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TOPIC 3
OCCUPATION RISKS :
SOCIAL PROTECTION AND EMPLOYERS' LIABILITY

AUSTRALIAN RESPONSE TO QUESTIONNAIRE •

John Howe
j.howe@unimelb.edu.au

I. GENERAL QUESTIONS

1. Australia is a federation, comprising six states, two territories and a federal government. Matters of protection from, and compensation for, employment injuries and occupational diseases fall within the jurisdiction of the States and Territories[1]. In addition, employees of the federal government are entitled to the benefit of a separate statutory scheme that deals with the same matters[2].

The legislation in Australia dealing with the prevention of occupational diseases and injuries is separated from the legislation dealing with compensation for those diseases and injuries.

The prevention of occupational diseases and injuries is regulated by a legislative scheme known as occupational health and safety laws. These laws are generally based on the recommendations of the Robens Report of 1972.[3]

• Prepared by Eliza Meehan, solicitor, Freehills and Peter Rozen, barrister, Victorian Bar.

[1] *Occupational Health and Safety Act* 2004 (Vic) [**OHSA(Vic)**]; *Accident Compensation Act* 1985 (Vic) [**ACA(Vic)**]; *Workers' Compensation Act* 1987 (NSW) [**WCA(NSW)**]; *Occupational Health and Safety Act* 2000 (NSW) [**OHSA(NSW)**]; *Workplace Health and Safety Act* 1995 (QLD) [**WHSA(QLD)**]; *Workers' Compensation and Rehabilitation Act* 2003 (QLD) [**WCRA(QLD)**]; *Occupational Health and Safety and Welfare Act* 1986 (WA) [**OHSWA(WA)**]; *Workers' Rehabilitation and Compensation Act* 1986 (SA)[**WRCA(SA)**]; *Workers' Health and Safety Act* 1995 (Tas) [**WHSA(TAS)**]; *Workers' Rehabilitation and Compensation Act* 1988 (Tas) [**WRCA(TAS)**]; *Occupational Safety and Health Act* 1984 (WA) [**OSHA(WA)**]; *Workers Compensation and Rehabilitation Act* 1981(WA) [**WCRA(WA)**]; *Occupational Health and Safety Act* 1989 (ACT) [**OHSA(ACT)**]; *Workers' Compensation Act* 1951 (ACT) [**WCA(ACT)**]; *Work Health Act* 1986 (NT) [**WHA(NT)**].

[2] *Occupational Health and Safety (Commonwealth Employment) Act* 1991 [**(OHS(CE)A**]; *Safety, Rehabilitation and Compensation Act* 1988 [**SRCA**]; *Commonwealth Employees Rehabilitation and Compensation Act* 1988 [**CERCA**]

[3] *Report of the Committee on Safety and Health at Work 1970-1972,* HMSO, London, 1972.

The compensation of workers is regulated by legislation referred to as workers' compensation legislation. This is based on similar legislation originally enacted in Great Britain in 1897.[4]

In addition to the workers' compensation schemes, people who are injured at work are compensated through federally administered social security and public health systems, both of which are funded through taxation revenue.

Recently, the federal government has appointed an industry specific Federal Safety Commissioner whose duties include the supervision of occupational health and safety in the building industry[5]. There is also separate Commonwealth legislation regulating the prevention of, and compensation for, occupational injury and disease in the seafaring industry.[6]

By virtue of the Commonwealth Constitution, Australian industrial relations and employment law has historically been regulated by a combination of federal and state legislation. However, as a result of recent amendments to the federal statute, industrial relations in the overwhelming majority of Australian workplaces will now be regulated by the federal government's legislative scheme[7].

The workers' compensation legislation dates back to the turn of the twentieth century. South Australia was the first state to introduce workers' compensation legislation in 1900. In Victoria, the first statute to compensate injured workers was enacted in 1914. The other jurisdictions enacted similar legislation around the same time[8].
With some minor changes to the coverage and scope of the schemes, the workers' compensation systems remained broadly the same until the 1980's.

Since the 1980's, most of the Australian workers' compensation statutes have been amended to restrict or prohibit workers' access to common law actions for compensation. For example, common law actions against employers have been abolished in the Commonwealth, South Australia and the Northern Territory. Only the Australian Capital Territory permits unrestricted access to common law claims. The other statutes generally limit a worker's access to the common law compensation to cases of serious injury or disease, requiring a worker to meet a threshold requirement before he or she can pursue a common law claim.

For instance, in Victoria, a worker must have a 'serious injury' before he or she is entitled to pursue a common law claim. A serious injury is defined by the statute to mean either 30% or more whole person impairment, or an impairment, the consequences of which are "very considerable" in terms of pain and suffering and economic loss[9].

2. The workers' compensation schemes are principally financed by a levy imposed on employers who pay a premium. In some jurisdictions the premiums are "experience-rated", meaning that the premium is linked to the employer's recent claims experience[10]. "Class

[4] *Workmen's Compensation Act* 1897 (Eng.).
[5] *Building and Construction Industry Improvement Act* 2005 (Cth) Chapter 4.
[6] *Occupational Health and Safety (Marine Industry) Act* 1993 (Cth); *Seafarers' Rehabilitation and Compensation Act* 1992 (Cth).
[7] See *Workplace Relations Act* 1996
[8] WA 1902; QLD 1905; NSW 1910; Tas 1910; NT 1920; ACT 1951.
[9] ACA(Vic) ss134-135C. See also SRCA(Cth) ss4(1), 42-52A, 124; WCA(NSW) ss149-151AC; WCRA(QLD) ss10 and 223-266; WRCA(SA) s54; WCRA(WA) s85-93G; WRCA(TAS) ss132-138AD; WHA(NT) s52; WCA(ACT) ss180-186.
[10] SRCA(Cth) Pts VII-VIIB; WCA(NSW) Pt 7; WIMWCA(NSW) Pt 6; ACA(Vic) Pts 2, 5; *Accident Compensation (Workcover) Insurance Act* 1993 (Vic); WCRA(QLD); WCRA(WA) Pts VIII and X; WRCA(TAS) Pt IX; WCA(ACT) Pt II.

ratings" (or "industry ratings") are also used to some extent by all Australian jurisdictions. Class ratings link the premium to the type of industry of the employer. Bonus, penalty and discount schemes are also used to varying degrees in each of the jurisdictions[11].

People injured at work may also be further compensated by the public health system and the social security system, both of which are funded at the federal level by taxation revenue[12].

3. Workers excluded from the workers' compensation systems in Australia are those who do not fall within the common law definition of an 'employee'. That definition is a fluid one. The test the courts apply to determine whether a worker is an "employee" involves a weighing of all the factors of the case and a determination of whether the worker is, among other things, under the direct control of the employer, dependent on the employer or part of the enterprise of the employer. No single factor in the circumstances will be decisive[13].

However, while at common law, an independent contractor does not fall within the definition of an employee, and may therefore be *prima-facie* excluded, some of the occupational health and safety statutes in Australia contain provisions which deem (to varying degrees) independent contractors to be employees for the purposes of the statutes[14]. For example, section 21(3) of the Victorian Act modifies the definitions of employer and employee as follows:

> *(3) For the purposes of sub-sections (1) and (2) –*
>
> *(a) a reference to an employee includes a reference to an independent contractor engaged by an employer and any employees of the independent contractor; and*
>
> *(b) the duties of an employer under those sub-sections extend to an independent contractor engaged by the employer, and any employees of the independent contractor, in relation to matters over which the employer has control or would have control if not for any agreement purporting to limit or remove that control."*

There are no exclusions within the system for small enterprises, non-industrial enterprises, home workers, paid domestic workers or casual workers. However, unpaid domestic labour is not included in the coverage of the statutes.

4. The amount of compensation provided to workers and the period of time off work that is covered varies greatly from jurisdiction to jurisdiction. In Victoria, an injured worker generally receives 95% of his or her pre-injury earnings for the first 13 weeks he or she is unable to work. After that time, he or she will receive approximately 75% of their pre-injury earnings for a period up to 104 weeks[15].

Medical and like expenses (e.g. physiotherapy) are generally paid in full, though some statutes make provision only for 'reasonable' or limited expenses[16]. The schemes also

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[11] WRCA(SA) Pt 5, ss 45, 49-50, 105, 115

[12] See Further Johnstone, R., *Occupational Health and Safety Law and Policy Text and Materials (2nd Ed.)*(Lawbook Co., 2004, New South Wales) pp20-22.

[13] *Stevens v Brodribb Sawmilling Company Pty Ltd; Gray v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21

[14] OHS(CE)A(Cth) s16(4); OHSA(Vic) 21(3); OHSWA (SA) s4(2); OHSA(WA) s19(4) and (5); WHSA(Tas) s9(4)-(7); WHA(NT) s3(1).

[15] ACA(Vic) ss5(1), 5A-5B, 59, 93-97, 115-119L. See also SRCA(Cth) ss4(1), 8-9, 19-23, 30-33; WCA(NSW) ss33-58; WCRA(QLD) ss106 and 141-177; WRCA(SA) ss3(1), 4, 35-42B; WCRA(WA) ss5(1), 18 (plus Sched 1), 56, 67; WRCA(TAS) ss3(1), 69-70; WHA(NT) s49, 64-69, 74; WCA(ACT) ss37-47.

[16] SRCA(Cth) ss4(1), 16, 29, 39; WCA(NSW) ss59-64A, 74-78; ACA(Vic) ss5(1), 99-99A; WCRA(QLD) ss46, 209-218 and 220-225; WRCA(SA) ss3(1), 32-33; WCRA(WA) ss5(1), 18 (plus Sched 1), 158; WRCA(TAS) ss74-77A; WHA(NT) s73, 76-78; WCA(ACT) ss69-76.

provide for a death benefit for dependents of the deceased worker, including income compensation and funeral expenses.

A worker may also receive compensation for pain and suffering where he or she has sustained a permanent injury. Generally in cases of permanent injury, the worker will receive a percentage of a prescribed amount depending on the type of injury. For example, in South Australia, a worker who suffers loss of vision in both eyes will receive 100% of the prescribed sum for a permanent disability, whereas a worker who suffers loss of vision in only one eye will receive 50% of the prescribed sum[17]. The other jurisdictions maintain similar standards[18].

5. Workers who suffer injuries while commuting to and from work may, in some jurisdictions, be compensated by workers' compensation and by the transport accident schemes. However, where this occurs, the workers' compensation schemes permit recovery of the cost from the fund under the transport accident scheme[19].

Commuting accidents generally fall within the definition of a an injury occurring "within the course of employment" and as such are compensable in most jurisdictions under the workers' compensation schemes. The Victorian statute deems an injury to have arisen during the course of employment where the injury occurred while the worker was travelling between his or her residence and his or her place of employment[20].

However, in recent years, commuting claims have been removed from the Victorian, Western Australian and Tasmanian statutes and have been modified in the South Australian scheme. In those jurisdictions, there is a separate scheme to compensate people involved in transport accidents[21].

6. There are two main links in Australia between the employment injuries and occupational diseases protection schemes and the compensation schemes.

First, in each Australian jurisdiction, the same government agency that administers occupational health and safety laws also administers the workers' compensation scheme. Consequently, data derived from the workers' compensation system can be utilised to determine policy for the prevention of occupational illness and injuries[22].

Secondly, the insurance premium paid by an employer may be dependent on the performance by the employer in relation to the prevention of illness and injury. Therefore, an employer experiencing a high number of compensation claims relative to other members of its industry can expect to pay a higher premium.

There are very few links between the sickness benefits scheme and the workers' compensation and occupational health and safety schemes because the former is federally funded and administered while the latter are both state based.

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[17] WRCA(SA) Sched 3.

[18] SRCA(Cth) ss4(1), 24-28; WCA(NSW) ss65-73; ACA(Vic) 98-98E; WCRA(QLD) ss178-193; WRCA(SA) ss43, Sched 3; WCRA(WA) ss24-31, Sched 2, 49-55, Sched 4; WRCA(TAS) ss71-73B; WHA(NT) ss770-72; WCA(ACT) ss48-68 and Sched 1.

[19] See generally *Industry Commission* 1994, p178.

[20] OHSA(Vic) s8(2)(b)(i). See also SRCA s6; OHSA(NSW) s10(1); WCRA (QLD) s35; WRCA(SA) s30(5)(b) and 54(2); WCA(ACT) s36; WHA (NT) s4; WCRA(WA) s19(2) (not compensable); WRCA(TAS) s25(6) (not compensable).

[21] *Transport Accident Act* 1986 (Vic); *Motor Accidents (Liabilities and Compensation Act)* 1973 (Tas); *Motor Vehicle (Third Party Insurance) Act* 1943 (WA); *Motor Vehicles Act* 1959 (SA) Part 4.

[22] For further discussion, see Johnstone, R., *Occupational Health and Safety Law and Policy Text and Materials (2nd Ed.)*(Lawbook Co., 2004, New South Wales) pp97-98

7. There are prohibitions against terminating a person's employment on the basis of his or her absence from work for any kind of injury in the federal industrial relations laws[23]. There are also protections for sick, injured or disabled workers contained in the federal human rights and anti-discrimination laws and the state based anti-discrimination laws[24]. The general exception to the rule is that a person's employment may be lawfully terminated where he or she is unable to perform the inherent requirements of the position[25].

In cases where termination of employment is allowed for a work related injury, some jurisdictions (Queensland, South Australia and New South Wales) prohibit employers from dismissing employees for a specified period of time[26]. In addition, most of the workers' compensation jurisdictions place employers under a positive duty to provide duties that accommodate the employee's temporary incapacity for a prescribed period of time. The prescribed period varies from jurisdiction to jurisdiction. In Victoria, the period is 12 months[27].

In some cases, an employer who wishes to terminate the employment of an employee is also required to follow steps designed to ensure that the employee is afforded procedural fairness prior to being terminated and that the termination is for a valid reason. Those requirements are outlined in the federal industrial relations legislation[28].

II RESPONSIBILITIES OF THE EMPLOYER

8. Employers in all Australian jurisdictions have a general duty or obligation to ensure, so far as is (reasonably) practicable, a working environment that is safe and without risks to health for their employees[29].

A failure to comply with this obligation constitutes a criminal offence in each jurisdiction[30]. The prosecuting authority from each jurisdiction is empowered to undertake investigations and prosecute offending employers[31]. Sanctions range from administrative sanctions to imprisonment[32].

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[23] *Workplace Relations Act* 1996 s659(2)(e).

[24] *Human Rights and Equal Opportunity Act* 1986 (Cth)*; Disability Discrimination Act* 1992 (Cth); *Equal Opportunity Act* (Vic) 1995; *Anti-discrimination Act* 1977 (NSW); *Equal Opportunity Act* 1984 (SA); *Anti-discrimination Act* 1991 (QLD); *Equal Opportunity Act* 1984 (WA); *Anti-discrimination Act* 1998 (Tas); *Discrimination Act* 1991 (ACT); *Anti-discrimination Act* 1992 (NT).

[25] *Workplace Relations Act* 1996 s659(3); and *Human Rights and Equal Opportunity Act* 1986 (Cth); *Equal Opportunity Act* 1995 (Vic); *Anti-discrimination Act* 1977 (NSW); *Equal Opportunity Act* 1984 (SA); *Anti-discrimination Act* 1991 (QLD); Equal Opportunity Act 1984 (WA); Anti-discrimination Act 1998 (Tas); *Discrimination Act* 1991 (ACT); *Anti-discrimination Act* 1992 (NT).

[26] See WRCA(SA) s58C; *Industrial Relations Act* 1996 (NSW) s99; *Industrial Relations Act* 1999 (QLD) s92.

[27] ACA(Vic) s155A; WCRA(QLD) s228; WRCA(SA) s58B; SCRA(Cth) s40; WRCA(TAS) s138B; WHA(NT) s75A; WCA(ACT) ss105 and 106.

[28] See *Workplace Relations Act* 1996 Part 12, Div 4, Subdivisions B and C.

[29] OHS(CE)A (Cth) s16(1); OHSA(Vic) s21(2); OHSA(NSW) s8(1); WHSA(QLD) s22(1); OHSWA (SA) s19(1); OHSA(WA) s19(1); WHSA(Tas) s9(1); WHA(NT) s29(1); OSHA(ACT) s27(1).

[30] OHS(CE)A (Cth) s11(2) and (3); OHSA (Vic) s21(4); OHSA (NSW) s28; WHSA (QLD) s24; OHSA(SA) s58; OHSA(WA) s52; WHSA(TAS) s55; WHA(NT) s178; OHSA (ACT) s35A.

[31] OHS(CE)A (Cth) s77; OHSA(Vic) s130; OHSA(NSW) s106; WHSA(QLD) s164; OHSWA (SA) s58; OHSA(WA) s52; WHSA(Tas) s55; WHA(NT) s179; OSHA(ACT) s35A and the *Magistrates Court Act* (Tas) 1930.

[32] OHS(CE)A (Cth) s16 and 17 (maximum fines), and separate penalties are set out for a breach of each relevant section; OHSA(Vic) s21(d) and separate penalties for each relevant section; OHSA(NSW) s117; WHSA(QLD) s24(1) and separate penalties are set out for each relevant section; OHSWA (SA) sets out a maximum penalty for each relevant section. See also s 4(5); OHSA(WA) s54 (general penalty) and penalties for each relevant; WHSA(Tas) each relevant section sets out a maximum penalty; WHA(NT) s178 (maximum penalty where no other is specified) and some sections set out a separate maximum penalty; OSHA(ACT) sets out a separate maximum penalty for each relevant section.

9. The employers' obligations relating to the protection of the workers' life and health are described as 'general duties' or 'obligations' (see further response to question 8 above). For example, the Victorian statute prescribes the following duty in section 21:

> *21(1) An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.*
>
> *(2) Without limiting sub-section (1), an employer contravenes that sub-section if the employer fails to do any of the following –*
>
> > *(a) provide or maintain plant or systems of work that are, so far as is practicable, safe and without risks to health;*
> >
> > *(b) make arrangements for ensuring, so far as is practicable, safety and absence of risks to health in connection with the use, handling, storage or transport of plant and substances;*
> >
> > *(c) maintain, so far as is practicable, each workplace under the employer's management and control in a condition that is safe and without risks to health;*
> >
> > *(d) provide, so far as is reasonably practicable, adequate facilities for the welfare of employees at any workplace under the control or management of the employer;*
> >
> > *(e) provide such information, instruction, training or supervision to employees of the employer as is necessary to enable those persons to perform their work in a way that is safe and without risks to health.*

The other jurisdictions maintain similar provisions[33].

Responsibility for implementing the obligations rests with the employer. Many employers implement their obligations through occupational health and safety officers and consultative occupational health and safety committees. Provision is made in all jurisdictions except the Northern Territory for the election of occupational health and safety representatives in the legislation of each jurisdiction.[34]

The implementation of employer obligations is sometimes overseen by elected occupational health and safety representatives who have certain statutory powers to promote or ensure the health and safety of workers under the legislation in each jurisdiction with the exception of the Northern Territory[35].

In addition, occupational health and safety inspectors, employed by government agencies, have the statutory right to enter all workplaces to determine compliance with employer obligations[36]. For example, in Victoria, an inspector may enter a workplace at any time during working hours if the inspector reasonably believes that there is an immediate risk to the health or safety of a person arising from the conduct of an undertaking at the place[37].

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[33] OHS(CE)A (Cth) s16(1); OHSA(NSW) s8(1); WHSA(QLD) s22(1); OHSWA (SA) s19(1); OHSA(WA) s19(1); WHSA(Tas)s9(1); WHA(NT) s29(1); OSHA(ACT) s27(1).

[34] OHSA(CE)(Cth) ss24 and 25; OHSA(Vic) ss43-47; OHSA (NSW) ss13-19; WHASA(QLD) s70; OHSWA(SA) ss26-30; OHSA(WA) ss29-34; WHSA(TAS) s32; OHSA(ACT) ss36-50.

[35] OHSA(CE)(Cth) ss28(1); OHSA(Vic) 58-60; OHSA(NSW) ss18, 69; WHASA(QLD) s69(2); OHSWA(SA) ss32(1) and (5); OHSA(WA) ss30-35; WHSA(TAS) s32 and Regs 33-35; OHSA(ACT) ss43-45.

[36] OHSA(CE)(Cth) s42; OHSA(Vic) s95-109; OHSA (NSW) s59; WHASA(QLD) s104; OHSWA(SA) s38(1)(a); OHSA(WA) s43(1)(a); WHSA(TAS) s36(1); WHA(NT) s37(1); OHSA(ACT) s62.

[37] OHSA(Vic) s98.

Further, trade unions have certain rights to enter workplaces for the purpose of investigating a health and safety risk[38], though these powers have been diminished to some extent by recent amendments to the federal industrial relations legislation[39].

10. The Australian and New Zealand courts have interpreted the duties placed on employers as being non-delegable[40].

11. As discussed in the response to question 9 above, there are external bodies in all Australian jurisdictions that can collaborate with the employer to improve health and safety.

In particular, the governments of each jurisdiction maintain an agency charged with responsibility for administering the occupational health and safety and workers' compensation legislation[41]. The agencies employ a range of people with practical experience of workplace hazards, many of whom are tertiary qualified and experts in fields such as ergonomics, risk management and industrial hygiene.

As discussed above in response to question 9, trade unions also have some powers to oversee the implementation of the occupational health and safety legislation.

The competence of these regulatory bodies is generally of a high level but the competence of unions varies considerably. Some unions are able to employ tertiary- educated experts on a full time basis, whereas many are not. Further, the federal government has established an agency responsible for improving safety (among other things) in the building industry. An appointed officer of the agency is the Federal Safety Commissioner who is responsible for ensuring compliance with the legislation in the building industry[42].

12. Most of the Australian statutes impose a general duty of care on employers and self-employed persons in relation to non-employees, including labour hire employees and members of the general public attending the workplace. This is achieved in two ways.

First, there are deeming provisions such as those discussed in response to question 3 above, that provide that independent contractors are entitled to the protection of the employer's general duty.[43]

Secondly, the statutory regimes of each jurisdiction extend the duty of care imposed on employers and occupiers of premises where a commercial undertaking is being carried out to take reasonable precautions for the health and safety of persons other than employees. For example, section 23 of the Victorian Act provides as follows:

"An employer must ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising form the conduct of the undertaking of the employer".

Other jurisdictions have comparable provisions to achieve the same outcome[44].

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[38] OHSA(Vic) Part 8 Division 2; OHSA(NSW) s76-85.

[39] See *Workplace Relations Act* 1996 Part 15.

[40] See for example *Kondis v State Transport Authority* (1984) 154 CLR 672; *Rich v Queensland* (2003) 155 ALR 412; *Linework Ltd v Department of Labour* [2001] NZLR 639.

[41] Comcare (Cth); Victorian Workcover Authority (Vic); Workcover Authority of New South Wales (NSW); Health and Safety Queensland (QLD); Workcover Corporation (SA); Worksafe Western Australia (WA); Workplace Standards Authority (Tas); NT Worksafe (NT); ACT Workcover (ACT).

[42] *Building and Construction Industry Improvement Act* 2005 (Cth), Chapter 4.

[43] These provisions have been interpreted by the Courts in a manner that provides broad protection – see, e.g. *R v ACR Roofing Pty Ltd* (2004) 142 IR 157.

13. In each Australian jurisdiction, where two or more companies operate on the same worksite, each company has separate yet overlapping duties for the health and safety of those on the worksite.

Unless the statute provides otherwise, more than one general duty can be contravened in any particular situation and more than one person can be prosecuted for breach of the various general duties[45]. Further, in determining liability, the courts will look to the duties of both the duty holder whose conduct was the immediate cause of the risk, as well as any duty holders who may have played a part in any preceding actions in the chain of causation[46].

By way of example, the basic principle is codified in the WHSA (Tas) at section 21(a) as follows:

> *"If more than one person is under a duty or obligation imposed by this Part, each person must –*
>
> *(a) satisfy the duty or obligation imposed on the person without regard to the fact that another person may also be responsible for satisfying that duty or obligation; and*
>
> *(b) cooperate with any other person who is performing that duty or obligation."*

III PARTICULAR PROBLEMS

14. Under occupational health and safety laws, protection is provided in respect of psychological risks. The legislation in all jurisdictions requires the duty holder to provide a safe "working environment"[47]. That obligation extends to matters such as the prevention of unreasonable levels of stress in the workplace[48].

Similarly under the workers' compensation schemes, work related stress is, in some circumstances, a compensable condition. However, there are statutory limits placed on the circumstances in which such claims can be successfully made[49].

15. The term "working environment" under the occupational health and safety legislation in all jurisdictions includes exposure to contaminants such as tobacco smoke. In some jurisdictions, smoking is specifically prohibited in enclosed workplaces[50]. For example, in Victoria, a pecuniary penalty applies to a person who smokes in an enclosed workplace as well as to an occupier of that workplace who knew or ought to have known smoking was taking place. Exceptions exist for some workplaces including casinos, vehicles, licences premises and outdoor drinking areas[51].

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[44] OHSA(CE)(Cth) s17; OHSA (NSW) s8(2); WHASA(QLD) s28(3); OHSWA(SA) s22(1); OHSA(WA) s21; WHSA(TAS) s9(3); WHA(NT) s29(1); OHSA(ACT) s28(1).

[45] see for example Interstruct Pty Ltd v Wakelam (1990) 3 WAR 100 at 116 per Pidgeon J.

[46] *Workcover Authority of NSW (Inspector Yeung) v Thiess Pty Ltd* [2003] NSWIRComm 325 at para 31.

[47] OHSA(CE)(Cth) s16(1); OHSA(VIC) s21; OHSA (NSW) s8(1); WHASA(QLD) s22(1); OHSWA(SA) s19(1); OHSA(WA) s19(1); WHSA(TAS) s9(1); WHA(NT) s29(1); OHSA(ACT) s27(1).
See also definitions sections: OHSA(CE)(Cth) s5; OHSA(VIC) s4; OHSA (NSW) s4; WHASA(QLD) Sched 3 and ss8-22; OHSWA(SA) s4; OHSA(WA) s3; WHSA(TAS) s3; WHA(NT) s3; OHSA(ACT) s5.

[48] For further discussions see Johnstone, R., *Occupational Health and Safety Law and Policy Text and Materials (2nd Ed.)*(Lawbook Co., New South Wales, 2004) pp 23-24 and 639-650.

[49] Apart from New South Wales, Queensland and Tasmania, the statutes specifically refer to mental as well as physical injury. See SRCA(Cth) ss4 and 7; ACA(Vic) ss5(1) and 86-90; WCA(NSW) ss4 and 15-19; WCRA(QLD) ss32 and 181-182; WRCA(SA) s3(1); WCRA(WA) ss5(1); WRCA(TAS) ss3(1), 25A-26; WHA(NT) s3(1), 4(6); WCA(ACT) ss4, 27-30. See also *Zickar v MGH Plastic Industries Pty Ltd* (1996) 71 ALJR 32 at 46-55.

[50] *Tobacco Act* 1987 (Vic) ss5A and 5.

[51] *Tobacco Act* 1987 (Vic) ss5A.

16. The laws in each jurisdiction restrict the employment of pregnant women and persons of a certain age in particularly hazardous working conditions. Regulations made pursuant to the OHSA (Vic) 2004 contain an obligation on employers to remove women of reproductive capacity or who are pregnant or breastfeeding if their exposure to lead reaches a prescribed level[52]. In addition, Regulations made pursuant to the OHSA (Vic) prohibit a person under the age of 16 from being employed at a mine, and prohibit a person under the age of 18 from working underground[53].

Legislation concerning discrimination against women and persons of a certain age may also be relevant to the provisions restricting employment of those persons in hazardous circumstances. For example, the Courts have considered the conflict between laws prohibiting discrimination against women and standards created to limit the ability of women to work in dangerous conditions[54].

17. As discussed above in response to question 9, an employer has a responsibility to do all that is reasonably practicable to protect the health and safety of employees in relation to exposure to hazardous substances. One of the matters to be taken into account in determining what is reasonably practicable is what the employer knows or ought reasonably to know about the hazard or risk and any ways that the risk can be reduced[55].

Therefore, if an employer does not know that a substance is harmful, and it is not reasonable to expect that the employer should have known that it was harmful, then that would be taken into account when determining the liability of the employer in any prosecution or claim. However, the courts expect that employers will keep abreast of all relevant industrial, epidemiological and medical developments.

18. Under Australian law, there is no outright prohibition on an employer asking an employee to undergo genetic or HIV testing in order to determine the employee's aptitude to be exposed to risks to which they would be particularly vulnerable. The legality of such testing will depend on the circumstances in which it is proposed that the testing will occur and the use that the employer intends to make of the information obtained from any tests carried out. In receiving any results, the employer would have to ensure that it complied with the anti-discrimination laws[56].

19. Where a worker has reasonable grounds to believe that the work being carried out poses a risk to his or her health, he or she may withdraw from the work without penalty.

At common law, there is a right to refuse to perform dangerous work. Although an employee is obliged to obey the reasonable directions of an employer, an employee maintains a limited right to refuse an instruction which exposes the employee to danger of injury or disease which is not reasonable having regard to the nature of the employment[57]. An instruction is unlawful if it requires an employee to perform work that contravenes a statutory standard set out in the occupational health and safety legislation.

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[52] *Occupational Health and Safety (Lead) Regulations* 2000 regulation 226.

[53] *Occupational Health and Safety (Mines) Regulations* 2000 regulation 305.

[54] See *Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd* (1993) 46 FCR 301 and further Johnstone, R., *Occupational Health and Safety Law and Policy Text and Materials (2nd Ed.)*(Lawbook Co., 2004, New South Wales) p160.

[55] See for example OSHA(Vic) s20(2)(c).

[56] For further discussion see Johnstone, R, "Pre-Employment Health Screening: The Legal Framework" (1988) 1 *Australian Journal of Labour Law* 115 and Otlowski, M., "The ALRC/AHEC Report on the Protection of Human Genetic Information in Australia: Implications for the Employment Sector" (2003) 16 *Australian Journal of Labour Law* 370.

[57] *Bouzourou v Ottoman Bank* [1930] AC 271; *Gilbertson-Greenham Pty Ltd and the Australian Meat Industry Employees' Union* (1990) 5 VIR 189.

Further, some jurisdictions provide a statutory right for occupational health and safety representatives to stop dangerous work that is being carried out in certain circumstances[58].

Further, under the federal industrial relations legislation, the cessation of work where there is an imminent threat to health or safety will generally not be "industrial action"[59].

IV. COMPENSATION OF EMPLOYMENT INJURIES AND DISEASES

20. The types of benefits payable for injury compensation is discussed above in response to question 4. Payments may be refused where the administrative authority considers the claim to be outside the range of statutory entitlements. For example, a worker who is not an employee or deemed employee may be refused a benefit, as might a person whose injury is considered to be not related to his or her work. This is discussed in more detail in response to question 3 above.

The benefits are managed by an administrative authority in each jurisdiction, as discussed in detail in response to question 11 above.

21. Compensation is limited. Generally workers are only entitled to a proportion of their pre-injury earnings (as detailed in response to question 4 above), however medical and like expenses are generally covered in full.

In most jurisdictions, employees must choose between seeking compensation under a statutory scheme or pursuing compensation at common law. Such claims may be made against a range of defendants that will generally be those parties upon whom duties are imposed under the occupational health and safety legislation[60]. Each jurisdiction has also introduced legislation which limits the scope of common law claims[61].

22. The most highly publicised Australian case with regard to the establishment of special funds to compensate for damages to life or health arising out of the use of products or substances whose harmful effects can only be appreciated in the long term is the case of 'James Hardie Industries Limited (JHIL)'.

JHIL commenced manufacturing asbestos in the 1920's. After the harmfulness of asbestos became known, it was alleged that the company had been negligent in its handling of the product in relation to the health and safety of its employees and others to whom the company owed a duty of care at common law (e.g consumers of its products).

In the 1990s, JHIL placed the two subsidiary companies in the group who were potentially liable for asbestos related claims into a trust, known as the "Medical Research and Compensation Foundation" (The Foundation). The purpose of the foundation was to fund any asbestos related claims that might arise.

The first actuarial assessment of the possible liabilities was made in 1996. The existing and potential liabilities were estimated as at 1996 to be $230m, however this later grew to an estimate of $1090m. The Foundation was funded with approximately $293m.

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[58] OHSA(CE)(Cth) s28(1)(e), s27; OHSA(VIC) s 74; OHSA (NSW) s18 (power to investigate only with no power to order work to cease); WHSA(QLD) s81(reporting powers only with no right to direct work to cease); OHSWA(SA) s36(3); OHSA(WA) ss25 and 26 (power to report and explicit preservation of common law right to refuse dangerous work); WHSA(TAS) s17; WHA(NT) s32 (right vested in individual employees); OHSA(ACT) s56.

[59] *Workplace Relations Act* 1996 s420(1)(g); *Building and Construction Industry Improvement Act* 2005 s36(1)(g).

[60] *McLean v Tedman and Brambles Holding Ltd (*1984*)* 155 CLR 306

[61] See for example: *Civil Liability Act* 2002 (NSW) ss 12-18; *Civil Liability Act* 2003 (Qld) s53-62; *Wrongs Act* 1958 (Vic) ss28B-28L; *Civil Liability Act* 2002 (WA) s7-13; *Wrongs Act* 1936 (SA) ss24B-24H; *Personal Injuries (Liabilities and Damages) Act* 2002 (NT) ss20-30; *Civil Law (Wrongs) Act* 2002 (ACT) ss38-39.

The company group became the subject of an inquiry undertaken by the New South Wales government. As a result of the inquiry, the company group agreed to make additional funding available to settle any present and future asbestos related claims. The amount of the funding was uncapped[62].

23. All Australian occupational health and safety legislation (except the legislation of the Northern Territory) provides for employee health and safety representatives who are granted a range of statutory powers to enable them to participate in improvements to safety and health at the workplace. For example, health and safety representatives are empowered to inspect workplaces and require improvements to the safety of the workplace in certain circumstances[63].

Legislation also provides for joint employer/employee committees[64]. Such committees are generally required to have at least 50% employee representation. They are responsible for overseeing the implementation of health and safety policies and procedures in the workplace. Their role complements that of the occupational health and safety representatives.

Workers who are health and safety representatives or members of health and safety committees have statutory protection from discrimination on the grounds of their participation or roles as committee members or representatives. The rules preclude victimisation of those workers[65]. In addition, workers are protected by common law rules pertaining to wrongful dismissal, and statutory unlawful dismissal and anti-discrimination provisions[66].

Workers who are elected as health and safety representatives have a statutory right to be trained in all jurisdictions except the Northern Territory, and in some jurisdictions to be provided with paid time off by their employer to undertake such training. Further, the representatives or committee members may be assisted by external experts in fields such as ergonomics or risk management[67]. Trade unions may also assist health and safety representatives as discussed in response to question 9 above.

24. There is an ongoing debate in Australia about the viability and practicality of having nine different statutory regimes to govern occupational health and safety and workers' compensation. Australia has a relatively small population of approximately 20 million people, so it is argued that one regime could govern occupational health and safety and workers' compensation on a national basis[68].

Over the past decade, the governments of each jurisdiction have cooperated to some extent towards establishing uniform standards for occupational health and safety and workers'

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[62] David Wishart, "The inquiry into the James Hardie transactions: whitewashing some very dirty linen" [2005] *Companies and Securities Law Bulletin* 36

[63] OHSA(CE)(Cth) ss24-33; OHSA(VIC) ss 58-71; OHSA (NSW) s21-27; WHASA(QLD) ss70-85; OHSWA(SA) ss26-30; OHSA(WA) ss29-34; WHSA(TAS) s32 and *Industrial Safety, Health and Welfare (Employees' Safety Representatives) Regulations* 1982 (regs 31-38); OHSA(ACT) ss36-50.

[64] OHSA(CE)(Cth) ss24-33; OHSA(VIC) s 72; OHSA (NSW) s21-27; WHASA(QLD) ss70-85; OHSWA(SA) ss26-30; OHSA(WA) ss29-34; WHSA(TAS) s32 and *Industrial Safety, Health and Welfare (Employees' Safety Representatives) Regulations* 1982 (regs 31-38); OHSA(ACT) ss36-50

[65] OHSA(CE)(Cth) ss34-36; OHSA(VIC) s76; OHSA (NSW) s17; WHASA(QLD) s86; OHSWA(SA) s31; OHSA(WA) s36; WHSA(TAS) s26; OHSA(ACT) s39.

[66] See *Workplace Relations Act* 1996 s659

[67] OHSA(CE)(Cth) ss27 and 28 OHSA(VIC) s 70; OHSA(NSW)27(1)(f) and (g) and regulation 31; WHASA(QLD) s70(1)(e) (no provision for assistance); OHSWA(SA) ss34(3)-(5) and 32(3); OHSA(WA) s35(1)(e) (no provision for assistance); WHSA(TAS) *Employees' Safety Representative Regulations* 1982 reg 33 (no provision for assistance); OHSA(ACT) s45(1)(ea) (no provision for assistance).

[68] For further discussion see Johnstone R., *Occupational Health and Safety Law and Policy Text and Materials (2nd Ed.)*(Lawbook Co., 2004, New South Wales) pp97-99.

compensation. However, progress has been slow and there continues to be an active debate about the issues arising. The recent National Workers' Compensation and Occupational Health and Safety Frameworks Productivity Commission Inquiry Report examined in detail the possibility for developing nationally consistent workers' compensation and occupational health and safety legislation[69].

[69] (No. 27,16 March 2004)