potential severity of that injury or disease risk.

Reducing the risk

Identifying control measures

The final step in risk assessment is to determine the control measures that need to be taken and the ongoing review of those measures. In some instances, a combination of control measures may be appropriate. The means of reducing risks can be grouped into the categories outlined in the table opposite. Control measures should be designed:

- to eliminate or reduce the risks of a hazardous work process and to minimise the effects of injury or disease; and
- to reduce the risk of exposure to a hazardous substance.

Preferred controls

The control of occupational injury and disease risks should preferably be dealt with by elimination, substitution, isolation, engineering or administration controls. These controls generally eliminate, reduce or minimise risk in a more reliable manner than personal protective equipment.

Controls involve implementing measures which reduce the hazard and risk in the workplace.

Where regulations require specific methods to control the risk, these must be complied with.

Information or ideas on control measures can come from:

- Codes of practice
- Guidance notes
- Employees
- Industry or employer associations
- Unions
- Government bodies
- Specialist practitioners and consultants
- Australian Standards
- Other relevant standards
- Other publications and reference data bases
- Material Safety Data Sheets
- Manufacturers and suppliers

Workplace hazard control

Hierarchy or preferred order of control

There is a hierarchy or preferred order of control measures which ranges from the most effective to the least effective.

The hierarchy of control measures is:

elimination – removing the hazard or hazardous work practice from the workplace. This is the most effective control measure;

substitution – substituting or replacing a hazard or hazardous work practice with a less hazardous one;

isolation – isolating or separating the hazard or hazardous work practice from people involved in the work or people in the general work areas from the hazard. This can be done by installing screens or barriers; or marking off hazardous areas;

engineering control – if the hazard cannot be eliminated, substituted or isolated, an engineering control is the next preferred measure. This may include modifications to tools or equipment, providing guarding to machinery or equipment;

administrative control – includes introducing work practices that reduce the risk. This could include limiting the amount of time a person is exposed to a particular hazard; and

personal protective equipment – should be considered only when other control measures are not practicable or to increase protection.

Control measures are not mutually exclusive. That is, there may be circumstances where more than one control measure should be used to reduce exposure to hazards.

Control through personal protective equipment

Personal protective equipment should be used in circumstances where other methods of control are not practicable or where there is a need to increase the level of protection. The factors which determine the appropriateness of using personal protective equipment include:

- the nature of the work or the work process concerned;
- the severity of any potential injury or disease;
- the state of knowledge about the injury or disease related to the work or process;
- information available to employers about methods of preventing injury or disease associated with a particular hazard or risk;
- the availability and suitability of methods to prevent, remove or mitigate causes of injuries or diseases associated with a hazard or risk; and
- whether the costs of preventing, removing or mitigating that injury or disease are prohibitive in the circumstances.

There are some situations where temporary use of personal protective equipment may be necessary.

These include:

- where it is not technically feasible to achieve adequate control of the hazard by other measures. In these cases, the hazard should be reduced as far as practicable by other measures and then, in addition, suitable personal protective equipment should be used to secure adequate control;
- where a new or revised risk assessment indicates that personal protective equipment is necessary to safeguard safety and health until such time as adequate control is achieved by other methods, for example, where urgent action is required because of plant failure; and
- during routine maintenance operations.

Although exposure to hazards occurs regularly during such work, the infrequency and small number of people involved may make other control measures impracticable.

Review of control measures

Constantly reviewing control measures is important to ensure they continue to prevent or control exposure to hazards or hazardous work practices.

Engineering controls should be regularly tested to ensure their effectiveness. Performance testing and evaluation standards should be established.

Repair and maintenance programs should specify:

- where servicing is required;
- the extent of servicing required;
- the nature of the servicing required;
- the frequency of servicing;
- who is responsible for maintaining repair and maintenance programs; and
- how defects will be corrected.

In order to keep accurate records, a recording or reporting system should be developed, implemented and maintained.

Appendix 2

Other sources of information

Other sources of information

1. *Western Australian Occupational Safety and Health Act 1984 and regulations*

The *Western Australian Occupational Safety and Health Act 1984* and the *Occupational Safety and Health Regulations 1996* can be purchased from WorkSafe, Westcentre, 5th Floor, 1260 Hay Street, West Perth [Tel. (08) 9327 8777] or State Law Publisher, 10 William Street, Perth [Tel. (08) 9321 7688]. Copies are also held in the WorkSafe library, 5th floor, 1260 Hay Street West Perth.

2. Commission for Occupational Safety and Health publications

The Commission for Occupational Safety and Health codes of practice, guidance notes and other publications can be purchased from WorkSafe, Westcentre, 5th Floor, 1260 Hay Street, West Perth Telephone (08) 9327 8777. They can be downloaded from the Internet Service on www.worksafe.wa.gov.au. Copies are also held in the WorkSafe Library. A list of these publications is available from the Department of Commerce.

3. Contacts for further information

Chamber of Commerce and Industry of Western Australia

180 Hay Street
EAST PERTH WA 6000
Telephone: (08) 9365 7415
Facsimile (08) 9365 7500
Email: osh@cciwa.com

UnionsWA

Level 4
79 Stirling Street
PERTH WA 6000
Telephone: (08) 9328 7877
Facsimile (08) 9328 8132
Email: unionswa@tlcwa.org.au

WorkSafe

Department of Commerce
Level 5
1260 Hay Street
WEST PERTH WA 6005
Telephone: 1300 307 877
TTY: (08) 9327 8838
Facsimile: (08) 9321 8973
Email address: safety@commerce.wa.gov.au
Website: www.worksafe.wa.gov.au