

**SAFEGUARDING THE STUDENT: SCHOOL-TO-
WORK TRANSITION PROGRAMS AND
OCCUPATIONAL HEALTH AND SAFETY LAW**

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1 INTRODUCTION

This report is concerned with the protection from harm of students involved in ‘school-to-work’ transition programs (including new apprenticeships) and the potential legal liability of the various parties involved in such programs.

The report should not be seen as legal advice. It is intended to assist the National Occupational Health and Safety Commission (‘NOHSC’) in the development of appropriate policies for the protection of young people. The applicable law is not settled and, as will be seen from the remainder of the report, is in a fluid state. In attempting to describe the legal obligations of relevant parties, I have drawn on other legal relationships that I consider to be analogous to the ones under consideration.

2 FACTUAL BACKGROUND

What is a ‘school-to-work’ transition program? I have been provided by NOHSC with a table that identifies three relevant types of these transition programs. * The three programs identified are:

- Work experience;
- Structured Work Placements; and
- School-based New Apprenticeships.

For present purposes, the important differences between these are:

- Subject to any statutory deeming provisions, only a person participating in a new apprenticeship is an employee of the ‘host employer’; and
- In the first two situations, the person is a student owed all of the normal legal protections that a student is owed by the educational authority at which he or she studies.

The legal issues that arise in all three situations are considered in this report. Most of the issues are common to each type of program. Because of the complexities thrown up by the second category, structured work placements, that category is the focus of the report.

I have proceeded on the basis that a structured work placement is part of “Structured Workplace Learning” (‘SWL’). The Commonwealth of Australia’s Enterprise and Career Education Foundation (‘ECEF’) defines SWL as follows:

SWL forms part of Vocational Education and Training (VET) in Australia. It involves on-the-job training that is integrated with classroom learning delivered at a school or another learning organisation. SWL provides students with the opportunity to acquire industry-specific knowledge, skills and experience in the workplace before they leave school. SWL is offered within the framework of the education system (schools, TAFE colleges and other private Registered Training Organisations) so that the tasks a student completes within the workplace can contribute to a senior secondary school certificate and/or an industry recognised qualification.¹

ECEF funds approximately 260 SWL programs around Australia. According to its website, “as many as 85,000 students around Australia are already

participating in [SWL] programs funded by ECEF”. I understand that there are many others who are not funded by ECEF.

It is clear that there are many students, education providers and workplaces that are affected by SWL. Numerous examples of the experience of students involved in SWL are reproduced on the ECEF web-site. They provide an indication of the range of enterprises that may have students placed at their workplaces.

The following are a few such examples with names deleted to respect privacy.

- A secondary school student completed a Certificate III in Community Services (Aged Care) after participating in her school’s SWL program at a nursing home for the elderly.
- A year 11 student completed a traineeship in retail operations at a large sportswear store as part of her school’s SWL program.
- As part of a SWL program, a year 11 student did a five-day placement as a concierge at a hotel.
- A 17 year old performed a total of 210 hours of work in a variety of workplaces such as childcare centre and an office.

It may immediately be observed that in each of these workplaces the student concerned may be exposed to numerous risks to her or his health and safety. Statutes exist in all Australian jurisdictions to protect workers against risks to their health and safety arising from their work. The protection derives primarily from the imposition of onerous duties on employers for the protection of employees and others who may be affected by the employer's conduct of its undertaking.

However, unlike most others at a workplace, a student involved in a SWL program is not an employee of the employer conducting the undertaking at which he or she has been placed. Nor is the student a contractor of the employer. Further, the student is not an employee of the education provider which has sent the student to the workplace.

This report examines the legal ramifications of SWL programs. In particular, it considers what protections are offered to a student engaged in a SWL program by occupational health and safety and other applicable laws. Before examining the operation of those laws in detail, it is helpful first to consider the position at common law.

3. COMMON LAW LIABILITY AND SCHOOL-TO-WORK PROGRAMS

It was noted earlier that most participants in SWL programs are secondary school students in years 11 and 12. These students could generally be expected to be between the ages of 15 and 17.

3.1 The duty at common law owed to the student by the school

It is well settled that a school owes a very onerous duty of care to its students.² The duty is ‘non-delegable’ in the sense that the school must ensure that reasonable care is taken for the welfare of its students – it cannot leave it to a teacher or any other individual to meet its duty of care.³ The reasons for this approach were explained by Mason J in the leading case of *Commonwealth v Introvigne*:

*The immaturity and inexperience of the pupils and their propensity for mischief suggest that there should be a special responsibility on a school authority to care for their safety, one that goes beyond a mere vicarious liability for the acts and omissions of its servants.*⁴

The standard of care that a school is required to meet in relation to its students is to take those steps which are reasonably necessary to prevent reasonably foreseeable injury.⁵ Earlier decisions in which it was held that the standard of care is that of the “reasonable parent” are no longer considered to be good law.⁶

There are numerous cases that illustrate the duty of care owed by schools and their teachers to pupils to protect the pupils from physical harm. Edwards et al provide the following examples in which schools have been held to be in breach of their duty:

- *A failure to engage sufficient staff to safely conduct a school;*

- *A failure to send sufficient numbers of teachers away with a group of pupils on a school excursion;*
- *A failure to devise a safe system of playground supervision;*
- *A failure properly to train its staff;*
- *A failure to purchase and maintain safe playground equipment;*
- *A failure to prevent pupils from undertaking activities which are inherently dangerous.*⁷

As may be seen from this list, the responsibilities of educational institutions at common law to their students range across a broad range of subject areas. In the present context, one of the most important of those responsibilities concerns the duty to supervise students. The facts in the High Court case of *Introvigne* are illustrative of the approach of the Courts.

A 15-year-old schoolboy was skylarking with friends in the school grounds but before classes began. The pupils each in turn seized a halyard attached to a flagpole and swung on it so that their full weight was suspended by the halyard as they flew through the air. While another boy was engaged in this activity, the “truck” at the top of the flagpole broke and fell onto the head of the plaintiff causing him serious injuries.

There were 900 pupils in the yard at the time. They were being supervised by one teacher; all other members of staff were at a meeting inside the school being informed of the death, the night before, of the principal. There were normally between 5 and 20 teachers supervising this number of pupils.

The High Court found the school authority to have breached its duty of care to the plaintiff. It had failed to take all reasonable care to ensure that he was not exposed to an unnecessary risk of injury. In particular, by providing only one supervising teacher, the school authority had failed to provide an adequate system of supervision to ensure that the plaintiff was not exposed to an unnecessary risk of injury. There was no suggestion that the school authority was vicariously liable for defective supervision on the part of the particular supervising teacher.

Mason J held that the school authority's duty to supervise did not mean that 15-year-old boys had to be under constant supervision and observation.⁸ However, the standard of reasonable care must factor in the "notorious" likelihood that large numbers of children, if left to their own devices, will engage in risky activities.⁹

As this case illustrates, the duty of supervision extends beyond class hours. There are numerous cases where it has been held that the duty to supervise extends beyond the geographical confines of the school property. For example, schools have been successfully sued for failing to supervise school excursions adequately.

In *Ayoub v Downs*,¹⁰ a teacher accompanied a group of 25-30 boys aged 14-15 on a farm walk on an unfamiliar route. A boy was injured when another boy opened a gate that swung hitting the first boy and knocking him down a slope. The teacher was at the rear of the group some distance from the gate. The school was held to be liable on the grounds that there should have been another teacher present supervising the first boys and that it was highly

negligent of the school to permit an excursion to a farm “the dangers of which had not previously been surveyed”. Similar observations have been made by other courts.¹¹

The authors of one text book summarise the state of the law concerning the duty to supervise activities away from school premises as follows: “With particularly dangerous activities, such as camping and bushwalking, extreme caution is needed”.¹² Careful and thorough planning is essential. A site visit will generally be necessary to fulfil the duty. Using modern risk management parlance, a school authority must engage in a risk assessment of such activities.

I have been unable to find any common law cases concerning findings that an educational authority had breached its duty of care by failing to take reasonable steps to ensure the safety of a student it had placed in a workplace for work experience purposes. However, it is clear to me that the common law principles described above are equally applicable to such situations. The greater the dangers to which the particular workplace will expose the student, the higher will be the standard of care imposed on the educational authority.

Courts will expect that an educational authority will, as a bare minimum, have assessed each and every student placed in a workplace with a view to determining if he or she is suitable for that placement. In most, if not all cases, it would be expected that a representative of the school will have visited the workplace and performed a risk assessment concerning all pertinent issues in the discharge of the school’s duty of care. Appropriate

instruction, information, training and supervision will be demanded of school authorities.

With this overview of the common law position in mind, it is now necessary to examine the application of occupational health and safety (OHS) legislation to school-to-work programs.

3.2 Summary of Common Law Position

At common law, an educational authority owes its students a non-delegable duty of care. The standard of care which must be met is to take those steps which are reasonably necessary to prevent reasonably foreseeable injury. To meet its duty of care, an educational authority must have adequate equipment, must plan school activities carefully and must supervise its students having regard to what the High Court has described as their “propensity for mischief”.

4. OHS LEGISLATION AND SCHOOL-TO-WORK PROGRAMS

4.1 OHS Law in Australia

Each of the Australian States and Territories has enacted legislation that regulates the health and safety of employees.¹³ The legislation is broadly modeled on the findings of the Robens report.¹⁴

Central to all of these statutes is the imposition of statutory duties of care on a range of parties in a position to take action to promote the health and safety of working people. Generally speaking, and with some variations between the jurisdictions, the following duties are imposed on identified parties under Australian OHS legislation:

- Employers, in favour of employees;
- Employers and the self-employed, in favour of non-employees;
- Occupiers of premises to those on the premises;
- Manufacturers and suppliers of plant and substances, in favour of those who may be affected by the use of the plant or substance;
- Employees in favour of themselves and others who may be affected by their acts and omissions.

This is not the place for a detailed exposition of these provisions.¹⁵ It is merely necessary to note that a breach of these duty provisions is a criminal offence. Significant fines may be imposed in the event that a person is found to have contravened a general duty provision. It is to be noted that sentencing decisions of the courts are starting to reflect the maximum penalties for OHS offences that have been set by State and Territory parliaments.¹⁶

Of the general duties listed above, the most relevant to this report is the duty of employers to persons other than employees of the employer. As noted in section 2 above, participants in School-to-work programs are not employees of either the host employer, the educational institution or the registered training organisation.

Although there are slight variations between the various State and Territory enactments, the legislation in New South Wales and Victoria is substantially reflective of that which applies throughout Australia. Therefore, I will use that legislation, and the cases that have interpreted it, as the basis for this part of the report.

Section 8(2) of the *Occupational Health and Safety Act 2000* (NSW) provides:

An employer must ensure that people (other than the employees of the employer) are not exposed to risks to their health and safety arising from the conduct of the employer's undertaking while they are at the employer's place of work.

A similar duty is imposed on the self-employed by section 9 of the *Occupational Health and Safety Act 2000* (NSW). It should be noted that it is a defence under section 28 of the Act for a person to prove that it was not reasonably practicable for them to comply with these duties.

Section 22 of the *Occupational Health and Safety Act 1985* (Vic.) is in the following terms:

Every employer and every self-employed person shall ensure so far as is practicable that persons (other than the employees of the employer or self-employed person) are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer or self-employed person.

The OHS legislation in operation in the other States and Territories contains provisions in somewhat similar terms.¹⁷ It will have been noted that the obligation imposed by section 8(2) of the New South Wales statute is qualified by the phrase “while they are at the employer’s place of work”. In other words, it is only risks that arise at the employer’s “place of work” that are addressed by the sub-section. A risk that arises away from the “place of work” is not the responsibility of the employer under that sub-section. The provisions in South Australia and Tasmania are similarly limited in this way.

The Industrial Relations Commission of NSW has interpreted the meaning of “place of work” in a number of cases.^{17A} The “place of work” of an employer extends to every area which may be affected by the work being done. However, it is clear that the potential scope of the Victorian provisions, and in those jurisdictions where the statute closely resembles that in Victoria, is broader than that which applies in New South Wales, South Australia and Tasmania.

Summary

Each Australian State and Territory has enacted OHS legislation for the protection of both employees and persons other than employees who are affected by the conduct of work.

The legislation varies as between the jurisdictions but under all of the statutes, an employer must make provision for the safety of persons, other than its employees, whose safety may be affected by the employer’s undertaking or the way it conducts its work.

4.2 Application to Schools/Education Providers

The precise arrangements under which teachers and others who work in schools are employed varies from jurisdiction to jurisdiction. It is unnecessary to consider this matter in this report.¹⁸ The important issue is that, whatever may be the precise employment arrangements, the vast majority of schools/education providers are “employers” within the meaning of OHS laws. They will therefore owe the duty imposed under section 8(2) of the NSW Act and section 22 of the Victorian Act to the extent that they conduct an “undertaking”.

What is an “undertaking”? The term is not defined in either statute. It has been considered by the Supreme Court of Victoria in the case of *Whittaker v Delmina Pty Ltd.*¹⁹ The case concerned the applicability of section 22 of the Victorian Act to a horse-riding school. An inspector had issued an improvement notice to the school requiring it to make better provision for the safety of its customers who hired its horses. A magistrate overturned the notice ruling that the “undertaking” of the school was confined to its “workplace” and did not extend to places where its patrons rode the horses. The Supreme Court overturned that decision on appeal. In the course of its judgement, the Court made the following observations about the meaning of the phrase “conduct of the employer’s undertaking” (at 280-281):

The expression is broad in meaning. In my view such a broad expression has been used deliberately to ensure that the section is effective to impose the duty it states ... The word [undertaking] must

take its meaning from the context in which it is used. In my view it means the business or enterprise of the employer ...and the word “conduct” refers to the activity or what is done in the course of carrying on the business or enterprise. A business or enterprise, including for example that conducted by a municipal corporation, may be seen to be conducting its operation, performing work or providing services at one or more places, permanent or temporary and whether or not possessing a defined physical boundary. The circumstances must be as infinite as they may be variable.

This passage is consistent with the approach that has been taken by the NSW Courts to the equivalent NSW provisions.²⁰ The approach taken by the Supreme Court of Victoria highlights the breadth of the scope of the section. How does the principle apply here?

In my opinion, an educational institution conducts an “undertaking” in which it educates students. If, as part of the process of educating its students it places them in workplaces as part of a “school-to-work” program, that activity would be part of the “conduct” of its undertaking. The students who are so placed are “persons other than the employees” of the institution. They are therefore owed a statutory duty for the protection of their health and safety. What is the nature of the duty owed?

The duty owed is to ensure, so far as is (reasonably) practicable, that the student is not exposed to risks to her or his health and safety. The duty is similar to that owed at common law and, in all likelihood, more onerous.²¹ The duty is somewhat analogous, in my opinion, to that owed by a Labour Hire company that places its employees at the workplaces of third parties as part of a commercial arrangement. Although in a school-to-work program, the commercial element will be absent and the student is not an employee of

the ‘placing’ party, there are sufficient similarities to the labour hire situation to make an examination of relevant court and tribunal decisions worthwhile.

The last twenty years have seen significant changes to the structure of the Australian labour market. One such change has been the emergence of labour hire companies which hire their employees to third parties. Under such arrangements, the employee works for the third party at its premises but generally remains employed by the labour hire company.^{21A}

A number of cases have come before the courts in Victoria and New South Wales in which OHS inspectors have alleged that OHS laws apply to such an arrangement so as to impose on both the labour hire company and the ‘host employer’ a statutory duty to safeguard the employee.²²

In the most recent of these cases, Hungerford J (of the NSW Industrial Relations Commission) set out the key findings of the earlier decisions. His Honour considered that an employer that sends its employees to perform work for a third party “has a special responsibility to ensure the health, safety and welfare of its employees at the other workplace for no other reason than that that workplace is removed from the employer’s direct management and control and would usually be at a location foreign, or at least unfamiliar to the employees concerned...”²³

The following general principles emerge from the decided cases:

- A labour hire company has a statutory duty to match its employee to the job for which the employee's labour is to be provided;
- Generally speaking, it will have a duty to visit the workplace concerned to conduct a risk assessment of the work (the content of such an assessment will vary);
- It will have a duty to inform, instruct and train the employee in relation to the relevant risks;
- It will have a duty to provide appropriate supervision (once again, the content will vary according to the circumstances);
- The 'host' employer will have a duty to take all practicable steps for the protection of both its employees and those hired from any labour hire company (the content of the duty to the latter will vary according to what has been done by the labour hire company itself and the circumstances generally).

The prevalence of labour hire arrangements in the workforce has led the State OHS regulatory authorities to develop, in consultation with industry representatives, useful guidance material to assist employers and others to meet these statutory responsibilities. The following publications (which are included as 'Schedule B' to this report) have been produced in Victoria and South Australia:

- *Guidelines for Managing Health & Safety in the Labour Hire Industry* (Workcover SA, 1997, reprinted in 2001)
- *Managing Health and Safety in the Temporary & Labour Hire Industry* (VWA, 1998).

The VWA publication (at pp 6-9) lists four steps that should be followed by a labour hire company prior to selecting a person for a particular assignment:

- Gather information about the job;
- Gather information about the skills and competencies required to do the job;
- Conduct a work site visit; and
- Obtain the client's written agreement to provide a safe and healthy work environment.

A further two steps are set out in relation to selecting the employee (at pp 9-11):

- Matching the contract worker to the job; and
- Providing the contract worker with appropriate information, instruction and training.

Finally the Guide refers to the need to monitor the health and safety of contract workers (pp 11-12).

The legal responsibility of an educational institution which is placing students in workplaces emerges from an understanding of its common law responsibilities (see section 3 above) and the somewhat analogous position of a labour hire company under OHS laws. However, it is important not to overstate the relevance of the labour hire cases to the position of an educational institution. There are several key differences between the two, not the least of which is the absence of a commercial relationship between

the provider of the labour and the host. These differences were canvassed in a very recent Victorian case where a TAFE college was prosecuted under section 22 of the Victorian Act.

The case concerned a student of the Northern Melbourne Institute of TAFE.²⁴ The student was enrolled in an advanced English for migrants program. A compulsory part of the program was a practical placement in a workplace. The TAFE college placed hundreds of students in workplaces as part of this program. The student was placed at a factory that manufactured blinds. Whilst employed there he was injured on an unguarded machine. There had been no visit of the workplace by anyone at the TAFE college prior to the placement commencing.

The college was prosecuted under section 22 of the Victorian Act. The prosecution alleged that the college had:

- (1) failed to communicate sufficiently, if at all, with the host employer as to the nature of the work and the health and safety arrangements;*
- and*
- (2) failed to attend the proposed place of work to assess the hazards, risks and supervision in advance of the current placement or to attend at all in respect of it.*

The court considered the threshold issue to be “whether there was sufficient connection with the undertaking of the [TAFE college] to call for the finding that the task being performed fell within the class of its undertaking ...”

(page 8). The court referred to the labour hire company cases discussed above and stated:

The defendant, however, cannot be likened to a labour hire company. [The student] was not its employee. [The host employer] was just one of hundreds of enterprises which had indicated a willingness from time to time to take on practical placement students of the Defendant. The Relationship between the Defendant and [the host employer] could be described as a co-operative arrangement. No payment was exchanged between the Defendant and [the host] and [the student] did not receive any payment while undertaking his practical placement.

The Court, at page 9, characterised the college's 'undertaking' as being "the provision of vocational education" and the conduct of such undertaking "includes the placing of students with an employer for work experience or training pursuant to a practical placement agreement". However, his Worship went on:

In my opinion once the placement has been effected, however, it cannot be said that the undertaking of the Defendant extends to the operations of the host employer while the student engages in his placement. It is far fetched, in my view, to describe the processes in the ... factory to which [the student] was exposed as the conduct of the Defendant's undertaking. I am not satisfied that while working at the ... factory and risk to [the student's] health and safety arose from the conduct of the business or enterprise of the Defendant.

This is an important decision. The decision appears to apply to all "practical placements" under section 87 of the *Vocational Education and Training Act* 1990 as the Court referred to that provision in its reasons. It in effect says that a TAFE college is under no obligation in relation to the safety of

students on placements at least in relation to risks arising from the host employer. The principles decided in the labour hire company cases are said not to apply.

I am not convinced that the Court has correctly stated the law. The decision appears to me to be inconsistent with the broad approach taken to the expression “conduct of the undertaking” by the Supreme Court in *Whittaker v Delmina Pty Ltd*. Whether another court will take the same approach in a future case remains to be seen. The decision does not create a precedent although other Victorian magistrates would have to be convinced not to follow it in future cases. It is unlikely to have much effect outside Victoria.

Even if the decision is accepted as correctly stating the law, it may, in future, be confined to its facts. In other words, a future court may take the view that a case involving a student of secondary school age who is placed as part of a SWL program is quite different to the situation that arose in *NMIT*.

In my opinion, and despite the Magistrates’ Court decision in *NMIT*, the labour hire publications discussed above provide a very useful starting point for the preparation of guidance on meeting OHS obligations for those involved in SWL programs. However, in preparing any such guidance material, the important differences between labour hire arrangements and SWL programs, as highlighted by the *NMIT* case, must be recognised.

Summary

A school or other educational authority may, as part of the conduct of its undertaking, place students in workplaces as part of their vocational

education and training. If they do, they will owe the student a duty to provide, so far as is practicable, for the safety and health of the student. The duty owed is analagous, but not identical, to that owed by a labour hire agency that places its employees in the workplaces of third party employers. Guidance material that has been prepared by OHS regulatory authorities provides assistance to those involved in the labour hire industry about meeting their statutory responsibilities to such employees. That material provides a useful model for the preparation of similar guidance material for educational authorities.

4.3 *Liability of Employees of Educational Institutions*

What statutory responsibility do teachers, principals and other employees of an educational institution have for the safety of a student placed in a workplace as part of a SWL program?

All Australian OHS statutes place an obligation on “employees”. However, the nature of the duty imposed varies considerably from jurisdiction to jurisdiction. In New South Wales, section 20(1) of the *Occupational Health and Safety Act 2000*, limits the duty to “people who are at the employee’s place of work”. Thus, in a workplace placement situation, where the relevant risk to safety will arise at a place other than where the teacher or principal works, there will be no liability.

By contrast, section 25 of the *Occupational Health and Safety Act 1985* (Vic.) is not so limited.²⁵ An employee’s responsibilities may extend beyond

the geographical confines of their workplace. However, there must be a demonstrated failure “to take reasonable care” for the safety of another person. In practice, a teacher or principal who applies the policies and practices of their employer, and acts in accordance with training received, in relation to the placement of students as part of a SWL program, will not be exposed to personal liability under OHS law.

4.4 Application to Host Employers

A student placed with a host employer will be owed a duty under section 8 of the NSW Act, section 22 of the Victorian Act, and the equivalent provisions in other State and Territory OHS laws. In Queensland, section 10(3) of the *Workplace Health and Safety Act 1995*, deems the ‘host employer’ to be the employer of a “trainee” employed by a “group training scheme” or “apprentice” when they are “engaged to do work for the host employer”. Similarly, apprentices and “industrial trainees” are deemed to be “employees” by section 3(1) of the *Occupational Safety and Health Act 1984* (WA).

Irrespective of whether the student is an “employee” of the host employer or not, the duty will be to take all (reasonably) practicable steps to ensure that the student is not exposed to risks to their health or safety that arise from the conduct of the employer’s undertaking.

In the *NMIT* case, the Court had no doubt that the student undertaking a practical placement was involved in the conduct of the host employer's undertaking (reasons, page 8).

In most cases, this will mean that the host employer should adopt the same approach to induction, information provision, instruction and training as it does to its employees who are performing the same or similar work.

Appropriate supervision arrangements with the placing education institution will need to be established. The host employer should discuss supervision requirements of each individual student with the educational institution that is placing the student. There should be an agreed process of reporting the progress of the student and of raising any concerns including safety concerns.

4.5 Application to Registered Training Organisations

Under State and Territory law, a provider of vocational education or training may apply to a government Training Body for registration.²⁶ If successful, it will be a Registered Training Organisation ('RTO'). The role of an RTO is to provide vocational education or training as part of the framework of accredited training in Australia. An RTO may be a TAFE College, a government body or a private employer.

If, as part of the provision of vocational education and training, an RTO places a student into a workplace, the RTO is legally in the same position as

an educational institution. The discussion and summary points in section 4.2 above are applicable.

4.6 School-based New Apprenticeships

ECEF defines new apprenticeships and school-based new apprenticeships as follows:

New Apprenticeships

New Apprenticeships is an umbrella term for the new national apprenticeship and traineeship arrangements that came into effect on January 1 1998. New Apprenticeships combine practical paid work with structured off-the-job training to give young people nationally recognised qualifications across an increasing range of industries. Traditionally, apprenticeships take three to four years to complete and traineeships last for one to two years. New Apprenticeships are 'competency based'. This means it may be possible for a New Apprentice to complete their training sooner if they have reached the skill level required. It is even possible to start a New Apprenticeship while still at school. New Apprenticeships are covered by formal agreements known as either 'Training Agreements' or 'Contracts of Training'. These agreements set out the training and supervision an employer must provide for the employee, as well as the employee's obligations as a New Apprentice.

School-based New Apprenticeships

School-based new apprenticeships allow students to start a New Apprenticeship while still attending school. The qualifications gained through school-based New Apprenticeships are nationally recognised.

As ECEF acknowledge, apprenticeships are governed by formal training agreements. In Victoria, for example, a training agreement is legally

ineffective unless approved by the State Training Board. It is an offence for an employer to employ a person under a training agreement unless the employer is approved by the Board to do so.²⁷

Before approving an employer to employ a person under a training agreement, the Board must be satisfied of the appropriateness of the employer (section 53(2)). The Board may impose a wide range of conditions as part of its approval of an employer and clearly could impose conditions for the protection of the health and safety of an apprentice (see section 53(3)).

As noted on page 4 of this report, one of the key differences between an apprenticeship on the one hand and work experience or a SWL program on the other, is that, subject to any statutory modifications (such as under the Queensland and Western Australian OHS laws), an apprentice is an employee of the host employer and the others are not. This means that an employer which employs a person under a contract of training must meet all of the obligations that employer has to its employees in relation to ensuring their health and safety. In addition, the employer must meet any statutory obligations imposed on them by the VET statute,²⁸ and any obligations imposed by the training contract itself.

As far as the school involved in a school-based new apprenticeship is concerned, its obligations to one of its students who is undertaking an apprenticeship will be similar to that of an educational institution falling within the description in section 4.2 above with one important difference. That difference is that the school could reasonably rely on the vetting of the

employer concerned by the State Training Board in jurisdictions which contain legislative requirements similar to the Victorian provisions discussed in the previous paragraphs.

5 SUMMARY AND CONCLUSIONS

This report has examined the complex legal issues that arise in the context of placements of students in workplaces by educational authorities as part of the provision by those authorities of vocational education and training.

It has been concluded that an educational authority does owe a duty of care to such a student both at common law and under OHS legislation to take all reasonable steps to ensure the protection of the student's health and safety.

The duty is analogous, but not identical, to that owed by a labour hire company which places its employees in the workplaces of third parties. Australian courts have determined that those duties are onerous. Australian OHS regulatory authorities have developed guidance material to assist those in the labour hire industry to meet those obligations. That material provides a useful model for the preparation of similar guidance material for those involved in work placements of students.

One difficult issue that needs to be addressed in any such material is what, if any, guidance should be given to educational authorities about visiting workplaces before placing students there as part of meeting their duty of

care. In my opinion, this can only be assessed on a case-by-case basis by the educational institution concerned when undertaking its risk assessment.

Relevant considerations will include:

- The nature of the work to be performed, i.e. what risks arise at the workplace?
- The age and characteristics of the student(s);
- The previous record of the employer; and
- The systems and policies in place at the employer for the protection of health and safety.

* The table is attached as Schedule A.

¹ www.ecef.com.au/web/home.nsf/ECEF/glossary

² For a detailed discussion of the common law liability of schools to students, see Ramsay and Shorten, 1996, ch.6; Edwards et al, 1997, ch. 6; and Heffey, 1985.

³ *Commonwealth v Introvigne* (1982) 150 CLR 258.

⁴ *Commonwealth v Introvigne* (1982) 150 CLR 258 at 271.

⁵ *Geyer v Downs* (1977) 138 CLR 91.

⁶ see *Ramsay v Larsen* (1964) 111 CLR 16 at 27, described as “somewhat unreal” by Murphy and Aickin JJ in *Geyer v Downs* (1977) 138 CLR 91 at 102.

⁷ Edwards et al, 1997, p.99.

⁸ *Commonwealth v Introvigne* (1982) 150 CLR 258 at 265-6

⁹ 150 CLR 258 at 266.

¹⁰ (SC(NSW), Common Law Division, Yeldham J, 7 October 1982, unreported).

¹¹ See the cases discussed in Ramsay and Shorten, 1996 at p. 179.

¹² Ramsay and Shorten, 1996 at p. 179

¹³ *Occupational Health and Safety Act 1985* (Vic.); *Occupational Health and Safety Act 2000* (NSW); *Occupational Health and Safety Act 1984* (WA); *Occupational Health, Safety and Welfare Act 1986* (SA); *Workplace Health and Safety Act 1995* (Tas); *Workplace Health and Safety Act 1995* (Qld); *Work Health Act 1986* (NT); *Occupational Health and Safety Act 1989* (ACT).

¹⁴ see generally, Creighton and Rozen, 1997, paragraphs [110]-[116].

¹⁵ see generally on the ‘general duties’, Johnstone, 1997, chs 5 and 6.

¹⁶ Fines totaling \$2m were imposed on Esso Australia Pty Ltd by the Supreme Court of Victoria in July of 2001: *DPP v Esso Australia Pty Ltd* [2001] VSC 263.

¹⁷ *Occupational Health and Safety Act 1984* (WA), section 21; *Occupational Health, Safety and Welfare Act 1986* (SA), section 22; *Workplace Health and Safety Act 1995* (Tas), section 9; *Workplace Health and Safety Act 1995* (Qld), section 28(2); *Work Health Act 1986* (NT), section 29(1)(b); *Occupational Health and Safety Act 1989* (ACT), section 28.

^{17A} see generally Tooma, 2001: [1.8.35].

¹⁸ see Edwards et al, 1997, ch. 3

¹⁹ (1998) 87 IR 268

²⁰ See Tooma, 2001, pp 28-29.

²¹ *Slivak v Lurgi* (2001) 75 ALJR 481 at paragraphs [51]-[53] (Gaudron J) and at [87] (Callinan J).

^{21A} The applicable legal principles are usefully summarised in the judgement of Marks J of the Industrial Relations Commission of NSW in *Workcover Authority of NSW (Inspector May) v Swift Placements Pty Ltd* (1999) 88 IR 53.

²² In New South Wales: *Workcover Authority of NSW (Inspector Ankucic) v Drake Personnel (No 1)* (1997) 89 IR 374; *Workcover Authority (NSW)(Inspector Dubois) v Industry Staffing Services Pty Ltd* (1999) 89 IR 430; *Drake Personnel v Workcover Authority of NSW (Inspector Ch'ng)* (1999) 90 IR 432; *Workcover (NSW) v Labour Co-operative Ltd (No 1)* (2001) 108 IR 283. In Victoria: *Reiss (VWA) v Drake Personnel Ltd* (unrptd, 7 December 2000, Mr Walter M).

²³ *Workcover (NSW) v Labour Co-operative Ltd (No 1)* (2001) 108 IR 283 at 320-1

²⁴ *Asbury v The Council of the Northern Melbourne TAFE* (unreported, Melbourne Magistrates' Court, Reynolds M, 7 March 2002; a copy of the Court's reasons for decision is attached as 'Schedule C' to this report).

²⁵ The precise meaning of section 25 is somewhat unclear: see Creighton and Rozen, 1997, paragraph [584].

²⁶ See, for example, section 23 of the *Victorian Qualifications Authority Act 2000* (Vic.).

²⁷ Section 53, *Vocational Education and Training Act 1990* (Vic.).

²⁸ See, e.g. section 54, *Vocational Education and Training Act 1990* (Vic.).

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