

OH&S MAP

An interpretation and overview of
the NSW *Occupational Health and
Safety Act 2000*

September 2007

OH&S

➤ Presented by David Nichols

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The content is academic and is **not intended** to reflect the view of the Department of Primary Industries

OH&S Map

- NSW OH&S law draws concepts from both Civil Law and Criminal Law.
- All Laws or “Actions” Both Civil and Criminal are “Formulaic” i.e. each action has defined elements that need to be met.
- The “formulae” is given by the court’s interpretation – you have to read the cases to determine what a Section really means.
- Eg Section 8 - Note: Facts are only relevant if they go to elements of an offence or a defence.

My Aim

1. To explain how OH&S Law really works
2. To enable you to focus effective effort
3. We will be looking at:-
 - Some background and history
 - The most likely offences and their elements
 - The defences which are also formulaic
 - The ten hurdles
 - The hierarchy of enforcement
 - The questions that need to answered so that you can determine your Standard of Care

Why and what next

- The OH&S Act seems to be misunderstood and that has led to a lot of misdirected effort and confusion.
- A lot of training products, Risk Assessment products and the like are not entirely in line with NSW OH&S.
- People have been unable to distinguish between messages that go to NSW OH&S and those that are just background static and those that are misleading.
- It is intended that this information be soon available on a CAD file that will let you print out a wall chart.
- The next step will be to use the wall chart to help show you how to respond to a serious investigation.

OH&S Law

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graph BT; CivilLaw[Civil Law] --> OH&S[OH&S Law]; CriminalLaw[Criminal Law] --> OH&S
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Civil Law

e.g.
Duty of Care
Negligence

Criminal Law

1. The Act (Actus Reus)
2. The Intent (Mens Rea)
[Look these up on the Internet]

Civil Law Example

Negligence

1. A **Duty of Care** was owed because of a **relationship** between the parties
2. An event occurred where the Plaintiff suffered material injury / damage (which was foreseeable, not too remote and within the scope of the relationship)
3. The event was **caused** by the negligent **act or omission** of the Defendant
4. The act or omission is deemed negligent if the defendant has failed to meet the requisite **Standard of Care** (Breach)

Elements of Negligence or the “Negligence Calc”

- (i) a **duty** to take reasonable care owed by the defendant to the plaintiff. This must be established by showing:
 - (a) reasonable *foreseeability* of risk of the kind of injury sustained;
 - (b) a relationship of "*proximity*" between the two people in connection with
 - (1) the type of **act or omission**;
 - (2) the injury sustained;
 - (c) *absence of any exclusion* of liability by statute, contract or other common law principle.
- (ii) a **breach** of that duty by behaviour inconsistent with the risk foreseeable;
- (iii) injury actually **caused** by the defendant's negligence, which was reasonably foreseeable, and not too remote.

Duty of Care

- **Relationship** eg Doctor/Patient, Driver/Passenger
- Once a **Duty of Care** is established then
- The relevant **Standard of Care** needs to be determined
- This is dependent on the circumstances
- The Civil Law uses the Common Law test of the “reasonable man”
- **OH&S Standard of Care is derived from**, but not wholly set by, **Statute** (I have adopted the 10 hurdles)
- The Statute draws on all relevant OH&S material that is available (The **hierarchy of enforcement**)

Remember

If a **Duty of Care** is raised at Law then

there will be a **Standard of Care** that has to be met.

As surely as night follows day

The background of the slide is a solid blue color. In the lower half, there are several faint, concentric circular ripples, similar to those created by a stone dropped in water, scattered across the bottom portion of the slide.

Criminal Law

- Criminal Offences have two basic elements:
- The **Act** (or omission)
- And **Intent** (requisite)

Note: these don't have to exactly line up eg. in murder it is sufficient intent to want to inflict GBH when the victim actually ended up dead.

Also: The need to prove intent influences the style and nature of interviews and also the nature of statements sought. (This distinguishes Criminal and OH&S)

Differences Civil v Criminal

Criminal Law

- Standard of Proof is “each element **beyond reasonable doubt**”
- Burden of proof is on “Prosecutor (person bringing the case)

Civil Law

- Standard of Proof is on “each element on **the balance of probabilities**” (the lesser standard)
- Burden of proof is on the Plaintiff (Person bringing the case)

OH&S Law

- Is a criminal code that borrows the duty of care concept from civil law.
- The code is enacted when a work relationship is established.
- A prima facie case involves actus reus (**the act only**) [standard = beyond reasonable doubt]
- The burden then shifts to the defendant to prove due diligence or beyond reasonable control (**equivalent to an absence of mens rea or intent**) [Standard = balance of probabilities]
- **This means that persons charged with an offence must run an active defence.**

OH&S Law

- The lack of intent means that the offence is a “strict” or “absolute” liability.
- The lack of intent changes the status and nature of the “record of interview” or “statement”.
- Because the investigator does not need to seek a confession in order to prove intent then the CMRA Section 60 indemnity is readily given.

OH&S Law

- The standard of proof on the OH&S elements of offence is the criminal standard.
- **Each** element must be proved “Beyond Reasonable Doubt”.
- The Prosecutor has to table “admissible evidence” that goes to each and every element.
- This leads to the Prima Facie case.

Employer Responsibility - OH&S

- Section 8 is used the most (previously 15 and 16)
- The Elements are not entirely given in the statute you get them from the court cases. Basically they are:
- **Employer/ Employee or Contractor** Relationship which establishes a **Duty of Care**
- Employee or Contractor exposed to a **Risk at Work**
- That Risk is **caused** by the **unlawful act or omission** of the employer.

The act or omission is unlawful if it fails to meet the requisite OH&S Standard of **Care** (I have adopted the 10 hurdles to help define this.)

Offence: Section 8 (1) of the *Occupational Health and Safety Act 2000*.

The **elements** of a charge under this offence that the prosecution has to **prove beyond reasonable doubt** are:-

1. That the **defendant** was an **employer** at the **time** of the alleged **breach**,
2. That an **employee's** health or safety was **exposed to risk**,
3. That the employee was **at work** at the time; and
4. That there was a **causal nexus between** the defendant's **breach** (of statutory duty) **and the risk** to the employee's safety

Note: Compare this with the statute.

Offence: Section 8 (2) of the *Occupational Health and Safety Act 2000*.

The **elements** of a charge under this offence that the prosecution has to **prove beyond reasonable doubt** are:-

1. That the **defendant** was an **employer**,
2. That a non-employee was exposed to risk to her or his health or safety,
3. That the risks arose from the defendant's conduct of an undertaking,
4. That the non-employee was at the defendant's place of work, and
5. That there was a **causal nexus** between the defendant's **breach** and the **risk** to the non-employee's safety.

Again: Compare this with the statute.

Defences

➤ Section 26

- (1) If a corporation contravenes the OH&S act or Reg, the directors & management contravenes: UNLESS
 - (a) He was not in a position to influence the conduct of the corporation
 - (b) He used all due diligence to prevent the contravention by the corporation

Managers

- Persons concerned with the management of the employer organisation are joined in automatically.
- This includes Directors and Managers
- The **burden of proof shifts** to these individuals to provide an adequate defence
- The **standard of proof** is the balance of probabilities

Defences cont

➤ Section 28

The person to prove

- (a) It was not reasonably practicable for the person to comply with the provision, or
- (b) The commission of the offence was due to causes over which the person had no control and impracticable for that person to make provision.

(OH&S Act)

On Defences

- They are stylised or formulaic
- The **burden** is on the defendant **to** basically **negate** requisite intent
- They require **action** on the part of the defendant
- They limit the scope and content of the defence
- If the **system of work used was unsafe** and the prosecutor can tie in a safe alternative that was known to you then **your due diligence defence has gone out the window.**
- This is where foreseeability gets a run.

Summary Section 8

- **The Statute** creates a Duty of Care and defines the circumstance where it applies, and
- Starts to define the requisite Standard of Care
- **The Court** requires that there be a **causal nexus** between a breach of the Standard of Care and the exposure to Risk and
- Ensures that determination of the Standard of Care is open ended with very broad limits

The Standard is further defined by other provisions of the Act and Regs which in turn draw in codes, guidelines and the like.

A key concept starts to emerge:- The “safe alternative system of work”

A common law forerunner of this Standard of Care is represented by the Nertney Wheel.

Nertney Wheel



OH&S Act S8(1) *v* Nertney model

➤ Duties of Employers

(1) Employer must ensure the health, safety and welfare at work of all employees.

- a) Any premises are safe
- b) Plant or substance for use is safe
- c) Systems of work are safe
- d) Provide information, instruction, training and supervision at work

- Work Environment
- Fit for Purpose equipment
- Competent People
- Safe Systems of Work

The 10 Hurdles

This list is designed to assist in discovering and applying the requisite Standard of Care called up by the statute.

- 1. Consultation Employees/contractors/ designers
- 2. Hazard Identification and Hierarchy of Controls
- 3. Risk Assessment
- 4. Risk Management MSMP, SEP, Procedures SOPs
- 5. Information Employees and others
- 6. Instructions and Training
- 7. Supervision
- 8. Monitor System of work
- 9. Review the operation
- 10. Revise as necessary

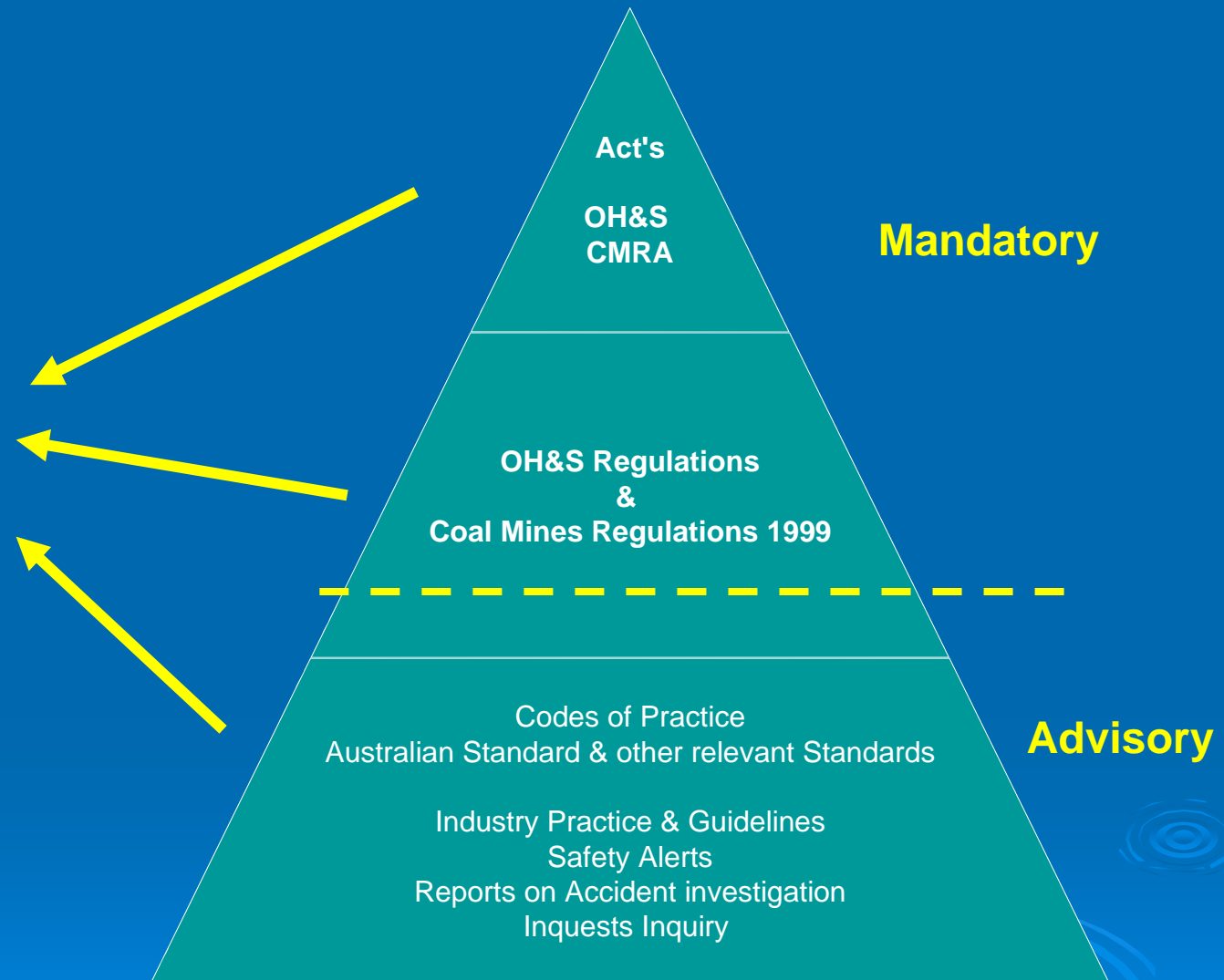
(APESMA, 2002)

| <u>HURDLE</u> | <u>Sample Question</u> | <u>Legislative Support</u> |
|---------------------------|---------------------------------------------------------------------------------------|-------------------------------------------------------------|
| 1. Consultation | What do workers think about safety? | OHS Act 2000, s 13-19; OHS Reg 2001 ch 3(applies to mines) |
| 2. Hazard Identification | What are the possible dangers? | OHS Reg 2001 reg 9 |
| 3. Risk assessment | How serious are the risks to workers which arise from these dangers? | OHS Reg 2001 reg 10, (to be authorized by employer) |
| 4. Risk Management | What can be done to eliminate or reduce those risks? | OHS Reg reg 11. Procedures, SEP > CMRA & Regs |
| 5. Information | What do workers need to know to be safe? | OHS Act 2000 s 8(1)(d); 11 (1)(b); OHS Reg 2001 reg 13, 16. |
| 6. Instruction & Training | How can I train workers to identify and deal with risks? | OHS Act 2000 s 8 (1)(d); OHS Reg 2001 reg 13 |
| 7. Supervision | What management structure is in place to see that safe procedures are being followed? | OHS Act 2000 s 8(1)(d); OHS Reg 2001 reg 14 |
| 8. Monitoring | Have I checked to see that my risk management is working? | Common sense! Australian Std implied |
| 9. Review | Is my risk management plan still valid in light of changing conditions? | OHS Reg 2001 reg 12 |
| 10. Revising | Do I need to change anything? Have I changed what I need to change? | OHS Reg 2001 reg 12 |

Detail & Sources of Information

10 Hurdles

1. Consultation
2. Hazard Identification
3. Risk Assessment
4. Risk Management
5. Information
6. Instruction & training
7. Supervision
8. Monitoring
9. Review
10. Revision / Rectification



: Known Risk

: Known Control

Note: Codes etc can be called up by Regulation

4 Key Questions

- When classifying safety information into the ten hurdles the following need to be answered:
 1. Is it Real? I.e. Does it form a Known Risk or Known Control?
 2. How severe is the risk? If it can kill it cannot be ignored
 3. Is it relevant? Does it go to an area that I am responsible for?
 4. To which hurdle can it be applied?

This allows you to formulate your Standard of Care.

On Procedures

- Most of the game is played with **Known Risk/Known Control**
- Do not interpret a need for safety procedures as a need for a million detailed work procedures.
- The aim is to apply safety critical controls to relevant tasks so edit out that which does not go to safety.
- Analysing severity is critical
- As an example Isolation Procedures are applied to any number of tasks
- The first procedures should cover fatal risks and each procedure should/may cover multiple tasks.
- Mini risk assessments are not procedures.

END

Next time

If you are interested

How this translates into a serious accident
investigation

And how to defend.

Hierarchy of Controls

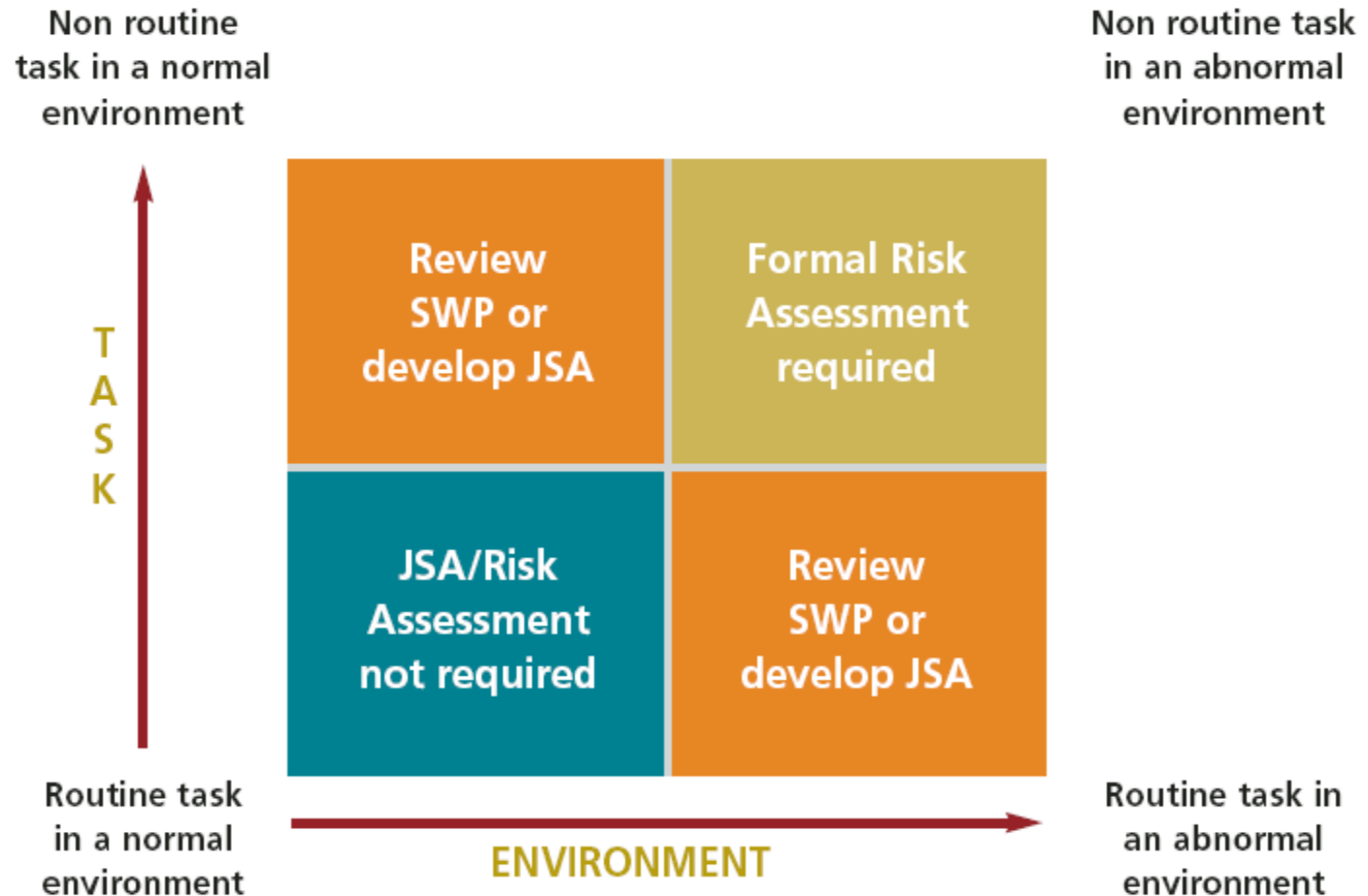
OHS Reg 2001 Clause 5 Meaning of “control” of risks.

- (1) Obligation to control a risk (when elimination of the risk is not reasonable practicable)
 - Substituting the hazard with a lesser risk
 - Isolating the hazard from the person
 - Minimising the risk by engineering means
 - Minimising the risk by administrative means
- (2) A combination of the above measures is required to minimise the risk to the lowest level.

Safe Work Procedures: WHEN?



When should a Risk Assessment/JSA be conducted?



Use this tool as a guide to judge when you need to conduct a JSA or whether a Formal Risk Assessment is required.

Due Diligence

How Does Your Organisation's Risk Management System Compare?

- Do you thoroughly understand all the risks facing the corporation?
- Have you quantified these risks? How are unquantifiable risks handled?
- How do you know the risk management actions you intend to take are in the best interest of the shareholders?
- How are your risk management practices and procedures well articulated, all encompassing and enforceable? Do they meet industry standards?
- Do you have a mechanism to monitor and measure your success in achieving risk management objectives?

- Is the company operating within set risk limits?
- Do you have adequate resources and capability to manage the risk of the corporation and how are these assets being deployed?
- Have you promoted and fostered the appropriate risk culture and is accountability for managing risk clearly identified?

➤ John Jones, Senior Vice President Risk Management, Engage Energy USLP

The End

