OVERVIEW

This reading follows *The Duty of Care Part 1*. Part 2 details the general duties of contractors, employees, self-employed persons, persons with control of a workplace, manufacturers and others. As in the case of Part 1, reference is made throughout to the Western Australian *Occupational Safety and Health Act 1984* (WA OSH Act) and, to a lesser extent, legislation in other Australian jurisdictions, to show how the principles discussed have been applied in law.

**Prerequisites**

Completion of the reading *The Duty of Care Part 1*.

**Objectives**

After reading this information you should be able to describe the key elements of the statutory general duties of:

- contractors and those involved in alternative working arrangements such as labour hire;
- employees;
- self employed persons;
- persons with control of workplaces;
- designers, manufacturers, importers and suppliers of plant;
- manufacturers, importers and suppliers of hazardous substances; and
- designers and builders of buildings or structures.

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Section 1: INTRODUCTION

Note: Much of the information in this reading is drawn from the WA Commission for Occupational Safety and Health guidance note General duty of care in Western Australian Workplaces www.commerce.wa.gov.au/WorkSafe/PDF/Guidance_notes/index.htm

This reading takes a broader approach than the guidance note, which relates to the application of Western Australian legislation to Western Australian workplaces.

The Duty of Care Part 1 reading covered the concept of "general duty of care" as it applies to OHS legislation. It briefly outlined the similarity with common law, the Robens Report and ILO Convention 155. Both of the latter have had a significant impact on modern OHS legislation.

The concept of general duty of care is the cornerstone of modern OHS legislation in many jurisdictions throughout the world, including Australia. While the history, development and implementation of such legislation vary across jurisdictions, common principles apply.
The terms "general duty of care", "duty of care" or "general duties" relate to broad responsibilities, expressed in general terms, of a wide range of persons who are connected with the work or working environment. This may include employers, employees, self-employed persons and others, such as people who control workplaces, design and construct buildings or manufacture and supply plant. The concept reflects the fact that a "duty of care" is owed in law by one person to another. Examples of such duties include:

- 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 health and safety, and that of others, at work; and
- self-employed persons must, as far as practicable, ensure the work does not adversely affect the health and safety of others.

The Duty of Care Part 1 examined in detail the employer's duty, with particular reference to the Western Australian Occupational Safety and Health Act 1984 (WA OSH Act). Duties under this Act are as follows:

"An employer shall, so far as is practicable, provide and maintain a working environment in which the employees of the employer (the "employees") are not exposed to hazards..."

This duty is further particularised by the specification of five particular duties, which apply without limiting the broader statement above. These, in summary, are to:

- provide safe workplaces, plant and systems of work;
- provide information, instruction, training and supervision;
- consult and cooperate with health and safety representatives and employees;
- where other measures are not practicable, provide personal protective equipment; and
- provide arrangements for safe use, handling, transportation and disposal of plant and substances.

A further employer duty, included separately under the general duty provisions of the Western Australian Act, is to report fatalities and specified injuries and disease.
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.

2.1 Contractors and sub-contractors

Standing on its own, the employee definition in most general duty of care style legislation does not cover contractors or sub-contractors. Some legislation deals with this by specifically extending particular provisions to contract arrangements.

Check whether this is the case in Victoria (www.workcover.vic.gov.au) and in one additional jurisdiction other than your own.
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. The duties of the Act overlap in these circumstances. Both the contractor and the principal have duties to the contractor’s employees. In Western Australia the duty 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 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).

2.2 A matter of control

The duties of "principals" are limited to matters which are under their control. 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 subcontractors, 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.

2.3 Written contracts

" 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 control.

While a contract cannot ‘hand over’ responsibility for OHS from one party to another, contract provisions dealing with health and safety 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 health and safety policies set for employees are applied to contractors and their employees.

The important thing to remember when writing OHS 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 OHS 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 sub-contractors who are unsure of the contractual arrangements and their responsibilities under the Act should seek professional advice as to the legalities of their contracts.

### 2.4 Labour hire arrangements

The WA OSH Act has provisions dealing specifically with labour hire arrangements. Check to see if there are similar provisions in New South Wales and Victoria.

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, in relation to those matters over which each has the capacity to control. In Western Australia the duty to report certain injury or disease occurrences to WorkSafe 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 health and safety, 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.
2.5 Other labour arrangements

The WA OSH Act also contains provisions 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 principal/contractor arrangements or 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 in relation to matters over which the person can have control. The duty to report certain injury or disease occurrences to WorkSafe also applies. Workers in this sort of relationship have the duties of an employee.
Section 3: EMPLOYEE’S DUTIES

3.1 Definition of employee

Check the definition of an employee in Victoria (www.workcover.vic.gov.au) and in one other jurisdiction. The definition can be expected to refer to a contract of employment and also to industrial trainees.

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. Protection for volunteers comes from other duties under the Act. Employers, self employed persons and employees all have responsibilities to ensure their work activities do not harm others (including volunteers).
3.2 Overview of employee’s duty

Like the employer’s duty, the employee’s duty may be outlined in very broad terms, supported by the specification of some particular elements of the duty. Again, these particular elements are not exclusive and do not in any way impinge on the generality of the overall duty. A typical general duty of an employee is established under the WA OSH Act as follows:

"An employee shall take reasonable care -

(a) to ensure his or her own safety and health at work; and

(b) to avoid adversely affecting the safety or health of any other person through any act or omission at work."

This duty is further particularised by the specification of six duties, which apply without limiting the broader statement above. These, in summary, are to:

- follow the employer's health and safety instructions;
- use personal protective clothing and equipment, as properly instructed;
- take good care of equipment;
- report hazards to the employer;
- report work-related injuries or harm to health to the employer; and
- cooperate with the employer to enable the employer to carry out his/her duties under the legislation.

3.3 Scope and extent of the employee’s general duty

Employees are required to take reasonable care for their own health and safety at work and to avoid harming the health and safety of others who may be affected by their action (or inaction).

This includes any action by an employee and other things that an employee may forget to do or choose not to do (ie an omission).
The standard of the employee's duty is less onerous than an employer's. While an employer must take practicable (or reasonably practicable) action, an employee is required only to take "reasonable care". This reflects the greater level of control over the work environment exercised by the employer compared to the employee.

The employee's duty does not stand alone. It is complementary to the employer's duty, and the employee needs to receive the appropriate information, instruction, training and supervision required of the employer, to properly fulfil his or her duty. Given this, it is the employee's duty to act in good faith.

The employee's basic duty to take reasonable care extends to all employees who fit the definition. This means the duty applies to all levels from production worker, store-person 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 health and safety 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.
3.4 Particular duties of the employee

Using the WA OSH Act as an example, particular duties of the employee may include to:

- Follow the employer's instructions provided for health and safety reasons.
- Use personal protective clothing and equipment that has been provided by the employer in accordance with the employer's duties. 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 health and safety. In particular, the employee must not misuse or damage the equipment.
- 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.
- Report injury or harm to health that is connected with the work activity.
- Cooperate with the employer to allow the employer to carry out his or her duties under the Act. This complements the employer's duty.
Section 4: EMPLOYERS AND SELF-EMPLOYED PERSONS

4.1 Duties to self and others

General duty of care style legislation also provides protection to non-employees who may be affected by the work. In Western Australia, both employers and self-employed persons have this duty (a self employed person being defined as one who works for gain or reward, other than under a contract of employment or as an apprentice or trainee, regardless of whether he or she is an employer). They must, so far as is practicable, avoid harming the health and safety of other people.

Employers and self-employed people are also required to take reasonable care for their own health and safety at work.

In the case of an employer, he or she must also ensure, as far as practicable, that the work of his or her employees does not harm others.
4.2 Protecting non-employees

The non-employees covered under the employer's and self-employed person's duties include groups such as customers, hospital patients, visitors to the workplace (including police, inspectors and other government officials), voluntary workers, students, an employee's family and any other person who may be affected by the work activity.

Where the duty relates to the work activity, as is the case in Western Australia, it is not confined to the workplace.

Employers and self-employed persons are required to take measures that are practicable and reasonable and all of the points raised in the discussion on "Practicability" should be taken into account.

Example:

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

The principal employer 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.

4.3 Protecting an employee’s family

Work activity involving hazardous substances has the potential to harm members of an employee’s family. The health and safety policies and procedures should ensure, for example, that employees are not transporting substances, such as contaminated dust or fibres, to their homes on work clothes or in vehicles.
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, 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.
Section 5: PERSONS WHO HAVE CONTROL

5.1 Overview

The person on whom this duty is imposed varies from jurisdiction to jurisdiction, according to the construction of the particular legislation. In general, the duty usually applies to persons who have some control over the workplace, whether by way of being the occupier, or some other person who has some residual control, such as owners and managing agents. British and New South Wales (Australia) legislation applies to persons not already bound by the employer's duty (Brooks 1993). The WA OSH Act 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 covers 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.

The duty under this provision is 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.

In Western Australia, employers who 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 as a person with control of a workplace, as well as the duties of an employer. 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.

In Western Australia, this duty does not apply to 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 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.

### 5.2 A matter of control

The duties of persons who have control of workplaces under the WA OSH Act are limited to the areas that are under that 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 and reasonable. All of the points raised in the discussion on "Practicability" would apply.

**Written Contracts**

It is recommended that a written record of health and safety 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.
A person cannot contract out of his or her statutory obligations; therefore, a written contract cannot pass an obligation to another person. However, written contracts do assist in the clarification of relationships and responsibilities, and assist in ensuring the appropriate parties are aware of and fulfil their obligations. This is particularly important where statutory obligations are overlapping and apply to more than one party.

5.3 Premises covered

In Western Australia this duty 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 when there is no connection with the trade, business or undertaking of the householder.

5.4 Safe entry and exit

The duty imposed on persons with control of the workplace (or its access or egress) relates to the physical condition of the workplace and all access ways used to enter and exit, including, for example, roads, walkways, doorways and lifts. 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.
5.5 Duties of manufacturers and others

Most general duty of care style legislation imposes some form of duty on manufacturers and others in relation to plant and substances for use in the workplace. In Western Australia and Britain, the duty is to ensure the item is designed and constructed so that it may be safely used in the workplace (Brooks 1993). Check whether this is the case in two other jurisdictions which should include New South Wales. Is it the same requirement or is there a requirement to ensure that the plant or substance is safe?

Under the WA OSH Act, 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 health and safety 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.
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 health and safety 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.

- 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.

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

The duty of manufacturers, importers or suppliers of substances used at workplaces is to provide adequate toxicological data. They 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 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.

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. The information provided by the supplier should take immediate, short term and long term effects into account.

Material Safety Data Sheets (MSDSs) are used internationally to provide information required for 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.

Duties shared

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

The duty could be shared by a number of people.

The first person who 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 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**

In Western Australia, 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 do not expose:

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

to hazards.

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.
Your feedback

WorkSafe is committed to continuous improvement. If you take the time to complete the online Feedback Form at the SafetyLine Institute website you will assist us to maintain and improve our high standards.

REFERENCES & FURTHER READING

WA Commission for Occupational Safety and Health guidance note *General duty of care in Western Australian Workplaces*.

