



GUIDELINES ON OCCUPATIONAL SAFETY AND HEALTH ACT 1994 (ACT 514)

**DEPARTMENT OF OCCUPATIONAL SAFETY AND HEALTH
MINISTRY OF HUMAN RESOURCES
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2006**

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PREFACE

Occupational Safety and Health Act (OSHA) was enacted on 25th February 1994 with the intent to ensure safety, health and welfare of all persons at all places of work. It was promulgated based on the self regulation concept with the primary responsibility of ensuring safety and health at the workplace lying with those who create the risks and work with the risks. The Act also provides for a consultative process at the policy level with the establishment of National Council for Occupational Safety and Health. This consultative process extends to where safety and health programs are implemented with both employers and employees representative as members of safety and health committee.

The Act contains 67 sections, divided into 15 parts and appended with 3 schedules. The first three parts state the objects of the Act and provide the infrastructure for appointment of officers and the National Council. The essences of the Act are the provisions in Part IV to VI. These parts provide for the general duties for those who create the risks e.g. employer, self-employed person, designer, manufacturer, supplier, etc and those who work with the risks i.e employees. How the Act is to be implemented and enforced are stipulated in other parts.

It is hoped that this document would contribute to the promotion of safety and health culture in Malaysian workplaces. This guideline is published with the intention to provide detail information and assistance to those enforcing the Act. It may also be useful for those working towards ensuring compliance with the provisions of the Act. Grey areas in the Act have been identified and guidance given on them.

Director General
Department of Occupational Safety and Health
2006

FOREWORD

These guidelines have been produced as a result of consultation project (Guidelines on OSHA 1994). The guidelines have been developed in consultation with key players in safety and health in the country. These included safety and health professionals, lawyers, representatives from government agencies, universities, employer federations and trade unions. Input from the Department of Occupational Safety and Health (DOSH) was obtained throughout the process. Assistance of all those who contributed to these guidelines is very much appreciated.

Prof. Dr. Krishna Gopal Rampal
Dr. Mohamad Nizam Jemoin
Universiti Kebangsaan Malaysia

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NAME	INSTITUTION
1. Prof. Kamal Halili Hassan	Universiti Kebangsaan Malaysia
2. Nurul Hafizah Rasabar	Universiti Kebangsaan Malaysia
3. Zulfa Azlin Bt. Zullkifi	Universiti Kebangsaan Malaysia
4. Mohd Sophian B. Zakaria	Universiti Kebangsaan Malaysia
5. Mohd Faeizal B. Mahamad	Universiti Kebangsaan Malaysia
6. Edmund Milkiu Balthazar	Universiti Kebangsaan Malaysia
7. Dr. Nor Aisyah Abu Bakar	Universiti Kebangsaan Malaysia
8. Dr. Rohani Mat Bah	Universiti Kebangsaan Malaysia
9. Cik Ng Yi Wen	Universiti Kebangsaan Malaysia
10. Dr. Anita Abd. Rahman	Universiti Kebangsaan Malaysia
11. En. Kang Eng Thye	Universiti Kebangsaan Malaysia
12. En. Sazman Wahab	Universiti Kebangsaan Malaysia
13. En. Ariffin Omar	Universiti Kebangsaan Malaysia
14. Cik Ruzita Shariff	Universiti Kebangsaan Malaysia
15. En. Rosnan Hamzah	Universiti Putra Malaysia
16. Pn. Muaziah Bt. Abd Rahman	DOSH
17. En. Majahar Abd Rahman	DOSH
18. En. Omar Mat Piah	DOSH
19. Dr. Abed Onn	SOEM (MMA)
20. Dr. Jagdev Singh	SOEM (MMA)
21. Dr. Abu Hassan Samad	Exxon Mobil
22. Dr. Sirajuddin Hashim	Kementerian Kesihatan Malaysia
23. Dr Nuing Jeluing	Sarawak Shell Sdn. Bhd.
24. Dr. Agus Salim	NIOSH Malaysia
25. Puan. Hjh Maimunah Khalid	NIOSH Malaysia
26. En. Fadzlul Haq Abd. Radzi	NIOSH Malaysia
27. Ir. Ahmad Nordin	Liyods Registered Technical Services
28. Dr. Mohd Azman	SOCOSO
29. En. N g Wei Khiang	HSE Practitioner
30. Mr. K. Nadasapillay	Malaysian Trade Union Congress
31. En. Ludin Embong	Golden Hope Plantation
32. En. Anis Fahmy	Malaysian Employers Federation
33. En. Veerasingam	BP Companies in Malaysia
34. En. Mazlan Kassim	Federation of Malaysian Manufacturers
35. Md. Azar Irwan Moh. Arifin	Attorney General Chamber
36. Mr. Saroop Rampal	Norendra & Yap
37. Cik Nur Fauziah Mokhtar	Kementerian Sumber Manusia

SCOPE AND APPLICATION

The guidelines on the Occupational Safety and Health Act 1994 are intended to explain and clarify provisions in each section of the Act. These guidelines shall provide assistance to Occupational Safety and Health Officers in carrying out their tasks of enforcing the Act in workplaces covered under the Act. The guidelines could also be used by employers, self employed persons, occupiers, designers, manufacturers, suppliers, employees and trade unions to understand and carry out their duties stipulated in the Act.

The guidelines include:

1. All sections of OSHA 1994.
2. Explanation on all sections of OSHA 1994.
3. Relevant examples of how selected provisions are to be implemented.
4. Examples of case law in occupational safety and health (local and overseas).

While the Act is an umbrella act to protect the safety and health of all persons at work and those affected by persons at work, the philosophy is one of self-regulation. Employers as a rule must follow the provisions of the Act, Regulations and relevant Codes of Practice and Guidelines (or at least be doing something which is as good) and follow best practice and advice. The employees too must comply with the provisions of the Act and cooperate with employers in their attempt to ensure a safe and healthy workplace. This is in line with the philosophy of the Act that is: responsibility for safety and health in the workplace lies with those who create the risks (employers) and those who work with the risks (employees).

By having a clearer explanation of the provisions of the Act, it is hoped that a more uniform understanding occurs among enforcement officers and also among those attempting to achieve compliance with the Act. It must be realized by all concerned that it is a breach of the criminal law when certain provisions of the Act are infringed. Those injured or diseased may bring about charges in civil courts when there is a breach of statutory duty under certain provisions of the Act.

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OCCUPATIONAL SAFETY AND HEALTH ACT 1994

ACT 514

An Act to make further provisions for securing the safety, health and welfare of persons at work, for protecting others against risks to safety or health in connection with the activities of persons at work, to establish the National Council for Occupational Safety and Health, and for matters connected therewith.

(25th February 1994)

BE IT ENACTED by the Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Rakyat in Parliament assembled, and by the authority of the same, as follows:

PART I

PRELIMINARY

1. Short title and application

- (1) This Act may be cited as the Occupational Safety and Health Act 1994.*
 - (2) Subject to subsection (3), this Act shall apply throughout Malaysia to the industries specified in the First Schedule.*
- This Act shall apply throughout Malaysia to industries specified in the First Schedule.

FIRST SCHEDULE

1. Manufacturing

Manufacture: To make something into a finished product using raw materials.

Example:

- Manufacture of food, beverage and tobacco
- Textile, wearing apparel and leather industries
- Manufacture of wood products including furniture
- Manufacture of paper and paper products, printing and publishing
- Manufacture of chemicals
- Non-metallic industry
- Basic metal industries
- Metal, machinery and equipment industry
- Other manufacturing industries

2. Mining and Quarrying

Mining: The process or business of obtaining or extracting any mineral from above or below the ground or in or below the sea.

Example:

- Coal mining
- Crude petroleum and natural gas production
- Metal mining

Quarrying: To extract stone or other mineral from a quarry.

Example:

- Stone quarrying, clay and sand pits

3. *Construction*

Construction : The activity or process of construction, extension, installation, maintenance, renewal, removal, renovation, dismantling or demolition of any building, any road, any drainage, any electrical works, any bridge and works which include site clearance, soil investigation etc. Broader definition can be obtained from the Construction Industry Development Board Malaysia Act 1994 (Act 520).

Example:

- General contracting including civil engineering
- Special trade contracting

4. *Agriculture, Forestry and Fishing*

Agriculture: The occupation or business of cultivating the land, producing crops, harvesting timber and raising livestock.

Example:

- Paddy farming
- Palm Oil plantation
- Poultry farming

Forestry: The planting of trees or managing forests.

Example:

- Forestry and logging

Fishing: The sport, industry or occupation of catching fish.

Example:

- Ocean and coastal fishing

5. *Utilities*

a) *Electricity*

Electricity: Supply of electric current especially when used as a source of power.

b) *Gas*

Gas: Supply of combustible gaseous substance such as natural gas or coal gas, used as a fuel.

c) *Water*

Water: Supply of water to a house, town or region.

d) *Sanitary services*

Sanitary: Relating to public health, especially general hygiene and the removal of human waste through the sewage system.

Example:

- Sanitary services

6. *Transport, Storage and Communications*

Transport: To carry people or goods from one place to another, usually in a vehicle.

Example:

- Lorry
- Bus
- Taxi
- Container transportation

Storage: The activity of storing something, or the condition of being stored.

Example:

- Warehouse

Communication: A system for sending and receiving message, as by post, telephone or telegram. Any method by which human beings pass information to another, including publishing, broadcasting and telecommunications. The art and technology of communicating in all its form.

Example:

- Radio
- Television

7. *Wholesale and Retail Trades*

Wholesale: The business of buying and selling goods in quantity at discounted prices, usually direct from manufacturers or distributors, in order to sell them on to the customer.

Example:

- Food, drink and tobacco
- Household and personal goods
- Motor vehicles, motorcycles, petrol, etc

Retail trade: The buying and selling of goods in small amounts directly to customers, example in shops.

Example:

- Food, drink and tobacco
- Household and personal goods
- Motor vehicles, motorcycles, petrol, etc

8. *Hotel and Restaurants*

Hotel: A building or commercial establishment where people pay for lodging, meals and sometimes other facilities or services.

Restaurant: A place where meals and drinks are sold and served to customers and the customers have to pay.

9. *Finance, Insurance, Real Estate and Business Services*

Finance: Control of money-The business or art of managing the monetary resources of an organisation, country or industrial.

Example:

- Financial institutions

Insurance: Financial protection against loss or harm-An arrangement by which a company gives customers financial protection against loss or harm.

Real estate: Land, buildings and things permanently attached to land and buildings, also called 'realty' and 'real property'.

Example:

- Real estate management

Business Services: The occupation, work or trade in which a person is engaged in commercial, industrial, or professional dealings; the buying and selling of goods or services. Any commercial establishment such as shop or factory.

Example:

- Accounting
- Legal services
- Recreational services
- Laundry services

10. *Public Services and Statutory Authorities.*

Public services: Services provided to the public by the government.

Example:

- Public administration
- Social and related community services
- Education services
- Research and scientific institutes
- Medical, dental and other health services
- Veterinary services
- Welfare institutions
- Cultural, art and tourism services

Statutory authorities: Organisation created, defined or required by a statute.

Example:

- Local authorities
- Universities

- This Act also applies to offshore installations as included in premises defined in Section 3 (1). The Petroleum Mining Act 1966 interprets off-shore land to mean the area of the continental shelf. Under section 21 (2) of the Exclusive Economic Zone Act 1984 the government has exclusive jurisdiction over artificial islands, installations and structures in the zone and on the continental shelf, including jurisdiction with regard to customs, fiscal, health, safety and immigration law.

- (3) *Nothing in this Act shall apply to work on board ships governed by the Merchant Shipping Ordinance 1952 (Ord. 70/52), the Merchant Shipping Ordinance 1960 of Sabah (Sabah Ord. 11/60) or Sarawak (Sarawak Ord. 2/60) or the armed forces.*

- This Act is not applicable to persons working on board ships except on board of ship exempted by the Merchant Shipping Ordinance 1952 (Ord. 70/52), the Merchant Shipping Ordinance 1960 of Sabah (Sabah Ord. 11/60) or Sarawak (Sarawak Ord. 2/60). Ships include every description of vessels used in navigation not propelled by oars. Ship repair dockyard and public dry docks not covered under this Act except when the owner or ship master engaged a contractor to do the maintenance or repair work. Harbour of commerce or port is covered under this Act but not the ship anchor at the harbour or port. Under Merchant Shipping Ordinance 1952 the Minister of Transport may make port rules to ensure the safety of employees employed in ports and on ships using ports.
- For this Act the armed forces as defined in Armed Forces Act 1972 are not covered. The armed forces or His Majesty's armed forces includes the regular forces and volunteer forces of Malaysia and any other forces which may be declared by the Yang di-Pertuan Agong from time to time to be armed forces. Civilians working under Ministry of Defence are to be covered under Occupational Safety and Health Act 1994.

2. Prevailing laws

(1) *The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other written law relating to occupational safety and health.*

- Provisions of this Act are additional to other laws relating to safety and health. Other written laws relating to occupational safety and health such as the Factories and Machinery Act (FMA) 1967 are still enforceable.

(2) *In the event of any conflict or inconsistency between the provisions of this Act and that of any other written law pertaining to occupational safety and health, the provisions of this Act shall prevail and the conflicting or inconsistent provisions of such other written law shall, to the extent of the conflict or inconsistency, be construed as superseded.*

- If there is any conflict or inconsistency between the provisions of this Act and its regulations and any other written law pertaining to occupational safety and health, the provisions of this Act and its regulations shall prevail.

Example:

- Under the Factories and Machinery Act 1967, Factories and Machinery (Asbestos Process) Regulations 1986 and the Factories and Machinery (Mineral Dust) Regulations 1989, medical surveillance is to be conducted every two years. Whereas under the Occupational Safety and Health (Use and Standards of Exposure to Chemicals Hazardous to Health) Regulations 2000, they are to be carried out annually. Permissible exposure levels under the Factories and Machinery (Asbestos Process) Regulations 1986 and Factories and Machinery (Mineral Dust) Regulations 1989 differ from that under the Occupational Safety and Health (Use and Standards of Exposure to Chemicals Hazardous to Health) Regulations 2000. The Occupational Safety and Health (Use and Standards of Exposure to Chemicals Hazardous to Health) Regulations 2000 shall prevail in this case.
- Requirement to establish a safety and health committee also differ between Occupational Safety and Health Act and Factories and Machinery Act. In Occupational Safety and Health Act 1994, every employer shall establish a safety and health committee at the place of work if there are forty or more persons employed

whereas Factories and Machinery (Building Operations and Works of Engineering Construction)(Safety) Regulations 1986, require fifty or more persons. In this case Occupational Safety and Health Act 1994 shall prevail.

- In Occupational Safety and Health Act 1994, an employer shall notify any accident which has occurred or is likely to occur at the place of work whereas in Factories and Machinery Act 1967, any accident must be notified if the accident prevents the person from following his normal occupation for more than 4 days. However when an accident occurs and medical leave is given even for less than 4 days it still needs to be reported under Occupational Safety and Health Act 1994.

3. Interpretation

(1) *In this Act, unless the context otherwise requires-*

‘contract of service’ means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract;

- A contract of service is a contract between two persons where one agrees to employ another as an employee to provide a service or work or operation. A contract of service does not need to be in writing to be legally enforceable, but it is easier to prove what has been agreed upon if there is written evidence. A master and servant relationship exists (refer Ready Mixed Concrete (South East) Ltd. V. Minister of Pensions and National Insurance [1968] 2 QB 497 (pg71) case in Appendix). Refer also to Employment Act 1955 and Industrial Relations Act 1967.

‘Council’ means the National Council for Occupational Safety and Health established under section 8.

‘employee’ means a person who is employed for wages under a contract of service on or in connection with the work of an industry to which this Act applies and—

- a) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the industry, whether such work is done by the employee at the place of work or elsewhere;*
 - b) who is employed by or through an immediate employer at the place of work of the industry or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the industry or which is preliminary to the work carried on in or incidental to the purpose of the industry; or*
 - c) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;*
- Employees are workers who are directly employed by the principal employer or through an immediate employer at the place of work or whose services are let on hire under a contract of service.
 - Pertaining to trainees, the Health and Safety at Work Act 1974 (UK) through The Health and Safety (Training for Employment) Regulations 1990 have provided that trainee be

included as employees. In Malaysia apprentices are to be considered as employees. No mention has been made with regards to trainees. Hence trainee can be considered as other persons at the work place.

'employer' means the immediate employer or the principal employer or both;

- Employer under the Employment Act 1955 means any person who has entered into a contract of service to employ any other person as an employee.
- An employer would include the immediate employer or the principle employer or both.
- Employers may include owner, developer, main contractor or subcontractor if there is a contract of service to employ any other persons as an employee.

'government' means the Federal Government, the Government of a State or a local government;

'immediate employer', in relation to employees employed by or through him, means a person who has undertaken the execution at the place of work where the principal employer is carrying on his trade, business, profession, vocation, occupation or calling, or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the trade, business, profession, vocation, occupation or calling of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such trade, business, profession, vocation, occupation or calling, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer;

- Example of an immediate employer in the private sector includes labour contractors in the workplace. In the public sector or statutory body, the head of department may depending on the facts of each case be considered as an immediate employer.

'industry' means the public services, statutory authorities or any of the economic activities listed in the First Schedule;

'occupier', in relation to a place of work, means a person who has the management or control of the place of work;

'officer' means the occupational safety and health officer appointed under subsection 5(2) and includes the Director General, Deputy Directors General, Directors, Deputy Directors and Assistant Directors of Occupational Safety and Health;

'place of work' means premises where persons work or premises used for the storage of plant or substance;

- In order to define a place of work for an employee, it is important to refer in which premise he is normally working, for example:
 - Postman- post office, motorcycle and offices or homes where letters are being delivered.
 - Taxi drivers- taxi stations, taxi bay, taxi.
 - Pizza delivery boy- pizza restaurant, motorcycle, client house/offices.
 - Meter reader- vehicle, house or office.

- Roads on which they travel are included as place of work.

‘plant’ includes any machinery, equipment, appliance, implement or tool, any component thereof and anything fitted, connected or appurtenant thereto;

‘practicable’ means practicable having regard to—

- a) the severity of the hazard or risk in question;*
- b) the state of knowledge about the hazard or risk and any way of removing or mitigating the hazard or risk;*
- c) the availability and suitability of ways to remove or mitigate the hazard or risk; and*
- d) the cost of removing or mitigating the hazard or risk;*

‘premises’ include—

- a) any land, building or part of any building;*
- b) any vehicle, vessel or aircraft;*
- c) any installation on land, offshore installation or other installation whether on the bed of or floating on any water; and*
- d) any tent or movable structure;*

‘prescribed’ means prescribed by this Act or the regulations;

‘principal employer’ means the owner of an industry or the person with whom an employee has entered into a contract of service and includes—

- a) a manager, agent or person responsible for the payment of salary or wages to an employee;*
- b) the occupier of a place of work;*
- c) the legal representative of a deceased owner or occupier; and*
- d) any government in Malaysia, department of any such government, local authority or statutory body;*

- Principal employer means the owner of an industry or the person with whom an employee has entered into a contract of service.
- Principal employer would include manager, agent or person responsible for the payment of salary or wages to an employee. An agent would be a person authorized to act for another person in business etc. In the public sector, the government of Malaysia, can be considered as principle employer.

‘secretary’ means the secretary appointed under subsection 12(1);

‘self-employed person’ means an individual who works for gain or reward otherwise than under a contract of employment, whether or not he himself employs others;

- Examples of self-employed persons include hawkers, a cook in his own restaurant, a mechanic in his own workshop and a registered medical practitioner in solo practice.

‘substance’ means any natural or artificial substance, whether in solid or liquid form or in the form of a gas or vapour or any combination thereof;

- Examples of substances include natural substances such as bacteria, virus, fungi and chemicals like lead, mercury and arsenic. Artificial substances include DDT and hydrochloric acid. For examples substance like lead can exist in solid (ingot lead), liquid (molten lead) and vapour (lead fumes) forms.

‘substance for use at work’ means any substance intended or supplied for use, whether exclusively or not, by persons at work;

‘supply’, in relation to any plant or substance, means the supply by way of sale, exchange, lease, hire or hire-purchase, whether as principal or agent for another;

‘trade union’ means any association or combination of workmen or employers within the meaning of the Trade Unions Act 1959 (Act 262).

(2) *For the purposes of this Act, risks arising out of the activities of persons at work shall be treated as including risks attributable to the manner of conducting an undertaking, the plant or substances used for the purposes of an undertaking and the condition of premises so used or any part of them.*

(3) *For the purposes of this Act—*

- a) ‘work’ means work as an employee or as a self-employed person;*
- b) an employee is deemed to be at work throughout the time when he is at his place of work but not otherwise; and*
- c) a self-employed person is at work throughout such time as he devotes to work as a self-employed person.*

4. Objects of the Act

The objects of this Act are—

a) *to secure the safety, health and welfare of persons at work against risks to safety or health arising out of the activities of persons at work;*

- There are four objects of this Act to ensure the safety, health and welfare of persons at work.
- The first object intends to protect persons at work against risks to their safety and health.
- The terms safety, health and welfare can be defined as follows:
 - Safety as the absence of risk to injury.
 - Health as a state of complete physical, mental and social well-being and not merely the absence of disease.
 - Welfare of employees would include provision of first aid, drinking water, canteen, washing facilities and toilets for men and women.

b) *to protect persons at place of work other than persons at work against risks to safety or health arising out of the activities of persons at work;*

- The second object intends to protect persons other than persons at work against risks to their safety and health. Other persons at place of work would include clients, visitors and members of the public.
- c) *to promote an occupational environment for persons at work which is adapted to their physiological and psychological needs;*
- The third object intends to promote a suitable work environment that fulfills the needs of persons at work. It is intended to fit the process and workstation to the physiological and psychological needs of the employees. The work environment should be conducive to human physiology e.g working in hot environment would require appropriate rest-work regime; trolley to assist carrying of heavy weights above individuals capacity. It should also meet psychological needs of the employees e.g employee should not be overwork or underwork; an appropriate level of stressor that maximize productivity but not resulting an employee who is stressed. Sexual harassment can be considered as a psychosocial hazard in the work place.
- d) *to provide the means whereby the associated occupational safety and health legislations may be progressively replaced by a system of regulations and approved industry codes of practice operating in combination with the provisions of this Act designed to maintain or improve the standards of safety and health.*
- The final object provides the means whereby associated occupational safety and health laws may be replaced by regulations and industry codes of practice in combination with the provisions of the Act. It intends to eventually phase out traditional prescriptive approaches which are rigid and less flexible with a legislation that is flexible and able to cater for rapid changes in technology.

PART II

APPOINTMENT OF OFFICERS

5. Appointment of officers

- (1) *The Minister shall appoint a public officer to be the Director General of Occupational Safety and Health, in this Act referred to as the 'Director General', for the purpose of exercising the powers, performing the functions and discharging the duties assigned to him under this Act.*
 - (2) *The Minister may appoint, from among public officers, such numbers of Deputy Directors General, Directors, Deputy Directors, Assistant Directors and other occupational safety and health officers as may be necessary for the purposes of this Act.*
 - (3) *If for any reason the Director General is unable to exercise the powers or discharge the duties of his office, the power shall be had and may be exercised and the duties shall be discharged by the Deputy Director General.*
 - (4) *Subject to such limitations as may be prescribed by regulations made under Part XIV of this Act, an officer appointed under subsection (2) shall perform all the duties imposed, and may exercise all the powers conferred, upon the Director General under this Act, and every duty so performed and power so exercised shall be deemed to have been duly performed and exercised for the purposes of this Act.*
- The enforcement of Occupational Safety and Health Act 1994 is implemented by the Department of Occupational Safety and Health (DOSH) under the Ministry of Human Resources.
 - The purpose of appointing public officers is to ensure that all powers, functions and duties under the Act can be carried out.

6. Appointment of independent inspecting body

- (1) *The Director General may, as he deems fit, appoint a person or independent inspecting body from any of the industries to advise or assist him in carrying out the objects and purposes of this Act.*
- Under this Act the Director General has been given the authority to appoint and pay a person or independent inspecting body from any industry to advise him in carrying out the objects of the Act. For example, he may appoint an independent body to investigate major accidents and give expert opinion, or carry out medical surveillance.
- (2) *A person or an independent inspecting body appointed under subsection (1) shall be paid such allowance, fee or reimbursement as the Minister may determine.*
 - (3) *An officer appointed under subsection 5(2) and a person or an independent inspecting body appointed under subsection (1) shall be subject to the control, direction and supervision of the Director General.*

(4) *The Director General and all officers appointed under subsection 5(2), and a person or an independent inspecting body appointed under subsection (1), shall be deemed to the public servants within the meaning of the Penal Code.*

- Persons appointed under subsection 5(2) shall be considered as public servants as stated in section 21 of the Penal Code (Act 574).

7. Certificate of authorisation

(1) *The Director General shall issue to every officer appointed under this Act a certificate of authorization which shall be produced on demand to the occupier or any person in charge of a place of work which the officer intends to enter pursuant to this Act.*

- Officers appointed under this Act are to be given certificates of authorisation in order for them to perform their duties. Currently the Department of Occupational Safety and Health officers are given authorization documents. This is important to avoid any conflict and to facilitate co-operation with the officer when enforcement activities are carried out.

(2) *In the case of the Director General, his certificate of authorisation shall be issued by the Minister.*

PART III

NATIONAL COUNCIL FOR OCCUPATIONAL SAFETY AND HEALTH

8. Establishment of the Council

There shall be established a council called the 'National Council for Occupational Safety and Health'.

9. Membership of the Council

(1) The Council shall consist of not less than twelve and not more than fifteen members who shall be appointed by the Minister, of whom—

- a) three persons shall be from organizations representing employers;*
- b) three persons shall be from organizations representing employees;*
- c) three or more persons shall be from Ministries or Departments whose responsibility is related to occupational safety and health; and*
- d) three or more persons, of whom at least one shall be a woman, shall be from organizations or professional bodies the activities of whose members are related to occupational safety and health and who, in the opinion of the Minister, are able to contribute to the work of the Council.*

• The National Council for Occupational Safety and Health (NCOSH) was established under this Act. Currently the membership of NCOSH is as follows:

- Employers represented by the Malaysian Employers Federation, Federation of Malaysian Manufacturers and the Malaysian Agricultural Producers Association (MAPA);
- Employees represented by the Council of Union of Employee of Public and Commercial Sectors (CUEPACS) and the Malaysian Trade Union Congress (MTUC);
- Government representatives comprised of Deputy Minister from the Ministry of Human Resources (who is also the Chairman of the Council), the Secretary-General of the Ministry of Human Resources, one representative from the Ministry of Health, one representative from the Ministry of Local Government and one representative from the Department of Agriculture;
- Non-governmental organisations represented by a representative each from the Malaysian Society for Occupational Safety and Health (MSOSH), Universities and the Malaysian Medical Association

(2) The Minister shall appoint from among the persons mentioned in subsection (1) a Chairman and a Deputy Chairman of the Council.

- Currently, the Deputy Minister of Human Resources is appointed as the Chairman.

10. Second Schedule to apply

The provisions of the Second Schedule shall apply to the members of the Council.

Second Schedule

1. *The members of the Council shall hold office for a term of three years or for such shorter period as the Minister may specify and shall be eligible for reappointment for a maximum of two terms.*
2. (1) *A member of the Council may at any time—*
 - (a) *resign from the Council by a notice in writing to the Minister; or*
 - (b) *be removed from the Council by the Minister for permanent incapacity or other sufficient cause,*

and upon such resignation or removal the term for which he was appointed shall be deemed to have expired.

 - (2) *Where any question arises as to whether any incapacity or cause exists or whether any incapacity is temporary or permanent or any cause is sufficient, the decision of the Minister shall be final.*
3. (1) *The following persons shall be disqualified from being appointed to or being members of the Council:*
 - (a) *person who has been found or is declared to be of unsound mind;*
 - (b) *a bankrupt;*
 - (c) *a person who has been convicted of any offence involving fraud, dishonesty or moral turpitude, or any offence relating to occupational safety and health under any law made thereunder; or*
 - (d) *a person who is otherwise unable or incapable of performing the functions as a member of the Council.*
 - (2) *A member of the Council appointed under subsection 9(1) shall cease to be a member—*
 - (a) *if he fails to attend three consecutive meetings of the Council without the permission in writing of the Chairman;*
 - (b) *if he becomes disqualified under subparagraph (1); or*
 - (c) *if his appointment is revoked by the Minister.*
4. (1) *The Minister shall summon the first meeting of the Council and thereafter the Council shall meet not less than once in three months at such place as the Chairman may appoint.*
 - (2) *The Chairman shall call a meeting of the Council on the request of any two members of the Council and such request shall be in writing with the reason therefor.*
 - (3) *At any meeting of the Council the Chairman shall preside, and in his absence the members shall elect one of their numbers to preside over the meeting.*

- (4) *The quorum of the Council shall be six.*
 - (5) *If on any question to be determined by the Council there is an equality of votes, the Chairman or, in the case where the Chairman is absent, the member presiding over the meeting, shall have a casting vote.*
 - (6) *Subject to subparagraphs (3), (4) and (5) the Council shall determine its own procedure.*
 - (7) *The Council shall cause proper records of its proceedings to be kept.*
5. *There shall be paid such allowances to members of the Council for attending meetings of the Council as the Minister may determine.*
 6. *A member of the Council who has a pecuniary interest whether direct or indirect in any matter to be considered by the Council shall declare the nature of the interest at every meeting at which the matter is considered.*
 7. *No member of the Council shall incur any personal liability for any loss or damage caused by any act or omission in administering the affairs of the Council unless the loss or damage was occasioned intentionally or through recklessness or gross negligence.*
- The second schedule explains the duration of membership, criteria for disqualification, council meetings and quorums of council meeting
 - The members hold the responsibilities as Council members for a term of three years and may be reappointed for a maximum of 2 terms. The members may resign by a notice or be removed by the Minister for reasonable cause.
 - A person who has been found to be of unsound mind, bankrupt, involved in any offences or unable to carry out the functions of the Council will be disqualified. Membership from the council shall cease if a person fails to attend three consecutive meetings without permission from the chairperson.
 - The quorum of the council shall be six.

11. Powers and functions of the Council

- (1) *The Council shall have power to do all things expedient or reasonably necessary for or incidental to the carrying out of the objects of this Act.*
- (2) *The Council may, and when requested by the Minister to do so shall, carry out investigations and make reports and recommendations to him with regard to any matter relating to the objects of this Act and, in particular, but without prejudice to the generality of the foregoing provisions, with regard to—*
 - a) *changes it considers desirable to occupational safety and health legislation;*
 - b) *the improvement of the administration and enforcement of occupational safety and health legislation;*

- c) *the fostering of a co-operative consultative relationship between management and labour on the safety, health and welfare of persons at work;*
- d) *the special problems with respect to occupational safety, health and welfare of women, handicapped persons and other groups in the community;*
- e) *the establishment of adequate methods of control of industrial chemicals at a place of work;*
- f) *the statistical analysis of occupationally related deaths and injuries;*
- g) *the provision of health care facilities at a place of work;*
- h) *the fostering of the development and adoption by law of industry codes of practice related to occupational safety, health and welfare;*
- i) *the development of rehabilitation plans and facilities to assist persons injured at a place of work*

- The powers and functions of the council are as stated above.

12. Appointment of secretary to the Council

- (1) *The Minister shall appoint a public officer from the office of the Director General to be the secretary to the Council.*
- (2) *The Council may, with the approval of the Minister, arrange for the use of the services of any staff or facility of the office of the Director General.*

- The secretariat of the Council is in the offices of Department of Occupational Safety and Health.

13. Committees

- (1) *The Council may-*
 - a) *establish committees in respect of different industries for the purpose of assisting the Council to perform its functions in relation to industry codes of practice; and*
 - b) *establish such other committees as it thinks fit for the purpose of assisting the Council to perform its other functions.*
- (2) *A committee shall consist of such number of persons as may be appointed by the Council from among its members.*
- (3) *Notwithstanding the provision of subsection (2), the Council may invite any person or a representative of any organization to advise a committee established under subsection (1) in the carrying out of its functions.*
- (4) *A person appointed under subsection (2) or invited to be a member of a committee under subsection (3) may be paid such allowance as may be determined by the Council with the approval of the Minister.*

- To assist the Council in performing these functions, and in particular to carry out its duties in relation to industry code of practice, the Council is empowered to establish committees with respect to different industries, e.g. the establishment of Committee for Small and Medium Industries.

14. Annual report

The Council shall, as soon as practicable, after the 30th June but before the 31st December of each year, prepare and forward to the Minister a report of its activities for a period of twelve months ending on the 30th June of each year.

PART IV

GENERAL DUTIES OF EMPLOYERS AND SELF-EMPLOYED PERSONS

Part IV provides for general duties of employers and self employed persons to their employees (section 15) and to persons other than the employees (section 17). The duties of an occupier of a place of work to person other than his employees are stated in section 18 of the Act.

15. General duties of employers and self-employed persons to their employees

Section 15 is one of the most important sections in the Act. It states the general duties of employers and self employed persons to their employees.

(1) It shall be the duty of every employer and every self-employed person to ensure, so far as is practicable, the safety, health and welfare at work of all his employees.

- This subsection provides for the duty of every employer to ensure safety, health and welfare at work of all his employees. However in carrying out this duty the terms ‘so far as is practicable’ has been used.
- The question of practicability must take into account the severity of the risk in question, knowledge about the risk and ways to remove or reduce it, the availability and suitability of ways as well as costs to remove or reduce it. The level of knowledge that is to be expected of the employer and self employed person has to be reasonable. The cost must commensurate with the expense and inconveniences which may be caused in the process of placing the safeguards in place and measured against the consequences of failing to do so. Common practice and knowledge throughout the industry is to be taken into account when making any judgment of whether a safeguard is ‘practicable’. Further guidance on ‘practicable’ standards and ways to achieve them can be obtained from applicable regulations, approved industry codes of practice and guidelines relevant to the particular work or industry.
- The UK Act uses the phrase ‘so far as is reasonably practicable’ and Occupational Safety and Health Act 1994 uses the words ‘so far as is practicable’. In Occupational Safety and Health Act 1994 the word ‘reasonable’ is not included. The issue arises on whether both sentences have the same meaning. The meaning of these sentences has been decided in the case of *Marshall v. Gotham Co. Ltd* [1954] AC 360 (pg71)(see Appendix).
- Referring to this English case, the court had weighed the risk factors with matters such as cost, time and hardship. It seems that even when the words are different, the effect is similar because the factors to be considered by the Court in England also exist in the element in Section 3 of Occupational Safety and Health Act 1994.
- A number of cases addressing the question of reasonable practicability are described in the Appendix:
 - *Edwards v. National Coal Board* [1949] 1 KB 704 (pg71)
 - *Associated Dairies v. Hartley* [1979] I.R.L.R 171 (pg71)

- Harrison (Newcastle–under-Lyme) v. Ramsey [1976] IRLR 135 (pg72)

Example:

- An example on what is to be considered as ‘so far as practicable’ would vary in different excavation work. Excavation work can be of different depth. It can be deep or shallow. For 3 feet excavation, benching is sufficient and no shoring required. This is because the risk to injury is very low. If the excavation is very deep, benching is not sufficient and shoring is needed to be carried out although cost for shoring is very high. This is because the risk of injury is high due to occurrences like collapse or landslide.

(2) *Without prejudice to the generality of subsection (1), the matters to which the duty extends include in particular—*

a) the provision and maintenance of plant and systems of work that are, so far as is practicable, safe and without risks to health;

- This subsection requires the employer to provide and maintain plant and system of work that is safe and without risks to health.
 - ‘Provision’: means to provide, to supply or to make available.
 - ‘Maintenance’ is work that is done regularly to keep a machine, building or piece of equipment in good condition and working order. The scope of the term depends upon the context in which it is found. It may involve keeping something in efficient working order as well as in good repair. Maintenance may be of preventive nature so as to guard against a thing falling into disrepair. Systems in the workplace also need to be maintained
 - ‘Plant’ is as interpreted in the Act includes any machinery, equipment, appliance, implement or tool, any component and anything fitted, connected or appurtenant.
 - ‘Appurtenant’ are accessories to machines and equipment.
 - ‘Safe system of work’ is a system or mode of work which under the circumstances make adequate provision for the safety of employees and which, if carried out with reasonable care, will protect the employees from foreseeable risks of injury. For example, before a new system is introduced those whom they will affect should be instructed as to their purposes, trained as to their implementation and thereafter monitored to ensure that the systems put in place are actually employed in practice.
- What is meant as ‘safe place at work’ and ‘safe system of work’ have been addressed by the following cases in the Appendix:
 - Wilson v Tyneside Window Cleaning Co [1958 2 QB 110 (pg72)
 - Cook v Square D Ltd [1992] ICR 262 (pg72)
 - Speed v Thomas Swift and CoLtd [1943] KB 557 (pg72)
 - Bolton MBC v. Malrod Installations Ltd [1993] ILR 358 (pg72)

Example:

- For example a tieback in scaffolding is to be considered as part of the plant and needs to be provided. However safety belts are part of personal protective equipment and not part of the plant.
- Example of system of work is provision of system for working in confine space. There must be standard operating procedures in place. Guidelines on working in confined space by the Department of Occupational Safety and Health should be followed.
 - b) the making of arrangements for ensuring, so far as is practicable, safety and absence of risks to health in connection with the use or operation, handling, storage and transport of plant and substances;*
- There is no definition of making ‘arrangement’ in this Act. Under this paragraph, arrangements in connection with use and operation, handling, storage and transport of plant and substance need to be made. There is a need to establish procedure, program and system to ensure safety and health.
- Making arrangements include procedures to carry out the task, training, inspection and audit and finally enforcement by the employer.
- A case addressing this issue is described in the Appendix:
 - Wright v. Dunlop Rubber Co. [1972] 13 KIR 255 (pg73)

Example:

- Example of making arrangement can be seen in using a forklift. There must be procedures on how to start, handle, transport, and store the forklift after using it. Training must be provided to make the employee familiar with the task carried out and the evidence of the training such as license or certificate of competency is very important. Employer should do an inspection and audit on the arrangements. Finally employer must enforce the arrangement to ensure all employees follow the requirements.
 - c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is practicable, the safety and health at work of his employees;*
- Under this paragraph, employers are required to provide information, instruction, training and supervision so that safety and health of his employees is ensured.
- Occupational safety and health information means factual material about occupational and safety hazards and precautionary, preventive, response, mitigative and other measures for securing occupational safety and health.
- Occupational safety and health instruction means telling people at work what they should and should not do to secure their safety and health while at work or otherwise at a place of work.
- Occupational safety and health training means helping people at work learn how to do what they should do for the same purpose, which may include, where appropriate, providing occupational safety and health information and instruction.

- Supervision means manage, watch and direct people at work to ensure that they follow instructions with regards to occupational safety and health.
- Information, instruction, training and supervision needs to be provided to ensure compliance.
- A case addressing this issue is described in the Appendix:
 - R v. Swan Hunter Shipbuilders [1981] ILR 831 (pg73)

Example:

- An example of information, instruction, training and supervision in a laboratory are as follows. Laboratory workers are exposed to numerous chemicals. Provision of information such as CSDS, safe working procedure, emergency procedure and effect of these chemicals must be made known to employees. Instruction such as direction on dos' and don'ts in laboratory is important for example no smoking in the lab. Training on handling of chemicals must be provided. Employers must keep the evidence of training. Supervision by the employers ensures employees follow the procedures in the laboratory.

d) so far as is practicable, as regards any place of work under the control of the employer or self-employed person, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of the means of access to and egress from it that are safe and without such risks;

- This subsection requires the employer to ensure conditions in any place of work under his control are safe and healthy. This will include ensuring entrances into these places of work and ways to exit from them are maintained at all times. An example of maintaining the access and egress is to ensure that it is clear from anything that could interfere or block the entrance or exit.

e) the provision and maintenance of a working environment for his employees that is, so far as is practicable, safe, without risks to health, and adequate as regards facilities for their welfare at work.

- This subsection requires the employer to provide and maintain a working environment (surrounding, condition or circumstance at work) that is safe and healthy.
- The working environment may include:
 - The workplace itself e.g. building, structure, vehicle.
 - All plant at the workplace
 - The physical environment e.g. lighting, ventilation, dust, heat, noise
 - The psychological environment e.g. mental stressor.
- The employer is also required to provide adequate welfare facilities at work for his employees.

Example:

- The working environment in the workplace would include both the physical environment as well as the psychosocial environment. For example in the workshop with employees with both Malaysian and foreign

employees, the physical environment (noise, lighting, ventilation) should be safe and healthy and the psychosocial environment would be to establish a good relationship between employees from the different countries and to prevent conflict among them. The working environment must be free of anything which may cause injury, disease or death. The working environment needs to be maintained by proper means such as by good housekeeping.

(3) *For the purposes of subsections (1) and (2)—*

a) ‘employee’ includes an independent contractor engaged by an employer or a self-employed person and any employee of the independent contractor; and

- Independent contractor is a contractor who works on his own and is paid for services rendered. For example, a contractor for renovation work would be an independent contractor. The persons hired to do renovation work would be an employee of the independent contractor.

b) the duties of an employer or a self-employed person under subsections (1) and (2) extend to such an independent contractor and the independent contractor’s employees in relation to matters over which the employer or self-employed person-

(i) has control; or

(ii) would have had control but for any agreement between the employer or self-employed person and the independent contractor to the contrary.

16. Duty to formulate safety and health policy

Except in such cases as may be prescribed, it shall be the duty of every employer and every self-employed person to prepare and as often as may be appropriate revise a written statement of his general policy with respect to the safety and health at work of his employees and the organization and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all of his employees.

- Under this section, the duty to formulate safety and health policy shall apply to all employers or self employed persons except those who have undertaking of not more than five employees which have been stated in Occupational Safety and Health (Employers’ Safety and Health General Policy Statements)(Exception) Regulations 1995. Employers are required to prepare a written statement of their occupational safety and health policy, organization and arrangements to carry out the policy.
- There are three components to this policy:
 - A general policy statement of employer’s commitment to safety and health outlining the overall philosophy and intent.
 - A statement of the organization for carrying out that policy- in hierarchical management structures- showing safety and health responsibilities from top management to the

shop floor. This statement should include information on persons in the organisation responsible for occupational safety and health and their duties.

- The policy should also include information on arrangements made to ensure that the policy is implemented. These arrangements should include safety and health training, inspections, accident reporting and investigations, safe systems of work, permits to work system and emergency procedures.
- Employee's involvement in formulating and reviewing the policy has been clearly stipulated in the Occupational Safety and Health (Safety and Health Committee) Regulations 1996.
- Policy should be written in language easily understood by the employees.
- Every employee should be given a copy of the policy statement and new employees can be given a copy during induction training. Safety and health training carried out by employers should include information on the policy.
- To ensure that the policy is brought to the attention of the employees, the written policy should be displayed at strategic places in the workplace for example the main entrance, general notice boards, meeting rooms etc., so that it can be seen and read by all employees.
- Since there will be changes in most organizations in terms of hazards, control measures and personnel in charge, employers are therefore required to review the policy periodically. It needs to be signed and dated by the employer (chief executive officer).
- Establishments may have SHE policies which cover all the three aspects; safety, health and environment. These policies are acceptable as long as information on organization and arrangements to ensure safety and health in the workplace are included in the policies.
- Osborne v Bill Taylor of Huyton Ltd [1982] ICR 168 (pg73) addresses the question of when to provide a written safety policy (see Appendix).

17. General duties of employers and self-employed persons to persons other than their employees

(1) It shall be the duty of every employer and every self-employed person to conduct his undertaking in such a manner as to ensure, so far as is practicable, that he and other persons, not being his employees, who may be affected thereby are not thereby exposed to risks to their safety or health.

- The employer and self-employed person have an additional duty to ensure that so far as is practicable, a person other than his employees who might be affected is not exposed to any health and safety risk.

- Hence the employer and self-employed person have a duty towards persons other than their employees that include their contractors, employees of contractors or other employer's employees temporarily visiting the premises, visitors/customers to the premises, Department of Occupational Safety and Health officers, sales person, family members and members of the public (school groups) both on his premises and within the vicinity. These persons are those who have entered the premises with permission of the employer. However for trespassers who enter without permission, they are not covered. For example, in a case where a person is killed by the collapse of a building in the course of demolition in the street, the company in control of the site can be convicted of an offence. Trespassers can be controlled by the provision of fences, barriers and warning notices of the danger such as 'no trespassing' or 'danger' around the work area. In most cases the normal precaution that should be adopted for security such as locking store cupboards and main doors and gates would also be sufficient enough for safety purposes.
- Persons who are authorized to enter premises should be considered as visitors and are covered under this Act. Those who enter the premises without permission are considered as trespassers and are not covered under this section. Under the Law of Tort, trespassing children are covered if there is an element of allurement in the area.
- Common law in England does not impose any duty on an occupier to take care for the safety of those who trespass on their property.
- Contactors themselves are responsible to ensure the safety and health of their employees and others entering the premises. Generally, the standard of protection required for visitors and others within a workplace will be similar to that given to employees. For example, machinery and substances should be used in such a way as to ensure the safety of employees, and also be sufficient to ensure the safety of non-employees.
- Occupational Safety and Health (Control of Industrial Major Accident Hazards) Regulations 1996 has illustrated clearly duties of employer or occupier to persons outside/surrounding premises. They are required to take preventive measures in order to ensure safety of their operations. Among others, they need to have an emergency response plan and provide information (as listed in Schedule 3 of the regulations) to the public.
- The following cases in the Appendix address the question of general duties of employers and self employed persons to persons other than the employees:
 - R v. Mara [1987] IRLR 154 (pg74)
 - R v. Board of Trustees of the Science Museum [1993] ILR 876 (pg74)
 - Aitchison v Howard Doris Ltd [1979] SLT (Notes) 22 (pg74)
 - R v Associated Octel Company Ltd [1996] 4 All ER 846 (pg74)
 - RMC Roadstore Products Ltd v Jester [1994] 4 All ER 1037 (pg74)

Example:

- An example of duty of employers to person other than employees would include the hospital. There are many visitors to hospitals. These individuals are at risk by exposing themselves to patients with communicable diseases. The hospital authority needs to reduce exposures as low as reasonably practicable. They need to have full proof procedure to control people entering certain sections of the hospital for example the x-ray department by providing signage and restricted access. Measures to reduce the risk for example from Tuberculosis (TB) and Severe Acute Respiratory Syndrome (SARS) will be different because the risks involved are different.
- (2) *It shall be the duty of every employer and every self-employed person, in the prescribed circumstances and in the prescribed manner, to give to persons, not being his employees, who may be affected by the manner in which he conducts his undertaking, the prescribed information on such aspects of the manner in which he conducts his undertaking as might affect their safety or health.*
- This section in prescribed cases requires employers and the self-employed to provide information to persons other than their employees as to how work activities carried out by them might affect the health and safety of these persons. For example, Occupational Safety and Health (Control of Industrial Major Accident Hazards) Regulations 1996 require specific information to be given to the members of the public who may be affected by a major accident at certain hazardous industrial activities. Another example would be those living near quarry blasting operations or building construction need to be informed of the risks associated with their activities.

18. Duties of an occupier of a place of work to persons other than his employees

- (1) *An occupier of non-domestic premises which has been made available to persons, not being his employees, as a place of work, or as a place where they may use a plant or substance provided for their use there, shall take such measures as are practicable to ensure that the premises, all means of access thereto and egress therefrom available for use by persons using the premises, and any plant or substance in the premises or provided for use there, is or are safe and without risks to health.*
- Under the Act, an occupier in relation to a place of work, means a person who has the management or control of the place of work. Based on Osborn's Law Dictionary, an occupier means a person who exercises physical control or possession of land and who has the actual use of land.
 - Under this subsection the duty of the landlord or any other person who leases or rents non domestic premises as a place of work or as a place where they may use plant or substances on the site is spelt out. This duty is owed to persons who are not his employees but who go to their premises as a place of work or use plant or substances provided for their use there. In most cases, the employer is the occupier of a place of work.
- (2) *A person who has, by virtue of a contract or lease or otherwise, an obligation of any extent in relation to—*

- (a) *the maintenance or repair of a place of work or any means of access thereto or egress therefrom; or*
- (b) *the prevention of risks to safety and health that may arise from the use of any plant or substance in the place of work,*

shall for the purpose of subsection (1) be deemed to have control of the matters to which his obligation extends.

- This subsection also recognizes that more than one person may have a certain degree of control of these premises at any one time. When an occupier makes available premises for the use of other persons, example a tenant or lessee, the measures which the occupier is required to take are based on anticipated use for which the premises have been made available. These other persons must ensure that the place of work and the means of entrances and exits are maintained. If any plant or substance is used in the place of work risk to safety and health need to be prevented.
- The main difference between section 17 and 18 are, section 17 states duties of employer and self-employed persons whereas section 18 states the duties of occupier of a place of work. Section 18 relates not to the employers but to the occupiers who are the ‘controllers’ of premises who make available non-domestic premises as a place of work to those who are not employed by them. Both the sections state duties to persons other than the employees.
- The following two cases described in Appendix address the duty of an occupier at a place of work:
 - Westminster CC v. Select Managements [1985] 1All ER 897 (pg75)
 - Austin Rover Ltd v Inspector of Factories [1990] 1 AC 619 (pg75)

Examples:

- The duties of an occupier can be clearly seen from the example of an operator of a fast food restaurant with a play area in a shopping complex. It is the responsibility of the operator of the fast food restaurant (occupier) to make available signage on the requirement of an adult to accompany children in specific age groups. The employer would also need to inform the employees about activities going on in the play area. Regular maintenance of that area needs to be carried out to ensure the safety and health of visitors. If he does not do anything and an accident occurs, he will be found liable.
- Another example is an occupier of an apartment block with domestic premises. Domestic premises would be premises occupied as a private dwelling (including garden, yard, garage) which is not used in common by the occupants of more than one such dwelling. Non domestic premises are premises other than this. A lift in a block of flats, corridor and staircases have been held to fall within the definition of non domestic premises since they are used in common by the occupants of more than one private dwelling. Hence here the occupier is responsible on safety of the common areas.

19. Penalty for an offence under section 15, 16, 17 or 18

A person who contravenes the provisions of section 15, 16, 17 or 18 shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding two years or to both.

- Under this section it is useful to understand the term ‘person’. In the Interpretation Acts 1948 and 1967, person is defined as “person” includes a body of persons, corporate or unincorporate. Therefore ‘a person’ includes:
 - natural person
 - body corporate e.g company
 - unincorporate e.g sole proprietor or partnership
- Hence the natural person, body corporate and unincorporated can be found guilty and liable to fined.

PART V

GENERAL DUTIES OF DESIGNERS, MANUFACTURERS AND SUPPLIERS

Part V of this Act provides general duties of persons who design, manufacture import or supply any plant (section 20) or any substance (21) for use at work.

20. General duties of manufacturers, etc. as regards plant for use at work

(1) *It shall be the duty of a person who designs, manufactures, imports or supplies any plant for use at work—*

(a) to ensure, so far as is practicable, that the plant is so designed and constructed as to be safe and without risks to health when properly used;

- This subsection imposes an obligation to the designers, manufacturers, importers and suppliers to ensure that a plant for use at work is designed and constructed to be safe and without risk to safety and health.
- Plant is defined under the Act as any machinery, equipment, appliance, implement or tool, any component thereof and anything fitted, connected or appurtenant thereto. Examples of plant include compressor, boiler, crane, hoist, autoclave, gas turbine, stamping machines, rolling machines and milling machines.
- Here, 'properly used' would mean that the plant is used in an appropriate (suitable) and correct manner as instructed by the designers, manufacturers, importers and suppliers. Having being given instructions, employers as well as employees must follow the instructions.

(b) to carry out or arrange for the carrying out of such testing and examination as may be necessary for the performance of the duty imposed on him by paragraph (a); and

- Designers, manufacturers, importers and suppliers are required to carry out testing and examination of the plant. Suppliers may need to carry out running test for plant before the employees use it.

(c) to take such steps as are necessary to secure that there will be available in connection with the use of the plant at work adequate information about the use for which it is designed and has been tested, and about any condition necessary to ensure that, when put to that use, it will be safe and without risks to health.

- The designers, manufacturers, importers and suppliers are required to issue instructions on proper use of the plant to the employer. The employee and employer are then required to follow the instructions.

(2) *It shall be the duty of a person who undertakes the design or manufacture of any plant for use at work to carry out or arrange for the carrying out of any necessary research with a view to the discovery and, so far as is practicable, the elimination or minimization of any risk to safety or health to which the design or plant may give rise.*

- Designers and manufacturers have the duty to carry out the necessary research to discover and eliminate or minimize any risk to safety or health which their design or plant might cause.
- (3) *It shall be the duty of a person who erects or installs any plant for use by persons at work to ensure, so far as is practicable, that nothing about the way in which it is erected or installed makes it unsafe or a risk to health when properly used.*
- Persons who erect or install any plant must ensure that it is not unsafe and does not post any risk to health when it is properly used.
- The following cases described in the Appendix relate the general duties of manufacturers, designers and suppliers:
 - West Bromwich Building Society v. Townsend [1983] ILR 257 (pg75)
 - Wright v Dunlop Rubber Co Ltd [1972] 13 KIR 255 (pg75)

Example:

- Example of responsibility of the designer would be an industrial designer is required to design a machine that is safe and without risk to health. The design for the machine is then given to the manufacturer to be used. The manufacturer than must ensure that the machine manufactured is safe and must have research done to ensure that the machine would operate safely. If the manufacturer cannot ensure that it is safe, he must inform the employer what to do to ensure the machine is operated safely and without risk to employees health. If the employer doesn't follow the instruction, the employer is then liable.

21. General duties of manufacturers, etc. as regards substances for use at work

- (1) *It shall be the duty of a person who formulates, manufactures, imports or supplies any substance for use at work—*
 - (a) *to ensure, so far as is practicable, that the substance is safe and without risks to health when properly used;*
 - This subsection states the duty of persons who formulate, manufacture, import or supply any substance for use at work.
 - Those who formulate, manufacture, import or supply must ensure that substances for use at work are safe and without risk to health when properly used, handled, processed, stored or transported by persons at work.
 - (b) *to carry out or arrange for the carrying out of such testing and examination as may be necessary for the performance of the duty imposed on him by paragraph (a); and*
 - This subsection requires that they should also make arrangement for the testing or examination of the substances.

- In some cases, for instance, where substances are further processed or repackaged, importers or suppliers will have to carry out their own test.

(c) to take such steps as are necessary to ensure that there will be available in connection with the use of the substance at work adequate information about the results of any relevant test which has been carried out on or in connection with the substance and about any condition necessary to ensure that it will be safe and without risks to health when properly used.

- They are required to make available adequate information about the substances supplied by them to users especially about any risk to which their inherent properties may cause. Information should include the results of any relevant test that had been carried out. Information on any condition needed to ensure the safety and health of employees during the use, handling, processing, storage, transportation or disposal must be available.
- For chemicals this information should include Chemical Safety Data Sheet (CSDS). Every chemical hazardous to health should be provided with CSDS and suppliers are required to comply with the provisions under the Occupational Safety and Health (Classification, Packaging and Labeling of Hazardous Chemical) Regulations 1996.
- When a particular item is regularly supplied such information as mentioned above need not necessarily accompany each delivery, if the information initially provided is still up to date. Should any new risk come to light, practicable steps must be taken to advise past as well as present customers.

(2) It shall be the duty of a person who undertakes the manufacture or supply of any substance for use at work to carry out or arrange for the carrying out of any necessary research with a view to the discovery and, so far as is practicable, the elimination or minimization of any risk to safety or health to which the substance may give rise.

- This subsection states the duty of the manufacturers and suppliers to arrange any necessary research to discover and as far as practicable to eliminate and minimize any risk to health or safety to which a substance may give rise when used, handled, processed, stored or transported.

22. Explanation to sections 20 and 21

(1) Nothing in section 20 or 21 shall be taken to require a person to repeat any testing, examination or research which has been carried out otherwise than by him or at his instance, in so far as it is reasonable for him to rely on the results thereof for the purposes of the section.

- This subsection states that these person are not required to repeat testing and examination and research which has already been carried out in so far as it is reasonable to rely on earlier results.

- In relation to the test and examination, the importers and suppliers normally could rely on the original checks carried out by the manufacturers.
- (2) *Any duty imposed on a person on any of the preceding provisions of this Part shall extend only to things done in the course of a trade, business or other undertaking carried on by him, whether for profit or not, and to matters within his control.*
- Duties imposed on persons under this part shall only apply when things are done to carry out trade or business or other undertakings and to matters under his control.
- (3) *Where a person designs, formulates, manufactures, imports or supplies any plant or substance for or to another on the basis of a written undertaking by that other to take specified steps sufficient to ensure, so far as is practicable, that the plant or substance will be safe and without risks to health when properly used, the undertaking shall have the effect of relieving the first-mentioned person from the duty imposed by the paragraphs 20 (1)(a) and 21 (a)(1) to such extent as is reasonable having regard to the terms of the undertaking.*
- This subsection gives limited powers to persons who design, manufacture, import or supply plant or substance to reduce or minimize their obligation. It enables them to get a written undertaking from the person with whom they are dealing with that the latter will take specific steps to ensure that plant or substance will be safe and without risk to health. The terms of the undertaking must be reasonable.
- (4) *Where a person (hereinafter referred to as the ‘ostensible supplier’) supplies any plant or substance for use at work to another (hereinafter referred to as the ‘customer’) under a hire-purchase agreement, conditional sale agreement or credit-sale agreement, and the ostensible supplier—*
- (a) *carries on the business of financing the acquisition of goods by others by means of such-agreement; and*
 - (b) *in the course of that business acquired his interest in the plant or substance supplied to the customer as a means of financing its acquisition by the customer from the third person (hereinafter referred to as the ‘effective supplier’)*
- the effective supplier and not the ostensible supplier shall be treated for the purposes of this Part as supplying the plant or substance to the customer, and any duty imposed by sections 20 and 21 on suppliers shall accordingly fall on the effective supplier and not on the ostensible supplier.*
- This subsection clarifies the role of ostensible and effective supplier. An ostensible supplier would be financiers or bank who would finance the acquisition of a plant or substance from a third person (‘effective supplier’). The effective supplier would be liable if there are safety and health risks.
- (5) *for the purposes of this Part a plant or substance is not to be regarded as properly used where it is used without regard to any relevant information or advice relating to its use which has been made available by a person by whom it was designed, manufactured, imported or supplied.*

- This subsection provides certain defence to manufacturer, importer, designer or supplier. The term to be understood here is ‘properly used’. ‘Properly used’ means that employees cannot be protected unless they follow and work strictly according to instructions and advice made available by manufacturer, importer, designer or supplier.

23. Penalty for an offence under section 20 or 21

A person who contravenes the provisions of section 20 or 21 shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding two years or to both.

- Body of person or body corporate or unincorporate who fails to comply with these provisions shall be guilty of an offence and shall on conviction, be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding two years or to both.

PART VI

GENERAL DUTIES OF EMPLOYEES

Part VI provides general duties of employees at work.

24. General duties of employees at work

- This section provides for general duties of employees at work. These duties bear criminal sanction for non-compliance and therefore an employee who fails to comply with it may be prosecuted.

(1) *It shall be the duty of every employee while at work—*

(a) to take reasonable care for the safety and health of himself and of other persons who may be affected by his acts or omissions at work;

- This subsection provides for the duty of the employee to take reasonable care for the safety and health of himself and other persons at work who might be affected.
- The requirement to discharge reasonable care would vary according to the status of the employee. The unskilled employee could be liable for intentional dangerous activity at work while the senior manager would be liable for professional judgment. Duty of reasonable care would be judged from his level of training and is to be based on the standard of reasonable care that is to be expected from the person.
- The following cases in the Appendix address the question of the duties of employee in the context of taking reasonable care for the safety and health of himself:
 - Hamzah D494 & Ors v Wan Hanafi bin Wan Ali [1975] 1 MLJ 203 (pg75)
 - Abdul Rahim b. Mohamad v Kejuruteraan Besi Dan Pembinaan Zaman Kini [1998] 4 MLJ 323 (pg76)

(b) to co-operate with his employer or any other person in the discharge of any duty or requirement imposed on the employer or that other person by this Act or any regulation made thereunder;

- An employee is required to cooperate with the employer and other person in discharging his duties.
- Co-operation between employees and employer and other persons at work under the Act is essential. This is to enable all the requirements under the Act be complied with. This is needed to establish a safe and healthy workplace.
- If an employer has set up a safe system of work and has done all that is reasonable to maintain it, then any employee who through his misconduct endangers himself would be considered as non-cooperative.

(c) to wear or use at all times any protective equipment or clothing provided by the employer for the purpose of preventing risks to his safety and health; and

- Employee should wear or use personal protective equipments or clothing at all times provided by the employer. If the personal protective equipment is found not to be suitable by the employee, the employee should inform the employer with regards to the problem.

(d) to comply with any instruction or measure on occupational safety and health instituted by his employer or any other person by or under this Act or any regulation made thereunder.

- Employees are required to follow instructions. For example they should follow instructions stated in the 'Safe Operating Procedure' provided by employers.

(2) A person who contravenes the provisions of this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding three months or to both.

25. Duty not to interfere with or misuse things provided pursuant to certain provisions

A person who intentionally, recklessly or negligently interferes with or misuses anything provided or done in the interests of safety, health and welfare in pursuance of this Act shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding two years or to both.

- A person is not to intentionally interfere with or misuse anything that has been provided in the interest of health, safety and welfare of employees and other persons at work. Misuse can apply both to plant and substance as well as system, procedure and rules. Person here includes natural persons, body corporate or unincorporate.
- Under this section the terms 'intentionally', 'recklessly' and 'negligently' need to be understood.
- Intentional: Done on purpose.
- Recklessly: Regardless of consequences or danger
- Negligently: Lack of proper care or culpable carelessness
- Interfere: Meddle, intervene, obstruct or be an obstacle.
- Misuse: Apply to wrong purpose or improper use.
- The following cases in Appendix explain the meaning of the terms 'intentionally', 'recklessly' and 'negligently':
 - Govinda Mudaliar Sons Govindasamy [1967] 2 MLJ 5 (pg78)

- Yap Liow See v Public Prosecutor [1937] MLJ 225 (pg78)
- Anthonymsamy v Public Prosecutor [1956] MLJ 247 (pg78)

Example:

- In a case of a machine with guarding, the employee would not be injured unless he deliberately puts his hand into the rollers or when he removes the guarding rendering it unsafe. By removing the guarding the employee has deliberately exposed himself to risk and he is liable to be charged under this section.
- For substances this would occur when user ignores instructions in the Chemical Safety Data Sheet.

26. Duty not to charge employees for things done or provided

No employer shall levy or permit to be levied on any employee of his any charge in respect of anything done or provided in pursuance of this Act or any regulation made thereunder.

- The employer must not charge his employees for providing personal protective equipments or other requirements of the law. For example the employee cannot be required to pay for personal protective equipments (e.g. safety boots, goggles, face mask, gloves or safety helmet) and employees welfare facilities (e.g. first aid box).

27. Discrimination against employee, etc.

(1) *No employer shall dismiss an employee, injure him in his employment, or alter his position to his detriment by reason only that the employee—*

- (a) *makes a complaint about a matter which he considers is not safe or is a risk to health;*
- (b) *is a member of a safety and health committee established pursuant to this Act; or*
- (c) *exercises any of his functions as a member of the safety and health committee.*

- An employee shall not be dismissed or be subject to a demotion if he makes a complaint about safety and health matters at the place of work or when he exercises his functions as a member of the safety and health committee in the workplace.

(2) *No trade union shall take any action on any of its members who, being an employee at a place of work—*

- (a) *makes a complaint about a matter which he considers is not safe or is a risk to health;*
- (b) *is a member of a safety and health committee established pursuant to this Act; or*
- (c) *exercises any of his functions as a member of a safety and health committee.*

- Trade union must not take any action on its members who carry out their functions as a member of the safety and health committee. This is to allow the employee to carry out their function as a committee member independently.

- (3) *An employer who, or a trade union which, contravenes the provisions of this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to a term of imprisonment not exceeding one year or to both.*
- (4) *Notwithstanding any written law to the contrary, where a person is convicted of an offence under this section the Court may, in addition to imposing a penalty on the offender, make one or both of the following orders:*
- (a) *an order that the offender pays within a specific period to the person against whom the offender has discriminated such damages as it thinks fit to compensate that person;*
 - (b) *an order that the employee be reinstated or re-employed in his former position or, where that position is not available, in a similar position.*

PART VII

SAFETY AND HEALTH ORGANISATIONS

28. Medical surveillance

- (1) *Where it appears to the Minister that in any of the industries or class or description of industries—*
- (a) cases of illness have occurred which he has reason to believe may be due to the nature of the process or other conditions of work;*
 - (b) by reason of changes in any process or in the substances used in any process or, by reason of the introduction of any new process or new substance for use in a process, there may be risk of injury to the health of persons employed in the process;*
 - (c) persons below the age of sixteen years are or are about to be employed in work which may cause risk of injury to their health; or*
 - (d) there may be risk of injury to the health of persons employed in any of the occupations specified in the Third Schedule, or from any substance or material brought to the industries to be used or handled therein or from any change in the conditions in the industries,*

he may make regulations requiring such reasonable arrangements as may be specified in the regulations to be made for the medical surveillance and medical examination, not including medical treatment of a preventive character, of the persons or any class of persons employed in the industries or class or description of industries.

Third Schedule

Occupations Involving Special Risk to Health

- 1. Any occupation involving the use or handling of, or exposure to, the fumes, dust or vapour of silica, asbestos, raw cotton dust, lead, mercury, arsenic, phosphorus, carbon bisulphide, benzene, organic-phosphate, nitrous fumes, cadmium, beryllium or pesticides.*
- 2. Any occupation involving the use or handling of, or exposure to, tar, pitch, bitumen, mineral oil including paraffin, chromate acid, chromate or bichromate of ammonium, potassium, zinc or sodium.*
- 3. Any occupation involving exposure to x-rays, ionizing particles, radium or other radioactive substances or other forms of radiant energy.*
- 4. Any occupation or process carried on in compressed air.*
 - Under this section the Minister may make regulations for medical surveillance and medical examinations for persons of any class or description of industries. He may do so when any of the conditions listed above occur.*

- Medical surveillance means the monitoring of persons for the purpose of identifying changes in health status due to occupational exposure to chemicals and other substances which are hazardous to health. It is a component of health surveillance.
 - A guideline on medical surveillance has been formulated under the Occupational Safety and Health (Use and Standard of Exposure of Chemicals Hazardous to Health) Regulations 2000 to guide and elaborate on the content and frequency of medical surveillance to be conducted. Duties of Occupational Health Doctor, employer and employee have also been stated in the guidelines.
 - Under Occupational Safety and Health (Use and Standard of Exposure of Chemicals Hazardous to Health) Regulations 2000 the health surveillance carried out includes medical surveillance conducted by an occupational health doctor.
 - Components of medical surveillance programme include:
 - a) Pre-employment and pre-placement medical examination.
 - b) Biological monitoring and biological effect monitoring.
 - c) Health effects monitoring.
 - d) Investigation of occupational disease and poisoning including workplace inspections.
 - e) Notification of occupational disease and poisoning.
 - f) Assist in disability assessment.
 - g) Return to work examination after medical removal protection.
 - h) Record keeping and monitoring.
 - The case of *Wright v. Dunlop Rubber Co.* [1972] 13 KIR 255 (pg78) described in the Appendix clarifies the duty to provide health surveillance.
- (2) *Regulations made under this section may require the medical surveillance to be carried out by persons registered by the Director General, and may prescribe the qualifications and other conditions which are to be satisfied in order to be registered for the purpose of this section.*
- This section states that regulations may be made with regards to persons carrying out medical surveillance. Under the Occupational Safety and Health (Use and Standards of Exposure to Chemicals Hazardous to Health) Regulations 2000, medical surveillance is to be conducted by doctors who have had training in Occupational Health and are registered by the Director General.
- (3) *A person who contravenes the provisions of this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding six months or to both.*

29. Safety and health officer

Occupational Safety and Health (Safety and Health Officer) Regulations 1997 have been made and provide details of registration of SHO, notification of SHO, duties of SHO and employer.

(1) *This section shall apply to such class or description of industries as the Minister may, by order published in the Gazette, specify.*

- In the Occupational Safety and Health (Safety and Health Officer) Order 1997 an employer of the class of industries listed in the order must employ a competent and qualified person to act as a safety and health officer at the work place. This subsection of the Act also requires the occupier to employ a safety and health officer.
- Under this order it is compulsory to employ a safety and health officer for an employer of any building operation or work of engineering construction where the total contract price of the project exceeds twenty million ringgit, any ship building, gas processing activity or petrochemical industry and any chemical and allied industry employing more than a hundred employees.
- It also covers any boiler and pressure vessel manufacturing activity, metal industry, wood working industry, cement manufacturing activity employing more than hundred employees and any manufacturing industry other than boiler, metal, wood and cement manufacturing employing more than five hundred employees.

(2) *An occupier of a place of work to which this section applies shall employ a competent person to act as a safety and health officer at the place of work.*

- An occupier of a place of work to which this section applies must employ a competent and qualified person to act as a safety and health officer at the work place.

(3) *The safety and health officer shall be employed exclusively for the purpose of ensuring the due observance at the place of work of the provisions of this Act and any regulation made thereunder and the promotion of a safe conduct of work at the place of work.*

- This section requires the safety and health officer to be employed exclusively for the purpose of ensuring adherence to the provisions of this Act and other regulations.
- As stated in the Occupational Safety and Health (Safety and Health Officer) Regulations 1997, among the duties of a safety and health officer to ensure that the provisions of this Act are complied with include to advise the employer or any person in charge of a place of work on the measures to be taken in the interest of the safety and health of the persons employed in the place of work.
- Safety and health officer must inspect the place of work to determine whether any plant such as machinery, equipment and appliance or substance or process or any description of manual labour used in the workplace, is of such nature liable to cause bodily injury to any person work there.
- He also needs to conduct training, supervision and promotion regarding work safety and health such as personal protective equipment training, new employee supervision and inculcate safety and health awareness among employers and employees. This training is to be tailored to meet different needs of different levels of management.

- It also the duty of safety and health officer to become a secretary to the safety and health committee as specified under subregulation 6(2) of the Occupational Safety and Health (Safety and Health Committee) Regulations 1996 and perform all the functions of the secretary as specified in that Regulation. The responsibilities of safety and health officer under these regulations include investigation of any accident, preparation of accident report, collect, analyse and maintain statistics on any accident which have occurred in a work place.
- An employer of a place of work is also required to provide the safety and health officer with adequate facilities, including training equipment and appropriate information to enable him to conduct his duties as required under the Act.
- An employer shall also direct a person who has the direct control on activity of the place of work to assist the safety and health officer in any investigation of accident, near-miss accident, dangerous occurrence, occupational poisoning and disease.
- Accident and incident record system must be updated by the safety and health officer.

Example:

- For a company that operates at many sites there may be a need to have a separate safety and health officer for each of the site. The person employed as a safety and health officer must be exclusive for safety and health work and cannot have other responsibilities. He must be available full time at the site for him to carry out the functions of safety and health officer.
- (4) *The safety and health officer shall possess such qualifications or have received such training as the Minister may, by notification in the Gazette, from time to time prescribe.*
- Under this section the Minister may gazette the qualifications safety and health officers must possess.
 - Qualification for safety and health officer are stated in Occupational Safety and Health (Safety and Health Officer) Regulations 1997:
 - holds a diploma in occupational safety and health or the equivalent from any professional body or institution, approved by the Minister, on the recommendation of the Director General;
 - has successfully completed a course of training in occupational safety and health and passed any examination for that course or the equivalent, approved by the Minister, on the recommendation of the Director General, and has a minimum of three years experience in occupational safety and health;
 - has been working in the area of occupational safety and health at least for a period of ten years; or
 - holds such other qualification or has received such training as prescribed from time to time by the Minister.

- (5) *An occupier who contravenes the provisions of this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to a term of imprisonment not exceeding six months or to both.*

30. Establishment of safety and health committee at place of work

- (1) *Every employer shall establish a safety and health committee at the place of work in accordance with this section if—*

(a) there are forty or more persons employed at the place of work; or

(b) the Director General directs the establishment of such a committee at the place of work.

- This section requires employers with 40 or more persons employed at the workplace to establish a safety and health committee. The employer may also be required to establish the safety and health committee if directed by the Director General.

- (2) *The composition of a safety and health committee established under subsection (1), the election or appointment of persons to the committee, the powers of the members of the committee and any other matter relating to the establishment or procedure of the committee shall be as prescribed.*

- Occupational Safety and Health (Safety and Health Committee) Regulations 1996 have been promulgated to provide further guidance and details for the formation, composition, function and activities of the committee.
- A safety and health committee must consist of a chairman, a secretary, representatives of employer and representatives of employees. Under the regulations the employer or his authorized manager shall be the chairman of the safety and health committee. A letter of authorization should be given to the authorized manager. Where 100 persons or less are employed, there should be at least 2 representatives each from employer and employees. Where more than 100 persons are employed, there should be at least 4 representatives each from employer and employee. Those with managerial responsibilities may be included as employer representatives while those who are not in managerial position could be included as employee representatives. It may be useful to have a union representative in the safety and health committee.
- Where a single committee is precluded from functioning effectively, a workplace may have more than one committee. For example, a large company which operates both at corporate and various sites, may need to have separate safety and health committees at corporate level and each of its sites. Another example of this would be in the construction site where there may be a need for the main contractor or subcontractors to establish separate safety and health committees. This would depend on the number of employer they have at the different sites.
- Persons employed at the place of work shall nominate the representatives to the committee.

- The representatives of employees in a safety and health committee shall be able to maintain and develop the employees' interest in establishing a safe and healthy working condition at the place of work.
 - Responsibilities of employer include monitoring the activities planned and carried out by all members of this committee.
 - The committee may remove a member for reasons as stated in the regulations including such as when he fails to attend three consecutive meetings of the committee without leave of the chairman, he has been found or declared to be unsound mind or he becomes a bankrupt.
- (3) *Every employer shall consult a safety and health committee with a view to the making and maintenance of arrangements which will enable him and his employees to co-operate effectively in promoting and developing measures to ensure the safety and health at the place of work of the employees, and in checking the effectiveness of such measures.*
- The committee functions as a platform for co-operation between employer and employees to promote and develop measures in enhancing the safety and health in workplace and to ensure the effectiveness of these measures.
- (4) *A person who contravenes the provisions of this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding six months or to both.*

31. Functions of safety and health committee

The safety and health committee established at a place of work pursuant to section 30—

- (a) *shall keep under review the measures taken to ensure the safety and health of persons at the place of work;*
 - (b) *shall investigate any matter at the place of work—*
 - (i) *which a member of the committee or a person employed thereat considers is not safe or is a risk to health; and*
 - (ii) *which has been brought to the attention of the employer;*
 - (c) *shall attempt to resolve any matter referred to in paragraph (b) and, if it is unable to do so, shall request the Director General to undertake an inspection of the place of work for that purpose; and*
 - (d) *shall have such other functions as may be prescribed.*
- This section lists the functions of the safety and health committee. Such functions have been detailed in the Occupational Safety and Health (Safety and Health Committee) Regulations 1996. The functions include:
 - Assisting in the development of safety and health rules and safe system of work and reviewing the effectiveness of safety and health programs.

- To conduct investigation on any matters on safety or health and to bring it to the attention of the employers.
 - To carry out studies on the trends of accidents, near-miss accidents, dangerous occurrences, occupational poisoning and diseases which occurs at the place of work.
 - To inspect the place of workplace at least once in every three months.
 - To discuss the observations during the inspection of the place of work and make recommendations to the employer on the remedial measures to be taken on matters that could affect the person at the place of work.
 - Report to the employer of any unsafe or unhealthy condition or practices at the place of work with recommendations for remedial action.
 - To review the safety and health policies at the place of work and make recommendations to the employer for any revision of such policies.
 - To assist the employer in any competition in connection with safety and health, to conduct talks on safety and health and any other activity which is held to promote a safe conduct of work at the place of work.
 - To form a sub-committee to assist the committee in the performance of its function.
 - The committee must meet as often as may be necessary commensurate with the risks faced at the place of work and the nature of work but shall meet at least once in three months.
 - The committee must invite any person who is involved in or has knowledge of any accidents, near-miss accidents, dangerous occurrences, occupational poisoning and disease occurred at workplace to attend any meeting to discuss it. They may also invite any person to any of its meeting to discuss any matters pertaining to occupational safety and health.
- Under this regulation the employer is required to provide training and information to safety and health committee members.
 - The safety and health committee from time to time would make recommendations to the employer on matters related to safety and health. If the employer or his authorized manager is unable to implement any of the recommendations he shall convey his reasons to the safety and health committee. If the committee does not agree with any of the reasons given the committee must make a request to the Director General to undertake an inspection of the place of work and to resolve the matter.

PART VIII

NOTIFICATION OF ACCIDENTS, DANGEROUS OCCURRENCES, OCCUPATIONAL POISONING AND OCCUPATIONAL DISEASES, AND INQUIRY

32. Notification of accidents, dangerous occurrence, occupational poisoning and occupational diseases, and inquiry

- This section imposes the responsibility of notification of accidents, dangerous occurrences and occupational poisoning and diseases on the employer and the medical practitioner.
- (1) *An employer shall notify the nearest occupational safety and health office of any accident, dangerous occurrence, occupational poisoning or occupational disease which has occurred or is likely to occur at the place of work.*
- The employer is required to notify accidents, dangerous occurrences, occupational poisoning and diseases to the nearest Occupational Safety and Health office.
 - Accident means an occurrence arising out of or in the course of work which results in fatal injury or non-fatal injury.
 - Fatal injury means injury leading to immediate death or death within one year of the accident.
 - Non fatal injury means—
 - (a) *a lost-time injury which prevent an employee from performing normal work and leads to permanent or temporary incapacity for work; or*
 - (b) *a no-lost-time injury where no work time is lost beyond that required for medical attention.*
 - The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR)(United Kingdom) defined “dangerous occurrence” as occurrence which arises out of or in connection with work that include:
 1. Collapse, overturning or failure of load-bearing parts of lifts and lifting equipment;
 2. Explosion, collapse or bursting of any closed vessel or associated pipework;
 3. Failure of any freight container in any of its load-bearing parts;
 4. Plant or equipment coming into contact with overhead power lines;
 5. Electrical short circuit or overload causing fire or explosion;
 6. Any unintentional explosion, misfire, failure of demolition to cause the intended collapse, projection of material beyond a site boundary, injury caused by an explosion;
 7. Accidental release of a biological agent likely to cause severe human illness;
 8. Failure of industrial radiography or irradiation equipment to de-energize or return to its safe position after the intended exposure period;

9. Malfunction of breathing apparatus while in use or during testing immediately before use;
 10. Failure or endangering of diving equipment, the trapping of a diver, an explosion near a diver, or an uncontrolled ascent;
 11. Collapse or partial collapse of a scaffold over five meters high, or erected near water where there could be a risk of drowning after a fall;
 12. Unintended collision of a train with any vehicle;
 13. Dangerous occurrence at a well (other than a water well);
 14. Dangerous occurrence at a pipeline;
 15. Failure of any load-bearing fairground equipment, or derailment or unintended collision of cars or trains;
 16. a road tanker carrying a dangerous substance overturns, suffers serious damage, catches fire or the substance is released;
 17. A dangerous substance being conveyed by road is involved in a fire or released;
 18. Unintended collapse of any building or structure under construction, alteration or demolition where over five tones of material falls, a wall or floor in a place of work, any false-work;
 19. Explosion or fire causing suspension of normal work for over 24 hours;
 20. Sudden, uncontrolled release in a building of 100 kg or more of flammable liquid, 10 kg or more of flammable liquid above its boiling point, 10 kg or more of flammable gas, or of 500 kg of these substances if the release is in the open air;
 21. Accidental release of any substance which may damage health.
- Additional categories of dangerous occurrences apply to mines, quarries, relevant transport systems and offshore workplaces. The above list of dangerous occurrences has been obtained from <http://www.riddor.gov.uk/infocontent.html>.
- (2) *Every registered medical practitioner or medical officer attending to, or called in to visit, a patient whom he believes to be suffering from any of the diseases listed in the Third Schedule of the Factories and Machinery Act 1967, or any disease named in any regulation or order made by the Minister under this Act, or occupational poisoning shall report the matter to the Director General.*
- Under this subsection, when a registered medical practitioner or medical officer attends to or visit a patient whom he believes to be suffering from any of the diseases listed in the Third schedule of Factories and Machinery Act 1967 or any disease listed under the Declaration of Occupational Diseases 2000 he is required to report the matter to the Director General.
 - Under the Factories and Machinery Act 1967 there is a requirement for the medical practitioner to report occupational poisoning and disease to the Chief Inspector and send a copy of the report to the occupier whereas in Occupational Safety and Health Act 1994 the medical practitioner is only required to report the matter to the Director General.
 - Under this section registered medical practitioner means a medical practitioner registered under Medical Act 1971 (Act 50). Occupational Health Doctor (OHD) is a medical practitioner registered by the Director General of the Department of Occupational safety and Health to conduct medical surveillance program of employees.

- Notification of Occupational Diseases should include the following information (as mentioned in section 32 of Factories and Machinery Act 1967):
- Name and location of the factory in which the patient states he is or was last employed.
- Name and full postal address of the postal address of the patient.
- The occupational disease of which the patient is suffering from.
- The proposed Occupational Safety and Health (Notification of Accidents, Dangerous Occurrences, Occupational Poisoning and Occupational Diseases) Regulations will provide further guidance on notification.

33. Director General may direct inquiry to be held

(1) If in the opinion of the Director General, an inquiry ought to be held into the nature and cause of the accident, dangerous occurrence, occupational poisoning or occupational disease, he may cause such an inquiry to be held by an occupational safety and health officer.

- Under this section the Director General may request an inquiry to be held and may appoint an OSH officer to conduct the inquiry to determine nature and cause of accident, dangerous occurrence, occupational poisoning or occupational disease.
- The nature and extent of the inquiry will be determined by the Occupational Safety and Health officer appointed. It can be held in the office or at the site of accident. The purpose of the inquiry is to investigate the nature and cause of the accident, dangerous occurrence, occupational poisoning or occupational disease and not to punish.
- The employer:
 - must be informed in advance the purpose of the inquiry
 - must be given enough time for the inquiry.
 - must be permitted to speak.
- In practice the inquiry should be in oral hearing mode.

(2) The Director General may appoint one or more persons of engineering, medical or other appropriate skills or expertise to serve as assessors in any such inquiry.

- The Director General may appoint one or more persons of engineering, medical or with other appropriate skills or expertise to serve as assessors in the inquiry. However those appointed as assessors must not have personal interest in the outcome of the inquiry and must not be biased.

(3) Every person not being a public officer serving as an assessor in the inquiry may be paid an allowance at such rate or rates as the Minister may determine.

34. Power of occupational safety and health officer at inquiry

For the purpose of holding an inquiry under this Act, an occupational safety and health officer shall have the power to administer oaths and affirmations and shall be vested with the powers of a First Class Magistrate for compelling the attendance of witnesses and the production of documents, maintaining order and otherwise duly conducting the inquiry, and all persons summoned to attend the inquiry shall be legally bound to attend.

- Inquiries are more formal than investigations and the person appointed to conduct the inquiry has powers to take evidence on oath, to require the attendance of witnesses and the production of documents, maintain order and to carry out such inspections of any premises to which the inquiry relates.
- Under this section for the purpose of holding an inquiry, an OSH officer shall have the powers of a First Class Magistrate for compelling attendance of witnesses, the production of documents and maintaining order in the inquiry. He shall also have the power to administer oath and affirmations.

PART IX

PROHIBITION AGAINST USE OF PLANT OR SUBSTANCE

35. Power to prohibit the use of plant or substance

(1) *Notwithstanding any written law to the contrary, the Director General may by order published in the Gazette prohibit the use of any plant or substance which in his opinion is likely to affect the safety and health of persons at work.*

(2) *Where the Director General proposes to exercise his power under subsection (1) he shall, before making the order, consult any Government department or other body which appears to him to be appropriate.*

- The Director General may issue a prohibition order for the use of any plant or substance by publishing it in the Gazette. Under the law an order is a common direction or instruction. It is an agency regulation that interprets or applies a statutory provision. An example of this is the Occupational Safety and Health (Prohibition of Use of Substance) Order 1999 which has prohibited the use of substances as listed below:

Item No.	Description of substance	Extent to which use of substance is prohibited
1.	4-Aminodiphenyl; Benzidine; 2-Naphthylamine; 4-Nitrodiphenyl; their salts; and any substance any of their compounds in any other substance in a total concentration exceeding 0.1 percent	(1) Manufacture and use for all purposes including any manufacturing process in which a substance described in column (1) is formed, except for research or analytical purposes
2.	Crocidolite	(2) All purposes except for research or analytical purposes
3.	Benzene; Carbon disulphide; Carbon tetrachloride and n-Hexane	Cleaning and degreasing
4.	White phosphorus	Use in the manufacture of matches

36. Aggrieved person may appeal

A person who is aggrieved by an order made under subsection 35(1) may, within thirty days of the order, lodge an appeal with the secretary to the Council who shall transmit the appeal to an appeal committee appointed by the Minister under section 63.

- This section allows a person aggrieved by an order made under subsection 35(1) of the Act to lodge an appeal to the Council. The Council would then transmit the appeal to an appeal committee appointed by the Minister.

PART X**INDUSTRY CODES OF PRACTICE****37. Approval of industry codes of practice**

(1) *The Minister may, upon the recommendation of the Council or the Director General, approve industry codes of practice comprising such directions as may appear to him to be necessary or proper for the guidance of persons in complying with the requirements of the provisions of this Act.*

- This section provides for industry codes of practice to be approved by the Minister on recommendation by the Council or Director General. Promulgation of industry codes of practice can be initiated by the industries, the government or other interested parties.
- Industry codes of practice give practical guidance about how compliance with the legal requirements of the Act and Regulations might be achieved.

(2) *The Minister may, upon the recommendation of the Council or the Director General, from time to time revise the industry codes of practice by amending, deleting, varying or adding to the provisions of the industry codes of practice.*

- This subsection provides the Minister to revise the industry code of practice from time to time. Provisions of industry code of practice need to be amended and updated as hazards change, technology advances and to take account of international obligation.

(3) *An industry codes of practice may—*

- consist of any code, standard, rule, specification or provision relating to occupational safety and health approved by the Minister; or*
- apply, incorporate or refer to any document formulated or published by any body or authority as in force at the time the industry code of practice is approved or as amended, formulated or published from time to time.*

- Industry codes of practice consist of any code, standard, rule, specification or provision relating to occupational safety and health approved by the Minister. Codes of practice set out standards by which the adequacy of the measures adopted should be judged.

(4) *The Minister shall cause to be published in the Gazette the approval of an industry code of practice and the amendment or revocation thereof.*

- An example of this is the Code of practice for HIV and AIDS in the workplace. This code of practice that has been developed by the Department of Occupational Safety and Health can only be considered as industry code of practice when it is gazetted. Currently guidance notes have been developed for example reproductive health in

the workplace, standing at work, confined space, first aid in the workplace and may be considered a code of practice. These when recommended by the Council or the Director General, approved by the Minister and gazetted can become industry code of practice.

- In the legal context the hierarchy is in the order of Act, subsidiary legislation, industry code of practice and guidelines. However industry code of practice and guidelines should not be termed as a legal context. It helps to further clarify the provisions contain in an Act.
- An Act is a statute passed by Parliament which set out duties and which are supplemented by subsidiary legislations, approved code of practice and guidelines. Regulations and order are made under the act and describe the requirements which apply to specific work situations. Regulations and orders are enforceable and non-compliance may result in prosecution and fines.

38. Use of industry codes of practice in proceedings

In any proceedings under this Act or any regulation made thereunder in which it is alleged that a person has contravened or failed to comply with a provision of the Act or any regulation made thereunder in relation to which an approved industry code of practice was in effect at the time of the alleged contravention or failure—

- (a) *the approved industry code of practice shall be admissible in evidence in the proceedings; and*
- (b) *if the court is satisfied in relation to any matter which it is necessary for the prosecution to prove in order to establish the alleged contravention or failure that—*
 - (i) *a provision of the approved industry code of practice is relevant to the matter; and*
 - (ii) *the person failed at any material time to observe the provision of the approved industry code of practice,*

the matter shall be taken as proved unless the court is satisfied that in respect of the matter the person complied with a provision of the Act otherwise than by way of observance of the provision of the approved industry code of practice.

- Under this section approved industry code of practice shall be admissible as evidence in proceedings in court. If the breach of the industry code of practice is proved at any material time, breach of the appropriate provision is taken to be proved, unless the court is satisfied that the defendant complied in some other way which is at least as good as the provisions of the code.
- Employers are advised to follow appropriate industry codes of practice or set up systems better than those stated in the industry code of practice. Industry code of practice are therefore whilst not law, may be used as proof that an employer did not do what a law required whether under the code of practice or his own better provisions.

PART XI

ENFORCEMENT AND INVESTIGATION

39. Powers of entry, inspection, examination, seizure, etc.

This section highlights powers of an occupational safety and health officer and what the officer can do when there is contravention of the Act. Powers of entry, inspection, examination, seizure, etc may require reference to Criminal Procedure Code.

(1) An occupational safety and health officer, in this Part referred to as the 'officer', may, for the purpose of carrying out the objects of this Act or any regulation made thereunder, at any reasonable time and upon the production of his certificate of authorization enter, inspect and examine any place of work other than a place used solely for residential purposes:

Provided that he may enter the residential place with the consent of the owner or if he has reasonable cause to believe that a contravention of this Act or any regulation made thereunder has or is likely to be committed.

- An occupational safety and health officer referred to as officer in this section is given the right to enter any premise to carry out the objects of the Act and related regulation. Under certain circumstances he does not have to get permission from the owner.
- Under this section, it is important to understand matters regarding reasonable time and reasonable cause to believe

Reasonable time:

- Reasonable time refers to what time of the day they can enter the premises. This visit must be conducted at any reasonable time upon producing the officer's certificate of authorization. "Reasonableness" depends on the facts of each case.

Reasonable cause to believe:

- The issue of reasonable cause to believe arises when an officer needs to enter a residential place. He can do this by obtaining permission from the owner or when he has reasonable grounds to believe that a contravention of this Act or any regulation under the Act has occurred in the residential place. The offence must be a serious offence and the offender should be brought to justice. The officer may also enter the residential place if he believes an offence is likely to be committed.

(2) In exercising his powers under subsection (1), an officer may—

(a) make examination and investigation of any plant, substance, article or other thing whatsoever as may be necessary to ascertain whether or not this Act or any regulation made thereunder has been complied with;

- An officer may examine or investigate any plant or substance or article during inspection to find out whether the employer complied with the Act or other related regulations.
 - (b) *direct that the place of work or any part thereof, or anything therein, shall be left undisturbed, whether generally or in particular respects, for so long as is reasonably necessary for the purpose of any examination or investigation under paragraph (a);*
 - When carrying out an investigation, an officer may order the area to be left undisturbed. The purpose of closing off the area is to preserve as closely as possible the condition that existed at the time of accident.
 - (c) *take such measurements and photographs and make such recordings as he considers necessary for the purpose of any examination or investigation under paragraph (a);*
 - All evidences must be recorded as soon as possible because certain types of evidence may be perishable or the site may be tampered knowingly or unknowingly.
 - An officer may also take measurements to obtain proper perspective, photographs and samples and shall inspect and take copies of relevant documents.
 - (d) *take samples of any article or substance found in the place of work which he has power to enter, and of the atmosphere in or in the vicinity of the place of work;*
 - (e) *require any person employed in a place of work in which any of the diseases named in the Third Schedule of the Factories and Machinery Act 1967 or any disease named in any regulation or order made by the Minister under this Act has occurred or is likely to occur, to be medically examined by a medical officer or a registered medical practitioner.*
- (3) *Where an officer is of the opinion that a plant or substance has caused or is likely to cause a danger to safety and health, he may—*
- (a) *cause it to be dismantled or subjected to any process or test at any convenient place and at such reasonable time as he may appoint, but not so as to damage or destroy it;*
- When an officer comes across a plant, substance or article which he has reasonable cause to believe presents danger to safety and health, he may order the plant to be dismantled, to be examined or tested at any convenient place at reasonable time so long as the same is not destroyed or damaged in the process.
 - (b) *take possession of it and detain it for so long as is necessary for all or any of the following purposes:*
 - (i) *to examine it and to do it anything which he has power to do;*
 - (ii) *to ensure that it is not tampered with before his examination of it is completed;*

(iii) to ensure that it is available for use as evidence in any proceedings for an offence under any of the provisions of this Act or regulation made thereunder.

- He may detain and take possession of it to examine it, to ensure that it is not disturbed before the examination is completed and to ensure that it is available for use as evidence in legal proceedings. Detain means hold and possession means to have control.
- (4) Where an officer is a medical officer he may—
- (a) carry out such medical examination as may be necessary for the purposes of his duties under this Act or regulation made thereunder; and
 - (b) exercise such other powers as may be necessary or as are conferred under subsections (2) and (3).
- Where the officer is a medical officer, he may conduct the necessary medical examinations and exercise other powers in subsection (2) and (3).
- (5) An officer may for the purposes of this section seek whenever necessary the assistance of the police if he has reasonable cause to apprehend any serious obstruction in the execution of his duty.
- An officer may take the police with him when entering any premises if he has reasonable cause to believe that the execution of his duty may be seriously obstructed.
- (6) Without prejudice to subsection (5), on entering any place of work or residential place by virtue of subsection (1), an officer may bring with him—
- (a) any other person duly authorized by the Director General; or
 - (b) any equipment or material required for any purpose for which the power of entry is being exercised.
- He may also take any other persons authorized by the Director General such as a specialist and also any equipment to assist him.

40. Entry into premises with search warrant and power of seizure

In every case where information is given on oath to a Magistrate that there is reasonable cause for suspecting that there is in a place of work or residential place any article, thing, book, document, plant, substance, installation or part thereof which has been used to commit or is intended to be used to commit an offence under this Act or any regulation made thereunder, he shall issue a warrant under his hand by virtue of which an officer named or referred to in the warrant may enter the place of work or residential place at any reasonable time by day or night, and search for and seize or seal the article, thing, book, document, plant, substance, installation or part thereof.

- In sections 40 and 41 officers must understand the difference of entering into premises with search warrant (section 40) and without search warrant (section 41). A warrant is an order allowing an officer to enter a premise without the permission of the employer/occupier and to search/seize.

- To enter into a place of work or residential place with a search warrant an officer must have reasonable cause to suspect that something for example plant, substances etc in the premises has been or will be used to commit an offence. The Department of Occupational Safety and Health officer may have reasonable cause to suspect if there is a complaint from neighbours or employees. He then needs to give this information on oath to a Magistrate to obtain a warrant from the Magistrate to enter the place of work or residential place. The officer needs to prepare written information on oath to be signed by the Magistrate. The Magistrate can only issue the warrant upon information that he has reason to believe evidence of the offence can be found in that place.

41. Entry into premises without search warrant and power of seizure

Where an officer is satisfied upon information received that he has reasonable grounds for believing that, by reason of delay in obtaining a search warrant, any article, thing, book, document, plant, substance, installation or part thereof in a place of work or residential place used to commit or intended to be used to commit an offence under this Act or any regulation made thereunder is likely to be removed or destroyed, he may enter the place of work or residential place without a warrant and seize or seal the article, thing, book, document, plant, substance, installation or part thereof found therein:

Provided that it shall be an offence for a person without lawful authority to break, tamper with or damage the seal or remove the article, thing, book, document, plant, substance, installation or part thereof or to attempt so to do.

- An officer may enter a premise without a search warrant when he has grounds to believe that the article, plant, substance etc. is likely to be removed or destroyed prior to a warrant being obtained. The officer may also enter without a warrant when he believes a serious offence has been committed.

42. Power of forceful entry and service on occupier of signed copy of list of things seized from premises

(1) An officer may, in the exercise of his powers under section 40 or 41, if it is necessary so to do—

- (a) break open any outer or inner door of a place of work or residential place and enter thereinto;*
 - (b) forcibly enter the place and every part thereof;*
 - (c) remove by force any obstruction to entry, search, seizure and removal as he is empowered to effect; and*
 - (d) detain every person found in the place until the place has been searched.*
- This subsection seeks to sanction the forceful entry into premises by an officer in exercising his powers under section 40 or 41.
 - Power of forceful entry can be exercised when the officer has a warrant as stated in section 40 or when he has reasonable grounds to believe that an offence under this Act or regulations has been or will be committed.

- Under paragraph 42(1)(d), he may detain every person found in the place until the place has been searched. But such detention does not mean arrest.
 - The power to detain only exists when the search is in progress.
- (2) *The officer seizing any article, thing, book, document, plant, substance, installation or part thereof under section 40 or 41 shall prepare a list of the things seized and forthwith, or as soon as is practicable, deliver a copy of the list signed by him to the occupier, or his agent or servant present in the premises, and if the premises are unoccupied the officer shall, wherever possible, post a list of the things seized on the premises.*

43. Further provisions in relation to inspection

- (1) *Upon entering any place of work an officer shall take all reasonable steps to notify the employer and the safety and health committee of the entry.*
- This subsection requires an officer to notify the employer and safety and health committee of his entry to the work place.
- (2) *Upon concluding an inspection, an officer shall give to the employer and the safety and health committee information with respect to his observations and any action he proposes to take in relation to the place of work.*
- On concluding the inspection he is required to give the employer and the safety and health committee information on his observations and on any action he proposes to take.
- (3) *Where an officer proposes to take and remove a sample from a place of work for the purposes of analysis, he shall notify the employer and the safety and health committee and after having taken the sample he shall where possible—*
- (a) *divide the sample taken into as many parts as are necessary and mark and seal or mark and fasten up each part in such a manner as its nature will permit;*
 - (b) *if required by the employer or the safety and health committee, deliver one part each to the employer or the safety and health committee;*
 - (c) *retain one part for future comparison; and*
 - (d) *if an analysis of the sample is to be made, submit another part to an analyst for analysis.*
- Procedures for removal of samples from the place of work for sampling are provided under this subsection.

44. Power of investigation

- (1) *An officer shall have the power to investigate the commission of any offence under this Act or any regulation made thereunder.*
- An officer has the power to investigate the commission of any offence under this Act.

(2) *An officer may, in relation to any investigation in respect of an offence committed under this Act or any regulation made thereunder, exercise the special powers in relation to police investigation except that the power to arrest without warrant given by the Criminal Procedure Code in any seizable offence may not be exercised by him.*

- The Criminal Procedure Code (Act 593) specifies general criminal procedures. If a specific statute, (e.g Occupational Safety and Health Act 1994) lays down a specific mode of trial or investigation than the statute will prevail over the Criminal Procedure Code as far as the offences covered by that statute are concerned.
- In this subsection, it has been mentioned that the officer has special powers in relation to police investigations except power to arrest without warrant.

(3) *Upon completion of his investigation, the officer shall immediately give all information relating to the commission of the offence to an officer in charge of a police station and a police officer may, by warrant, arrest any person who may have committed an offence under this Act or any regulation made thereunder.*

- Upon completing the investigation the officer must give all information relating to the offences to an officer in charge of a police station. The police officer may then issue a warrant and arrest any person believed to have committed the offence. ‘A police officer’ is any member of the Royal Malaysia Police, which includes a constable, a corporal and an assistant superintendent of police (Section 2, Police Act 1967).

45. Power to examine witnesses

(1) *An officer making an investigation under section 39 or 44 may examine orally any person who appears to him to be acquainted with the facts and circumstances of the case.*

- This subsection gives powers to an officer under section 39 or 44 to examine and question orally any person acquainted with the facts of the case.

(2) *The person referred to in subsection (1) shall be legally bound to answer all questions relating to the case put to him by the officer:*

Provided that the person may refuse to answer any question if the officer fails or refuses on demand to produce to him the certificate of authorization issued by the Director General to the officer under subsection 7(1):

Provided further that the person may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.

- The person being examined is legally bound to answer all questions and to state the truth. Please note that the person may refuse to answer any questions if the officer failed to produce the certificate of authorization upon request by the person questioned or if the answers of the question may incriminate him. An officer is bound by this subsection to inform the person being questioned of his right of refusal to answer questions.

- (3) *A person making a statement under this section shall be legally bound to state the truth whether or not the statement is made wholly or partly in answer to questions.*
- (4) *An officer obtaining information from a person shall first inform the person of the provisions of subsections (2) and (3).*
- (5) *A statement made by a person under this section shall, whenever possible, be reduced into writing and signed by him or affixed with his thumb print, as the case may be, after it has been read to him in the language in which he made it and after he has been given an opportunity to make any correction he may wish.*
- Statements given by the person being questioned should be written down in the language spoken by him. The officer shall read the report in front of the witness. Any correction may be made and the statement be signed by the person or affixed with his thumb print.
 - Proper techniques of interview should be used to ensure that the information is objective, accurate, relevant to events and not influenced by personal feelings or opinion. Reinterview may be needed for clarification.
- (6) *Where an officer uses the assistance of an interpreter, any inquiry or requisition to a person made on behalf of the officer by the interpreter shall, for all purposes, be deemed to have been actually made by the officer, and any answer thereto made to the interpreter shall be deemed to have been actually made to the officer.*

46. Employer, etc., to assist officer

The owner or occupier of, or employer at, any place of work and the agent or employee of the owner, occupier or employer shall provide such assistance as the officer may require for any entry, inspection, examination or inquiry or for the exercise of his powers under this Act.

- This section require all persons at the workplace such as occupier, employers, employees, subcontractors, agents etc. to provide assistance to the officers exercising their powers under this Act.
- Types of assistance to an officer may include:
 - Providing personnel to guide and assist him at the place of work
 - Providing relevant information in relation to his task e.g risk involved in carrying out the task (inspection, examination of plant/substance), documents (e.g medical surveillance records) etc.
 - Providing personal protective equipment (e.g mask, respirator, glove etc)

47. Offences in relation to inspection

A person who—

- (a) *refuses access to a place of work to an officer or a person assisting him;*
- (b) *obstructs the officer in the exercise of his powers under this Act or any regulation made thereunder, or induces or attempts to induce any other person to do so;*
- (c) *fails to produce any document required under this Act by the officer;*
- (d) *conceals the location or existence of any other person or any plant or substance from the officer;*
- (e) *prevents or attempts to prevent any other person from assisting the officer; or*
- (f) *in any other way, hinders, impedes or opposes the officer in the exercise of his powers under this Act or any regulation made thereunder,*

shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding one year or to both.

- This section provides a list of offences in relation to the exercise of inspection duties by an officer such as refusal to allow an officer to gain access to a place of work, obstructing them from carrying out their duty, concealing information regarding accident sites, things or persons, failing to produce documents etc.

48. Improvement and prohibition notice

- This section provides detail on notice of improvement (NOI) and notice of prohibition (NOP).
 - The Act requires employers and occupiers to take action to improve standards of safety and health in the workplace as instructed by an officer.
 - There are two types of notices which may be used in different circumstances i.e a notice of improvement (NOI) and a notice of prohibition (NOP).
- (1) *If an officer is of the opinion that a place of work, plant, substance or process is likely to be a danger, or is likely to cause bodily injury or is a serious risk to the health of any person, or is likely to cause damage to any property, he shall serve an improvement notice on the person under whose control the place of work, plant, substance or process lies, requiring the person to take measures to remove the danger or rectify any defect within such period as he shall therein specify, and in every such case the place of work, plant, substance or process shall not be used or operated even after the period of expiry of the notice until the danger has been removed or the defect made good to the satisfaction of the officer.*
- The terms place of work, plant and substance have been explained earlier. The term 'process' means 'series of stages in manufacture or other operations'. A process starts from the preparatory stage to the completion of the tasks.

Notice of Improvement

- An officer may issue a notice of improvement to remedy the situation/danger/risk within a specified time when he considers that safety and health requirements in this Act or other relevant statutory provisions have been contravened.

- The officer must specify the section or legal requirement that is being breached and the reasons thereof must be given. The period allowed to remedy the fault must also be stated. Actions that may be necessary to put matters right should also be stated in the notice.
 - Notice of improvement can be served on the person who is contravening the legal provision or it can be served on any person on whom responsibilities are placed whether he is an employer, an employed person or a supplier of equipment or materials.
 - Work cannot go on during the notice period or until the situation/danger/risk is rectified unless the officer gives permission to do so.
 - NOI is issued when there is no imminent danger.
- (2) *If an officer is of the opinion that the defect in subsection (1) is likely to cause immediate danger to life or property, he shall serve a prohibition notice prohibiting the use or operation of the place of work, plant, substance or process until such time that any danger posed is removed and the defect made good to the satisfaction of the officer.*

Notice of Prohibition

- A notice of prohibition may be issued by an officer when there is a risk of serious injury or damage to person or property at the place of work.
- The notice prohibits work activity which increases the risk to injury from being carried out.
- This includes prohibiting the use of or operation of place of work, substances, plant or process at work when the risk of injury is considered imminent.
- The notice must state the matters that give rise to risk of serious personal injury and may include precautions/remedies/steps that should be taken to put matters right.
- The use of any plant or the activities shall only be continued after the remedial action specified in the notice has been taken.
- Notice of prohibition can be served on the spot on the person undertaking the activity or on the person in control of it at the time the notice was served. However, notices can also be served by post to the appropriate address. If the officer is not able to establish the correct name and address, the notice may simply be addressed to the owner or occupier of the premise.

The case of ANI Engineering v Bolton [1987] 3 VIR 76, (pg79) as described in the Appendix, interprets the definition of ‘immediate risk’.

- (3) *An improvement notice or a prohibition notice under subsection (1) or (2) shall—*
- (a) *state that the officer is of the opinion that in respect of the plant, substance or process at the place of work, there is occurring or may occur an activity which is or is likely to be a danger or is likely to cause bodily injury or a serious risk*

to the health of any person or is likely to cause damage or is likely to cause immediate danger to life or property, and state the reasons for the opinion; and

(b) where in the officer's opinion the activity concerned is a contravention or is likely to be a contravention of any provision of this Act or any regulation made thereunder, specify the provision and state the reasons for the opinion.

- The term 'opinion' means 'view held'.
- Under this section the officer may need to carry out an assessment of plant or substance or process at the place of work before issuing a notice. This assessment will include:
 - To identify the hazard and characterize the risk.
 - If in the officer's opinion, there is a contravention he must specify the provision and state the reasons of his opinion.

(4) An officer may include in an improvement notice or a prohibition notice directions as to the measures to be taken to remove any danger, likely danger, risk, matter or activity to which the notice relates and the directions may refer to any approved industry code of practice.

(5) Without prejudice to the provision of subsection (2) an officer may, if he considers it necessary, proceed to render inoperative the place of work, plant, substance or process by any means he may deem best suited for the purpose.

(6) Where such an action is taken by the officer under subsection (5) he may, if he deems fit, recover the cost of the action from the occupier or person having responsibility or control of the place of work, plant, substance or process.

49. Penalty for failure to comply with notice

(1) A person to whom an improvement or a prohibition notice is issued under section 48 must comply with the same notwithstanding that an appeal against its issuance has been lodged.

(2) A person who without reasonable excuse fails to comply with any improvement or prohibition notice issued under section 48 shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding five years or to both, and to a further fine of five hundred ringgit for each day during which the offence continues.

- This section provides the penalty for a failure to comply with the terms of a notice of improvement or a notice of prohibition, notwithstanding that an appeal may have been filed.

50. Aggrieved person may appeal

- (1) *A person who is aggrieved by a notice issued by an officer under section 48 may, within thirty days from the date of such notice, appeal to the Director General who may, after considering the appeal, by order in writing confirm, revoke or vary the notice.*
 - (2) *A person who is aggrieved with a decision of the Director General made under subsection (1) may, within thirty days from the date of the decision, appeal to an appeal committee appointed by the Minister under section 63.*
 - (3) *Where an improvement or a prohibition notice is issued by the Director General or the Deputy Director General in the exercise of the powers conferred under section 48, the appeal shall be made to an appeal committee appointed by the Minister under section 63.*
- This section provides for the person who has been served by an improvement or prohibition notice a right to appeal to the Director General within 30 days. The Director General may then confirm, revoke or vary the notice.

PART XII

LIABILITY FOR OFFENCES

51. General penalty

A person who by any act or omission contravenes any provision of this Act or any regulation made thereunder shall be guilty of an offence, and if no penalty is expressly provided shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding one year or to both and, in the case of continuing offence, to a fine not exceeding one thousand ringgit for every day or part of a day during which the offence continues after conviction.

- This section provides for general penalty for offences already stated. (e.g sections 15,16,17,18, 20, 21 and 48).

52. Offences committed by body corporate

(1) Where a body corporate contravenes any provision of this Act or any regulation made thereunder, every person who at the time of the commission of the offence is a director, manager, secretary or other like officer of the body corporate shall be deemed to have contravened the provision and may be charged jointly in the same proceedings with the body corporate or severally, and every such director, manager, secretary or other like officer of the body corporate shall be deemed to be guilty of the offence.

- This section applies to offences committed by the body corporate. The body corporate can be private or public companies registered with the Registrar of Companies.
- The body corporate means any corporation formed or incorporated or existing within Malaysia
- A corporation is a body of persons having in law an existence and rights and duties distinct from those of the individual persons who from time to time form it. It has perpetual succession, a name and a common seal. Service of writs or process is upon an officer of the corporation. A sole corporation consists of only one member at a time in succession. An aggregate corporation consists of a number of persons, e.g. incorporated companies and municipal corporations.
- Director, manager, secretary or other officers of the body corporate can be charged jointly in the same court proceedings as the body corporate or separately.

(2) A person may be proceeded against and convicted under the provision of subsection (1) whether or not the corporation has been proceeded against or has been convicted under that provision.

53. Offences Committed by trade union

(1) *Where a trade union by any act or omission contravenes any provision of this Act or any regulation made thereunder, every officer, employee and person purporting to act on the instruction of any officer of the trade union shall be deemed to have contravened the provision and may be charged jointly in the same proceedings with the trade union or severally, and every such officer, employee or person shall be deemed to be guilty of the offence.*

- Trade union is an organization which consists wholly or mainly of employees and whose principal purposes include the regulation of relations between employees and employers or employers associations. The definition also extends to organizations which consist of constituent or affiliated trade unions, or the representatives of such organizations.
- This section relates to section 27 in respect of discrimination against employees who are members of the safety and health committee.

(2) *A person may be proceeded against and convicted under the provision of subsection (1) whether or not the trade union has been proceeded against or has been convicted under that provision.*

- Every officer, employee and person acting on instruction of officer of the trade union can be charged in the same court proceedings or separately.

54. Offences committed by agent

A person who would be liable under this Act or any regulation made thereunder to any penalty for anything done or omitted if the thing had been done or omitted by him personally shall be liable to the same penalty if the thing had been done or omitted by his agent.

- If a person engaged an agent and the agent fails to comply with any section of the Act or regulations under Occupational Safety and Health Act 1994, the person shall be liable to the same penalty.

55. Defence

It shall be a defence in any proceedings against a person for an offence under this Act or any regulation made thereunder to satisfy the court that the offence was committed without his consent or connivance and that he exercised all such due diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

- *Under this section the person charged needs to satisfy the court that the offence was committed without his consent. On his part the person charged must be able to show that he exercised all due diligence to prevent the offence being committed. The essence of defence for due diligence is that the defendant took such reasonable and*

practicable measures to avoid committing the offence and the court could conclude that the defendant was not negligent or otherwise at fault. It must be shown that the defendant's mind was concentrated upon the likely risk; general precautions are unlikely to be enough.

56. Body corporate or trade union liable to fine

Where a person convicted in respect of an offence under this Act or any regulation made thereunder is a body corporate or a trade union, it shall only be liable to the imposition of a fine provided therefor.

- Only a fine can be imposed on a body corporate or trade union.

57. Aiding and abetting

A person who aids or abets the commission of an offence under this Act shall be punished with the punishment provided for the offence.

- Aid and abet means to assist or to encourage. Aid and abet in criminal law is to assist in commission of a crime without actually participating in the offence itself. An accused who aids and abets must be shown to have been in some way linked in purpose with the person actually committing the principal offence, and the accused's words or conduct must encourage or render more likely the commission of the crime by the principal.

58. Safeguards against further personal liability

Subject to the provisions of this Act or any regulation made thereunder, no person shall incur any personal liability for any loss or damage caused by any act or omission by him in carrying out the duties under this Act or any regulation made thereunder, unless the loss or damage was occasioned intentionally or through recklessness or gross negligence.

- This section applies to employers, self employed person, occupier, designer, manufacturers and suppliers and employees in carrying out their duties under the Act.
- If there is loss or damage, they are not personally liable unless this loss or damage was caused intentionally or due to recklessness or gross negligence on the part of the employers or employees themselves.

59. Civil liability not affected by Parts IV, V and VI

Nothing in Parts IV, V and VI and the relevant industry code of practice shall be construed as—

- (a) conferring a right of action in any civil proceedings in respect of any contravention, whether by act or omission, of any provision of those Parts.*
- (b) conferring a defence to an action in any civil proceedings or as otherwise affecting a right of action in any civil proceedings; or*

(c) *affecting the extent, if any, to which a right of action arises or civil proceedings may be taken with respect to breaches of duties imposed by other legislations in regard to safety and health.*

- Occupational Safety and Health Act 1994 can be construed as an Act which imposes criminal liability. Civil action cannot be taken by any party if there is any contravention of any provision of Parts IV, V and VI in respect of the responsibilities of employer, occupiers, manufacturers, designers, suppliers, employee and trade unions. This section does not confer a right of action and nor does it confer a defence to an action in any civil proceedings.

60. Onus of providing limits of what is practicable

In any proceedings for an offence under this Act or any regulation made thereunder consisting of a failure to comply with a duty or requirement to do something so far as is practicable, or to use the best practicable means to do something, it shall be for the accused to prove that it was not practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement.

- Under this section the onus (burden, duty or responsibility) lies with the accused to prove to the court that what he did is the best approach and it was not practicable to do more than what he did to meet his duties. This is different with criminal law as stated in Evidence Act 1950 (Act 56) where the burden of proof lies on the prosecutor.

61. Prosecutions

Prosecutions in respect of offences committed under this Act or any regulation made thereunder may, with the prior written consent of the Public Prosecutor, be instituted or conducted by an occupational safety and health officer or by an officer specially authorized in writing by the Director General subject to the provisions of the Criminal Procedure Code.

- Under this section prosecution may be conducted by an OSH officer or by an officer authorized by the Director General with prior written consent from Public Prosecutor.

62. Compounding of offences

(1) *The Minister may, by order in the Gazette, prescribe any offence under this Act or any regulation made thereunder as an offence which may be compounded.*

- The Minister may order (by Gazette) any offence under this Act to be compoundable offences.

(2) *The Director General may at any time before conviction compound any of the offences prescribed under subsection (1) as an offence which may be compounded by collecting from the person reasonably suspected of having committed the offence a sum of money not exceeding the amount of the maximum fine to which the person would have been liable to if he had been convicted of the offence:*

Provided that the Director General shall not exercise his powers under this section unless the person in writing admits that he has committed the offence and requests the Director General to deal with the offence under this section.

- The Director General may collect a compound not exceeding the maximum fine imposed by the relevant section. This is if the person admits to the offence in writing and agrees to be dealt with under the provisions of this section.

PART XIII

APPEALS

63. Appeal committees

- (1) *The Minister shall appoint appeal committees for the purpose of considering any appeal made under section 36 or 50.*
 - The Minister has the powers to appoint appeal committees to consider appeals under sections 36 or 50.
 - Section 36 allows a person to appeal when he is affected by the publication by the Director General of a prohibition against the use of any plant or substance by virtue of section 35(1).
 - Section 50 allows person to appeal when he is affected by a notice of improvement or notice of prohibition issued to him by virtue of section 48.
- (2) *An appeal committee shall consist of a Chairman to be appointed by the Minister from among members of the Council and two other persons to be appointed by the Minister who, in his opinion, have wide experience and knowledge in matters relating to the subject matter of the appeal.*
- (3) *Every member of an appeal committee may be paid an allowance at such rate or rates as the Minister may determine.*

64. Powers of appeal committee

- (1) *An appeal committee may, after hearing an appeal, confirm, revoke or vary an order made by the Director General under section 35, a decision made by the Director General under subsection 50(1), or an improvement or a prohibition notice issued by the Director General under section 48.*
 - After hearing an appeal, the committee may confirm, revoke or vary an order made by the Director General under section 35 (prohibition of plant or substance), subsection 50(1) or section 48 (a notice of improvement or a notice of prohibition).
- (2) *An appeal committee shall decide and communicate expeditiously its decision to the person making the appeal.*
 - They shall communicate the decision on the appeal as soon as possible to the person who appeals.

65. Decision of appeal committee

The decision of an appeal committee shall be final and conclusive and shall not be questioned in any court.

- The decision of the appeal committee cannot be challenged in any court.

PART XIV
REGULATIONS

66. Regulations

- (1) *The Minister may make regulations for or with respect to the safety, health and welfare of persons at work in order to achieve the objects of this Act.*
- (2) *In particular and without prejudice to the generality of subsection (1), such regulations may—*
- a) regulate or prohibit—*
 - (i) the manufacture, supply or use of any plant;*
 - (ii) the manufacture, supply, storage, transport or use of any substance; and*
 - (iii) the carrying on of any process or the carrying out of any operation;*
 - b) prescribe the requirements with respect to the design, construction, guarding, siting, installation, commissioning, examination, repair, maintenance, alteration, adjustment, dismantling, testing, marking or inspection of any plant;*
 - c) prescribe the requirements with respect to the examination, testing, analysis, labelling or marking of any substance;*
 - d) prescribe the times and the manner in which employers or other specified persons are required to examine, test, analyse, label or mark any substance;*
 - e) prescribe the requirements to abstain from eating, drinking or smoking in any circumstances involving risk of absorption of any substance or risk of injury or poisoning arising out of the use of any substance;*
 - f) prescribe the requirements with respect to the instruction, training and supervision of persons at work;*
 - g) prescribe the procedure for employers to notify any accident, dangerous occurrence, occupational poisoning or occupational disease;*
 - h) prescribe the arrangements to be made with the respect to the taking of any action or precaution to avoid, or in the event of, any accident or dangerous occurrence;*
 - i) prohibit or require the taking of any action in the event of any accident or dangerous occurrence;*
 - j) prescribe the requirements with respect to the provision and use in specified circumstances of protective clothing or equipment and rescue equipment;*
 - k) prescribe the standards in relation to the use of, including standards of exposure to, any physical, biological, chemical or psychological hazard;*
 - l) regulate and require the monitoring by employers or occupiers of conditions at a place of work including the health of their employees;*
 - m) secure the provision of adequate welfare facilities by employers for persons at work;*
 - n) require the employers to keep and preserve records and other documents;*
 - o) prescribe the composition, powers, functions and procedures of safety and health committees and regulate the election or appointment of members of the committees and other related matters;*
 - p) prescribe the manner of holding inquiries under section 33 and of hearing appeals under section 36 or 50;*

- q) prescribe the fees payable or chargeable for doing any act or providing any service for the purposes of this Act or any regulation made thereunder;*
 - r) prescribe the offences which may be compounded and the method and the procedure to be complied with;*
 - s) prescribe the requirements for engaging a medical officer and the procedures for the registration of the medical officer;*
 - t) prescribe the requirements for employing a safety and health officer, the training required of a safety and health officer and the procedures for registration;*
 - u) prescribe any other matter which may appear to the Minister to be expedient or necessary for the better carrying out of this Act.*
- Under this section, the Minister has the powers to make relevant regulations to achieve the objects of the Act, which may include matters relating to those prescribed in paragraphs (a) to (u).

PART XV

MISCELLANEOUS

67. Duty to keep secret

(1) *Save for an inquiry under this Act or in any court proceedings relating to the commission of an offence under this Act or any regulation made thereunder, no person shall disclose any matter including any manufacturing or commercial secret which has come to his knowledge or which he has acquired while performing his duties under this Act.*

- Any person in pursuance of his duties under this Act has the duty to keep confidential any information such as manufacturing or commercial secrets obtained in the course of his duty except for disclosure during court proceeding or inquiry.
- Commercial secrets are those secrets that are meant to be kept private or unknown or hidden from all or all but a few.
- Manufacturing secrets are those secrets that are related to manufacturing process.

(2) *A person who contravenes the provision of this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding two years or to both.*

- Penalties for contravening provision of this section include a fine or imprisonment or both.

APPENDIX

CASES

Section 3: Interpretation

Contract of service

Ready Mixed Concrete (South East) Ltd. V. Minister of Pensions and National Insurance [1968] 2 QB 497.

The court held the contract of service exists if these three conditions are fulfilled.

- (1) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
- (2) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that the other as a master.
- (3) The other provisions of the contract are consistent with its being a contract of service.

Section 15: General duties of employers and self-employed persons to their employees.

Reasonable practicability

Marshall v. Gotham Co. Ltd [1954] AC 360

The plaintiff was the widow of a man who was killed while working in a gypsum mine owned by the defendants. He was killed by a fall of marl from the roof of the working place. The fall was due to 'slickenside', a condition which was unusual anywhere and had not occurred in the defendants' mine for at least 25 years. There was no reason to suspect its presence and the probabilities were all against its occurrence there. Accordingly the roof over working places was inspected daily but no props were used.

Lord Reid held; The only way to make a roof secure against a slickenside fall appears to be to shore it up, and, as the presence of slickenside cannot be detected in advance, full protection against this danger would require that every roof under which men have to pass or to work should be shored up or timbered. There is evidence that this is never done in gypsum mines and that in this mine the cost of doing it would be so great as to make the carrying on of the mine impossible.

Edwards v. National Coal Board [1949] 1 KB 704

Lord Justice Asquith states:

"Reasonably practicable" is a narrower term than "physically possible" and implies that a computation must be made in which the quantum of risk is placed in one scale and the sacrifice, whether in money, time or trouble, involved in the measures necessary to avert the risk is placed on the other; and that, if it be shown that there is a gross disproportion between them, the risk being insignificant in relation to the sacrifice, the person on whom the duty is laid discharges the burden of proving that compliance was not reasonably practicable. This computation falls to be made at a point of time anterior to the happening of the incident complained of.

Associated Dairies v. Hartley [1979] I.R.L.R 171

How can the employer discover what the law requires of him? Everyone has his own ideas of reasonableness, but even judges disagree. First, he can consult test cases to identify the

factors which the courts will consider material. Cost benefit analysis plays an important part. In one case, an inspector ordered ASDA Stores to provide safety shoes free of charge for all its employees working in warehouses, as a precaution against having a foot crushed by a loaded roller truck. This would have cost £20,000 in the first year and £10,000 in each succeeding year. The company already provided safety footwear at cost price. There had been ten accidents in the previous year involving roller trucks in ASDA's 66 stores. The industrial tribunal disagreed with the inspector on the ground that the expense was disproportionate to the risk

Harrison (Newcastle-under-Lyme) v. Ramsey [1976] IRLR 135

A notice that an employer should comply with his obligation under the Factories Act to paint his walls was upheld, despite the absence of any danger to health and the company's financial difficulties. There is more scope for argument when the employer is obliged to do that which is reasonably practicable and there is no Approved Code of Practice.

Safe Place at work

Wilson v Tyneside Window Cleaning Co [1958] 2 QB 110

An employer were to send an employee, a joiner to fit a new gutter on the roof of a house and the joiner was to be injured by falling a ladder which had been resting on a fascia which disintegrated because of dry rot, the employer would not be liable. However, if the building to which the employee was sent was known or ought to have been known by the employer to be in a dangerous state, the employer would be liable at common law.

Cook v Square D Ltd [1992] ICR 262.

The scope of the duty an employer owes to an employee who been sent to work in premises situated in a foreign country, in which the law dealing generally with the situation where an employee has been to work in premises not occupied by the employer was discussed. Here, the respondent had been sent by the appellants to work premises situated in Saudi Arabia. The respondent was injured when his became jammed in a hole situated in the floor of the premises. He sued employers, claiming that they had breached their common law duty to ensure that his place of work was safe. It was held by the Court of Appeal the common law duty had not been breached. In deciding the Farquharson LJ stated:

.....in determining an employer's responsibility one has to look at all the circumstances of the case, including the place where the work is to be done, the nature of the building on the site concerned (if there is a building), the experience of the employee who is so dispatched to work at such a site, the nature of the work he is required to carry out, the degree of control that the employer can reasonably exercise in the circumstances, and the employer's own knowledge of the defective state of the premises.

Safe system of work

Speed v Thomas Swift and CoLtd [1943] KB 557

It was held that it included the physical layout of the job, the sequence in which the work is to be carried out, as well as the provision, where necessary, of warnings, notices and instructions. A system of work may not be confined to the duties which the employee is expressly instructed to carry out by the employer.

Duty to provide safe plant

Bolton MBC v. Malrod Installations Ltd [1993] ILR 358

The duty to provide safe plant does not depend on whether the plant is in use. In this case, a contractor engaged to strip asbestos had installed a decontamination unit. The day before

he started work an inspector found electrical faults. It was held that the defendant was under a duty to ensure that the decontamination unit would be safe when the employees came to use it and he was convicted of an offence under the HSWA.

Arrangements

Wright v. Dunlop Rubber Co. [1972] 13 KIR 255

The employer must also make arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances. He must provide such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees. He must maintain and provide a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work. It is arguable that this could oblige the employer to provide medical or nursing services in a particular case. The civil courts have held that an employer who failed to institute regular examinations of his employees who had been exposed to carcinogenic substances failed in his common law duty to take reasonable care, despite the lack of any specific statutory obligation.

Information and Instruction

R v. Swan Hunter Shipbuilders [1981] ILR 831

A fire killed eight men working on a ship in the Swan Hunter shipyard. The fire was caused by a welder who, without any negligence on his part, ignited leaking oxygen with a welding torch. An employee of a subcontractor, Telemeter Installations, had failed to turn off the oxygen supply in a confined space when he left work on the previous evening. Swan Hunter had taken reasonable care to inform and train their own employees as to the dangers of oxygen, but they had not concerned themselves with the instruction or training of those not employed by them but working on their site. The Court of Appeal upheld the convictions of both Swan Hunter and Telemeter for breaches of s. 2 HSWA:

‘If the provision of a safe system of work for the benefit of his own employees involves information and instruction as to potential dangers being given to persons other than the employer’s own employees, then the employer is under a duty to provide such information and instruction, so far as is reasonably practicable.

Section 16: Duty to formulate safety and health policy.

Written safety policy

Osborne v Bill Taylor of Huyton Ltd [1982] ICR 168

The appellant owned and controlled 31 betting shops. In one shop fewer than five people were normally employed. The appellant was prosecuted for failing to provide a safety policy statement on the ground that the appellant’s undertaking comprised all the betting shops and so the exception provided in reg. 2 of The Employer’s Health and Safety Policy Statements (Exception) Regulations 1975 did not apply. On appeal, Ormrod LJ held that in order to ascertain if the shop in question was a separate undertaking one should consider whether the employer was carrying on 31 separate businesses or whether the employer was carrying on a single undertaking in 31 shops. It was a question of fact as to which category the relevant premises fell into. On the separate issue of whether, for the purposes of reg. 2, two people who, at different times, stood in for off-duty personnel, could be counted, the court was of the opinion that they could not on the basis that the phrase ‘for the time being’ in reg. 2 meant at any one time.

Section 17: General duties of employers and self-employed persons to persons other than their employees.

Risk

R v. Mara [1987] IRLR 154

A small cleaning company agreed to clean the premises of International Stores in Solihull. John Mara was a director of the company, of which the only other director was his wife. His company provided a polisher/scrubber which was left on the premises for the use of Mara's cleaners. It was agreed that the employees of International Stores could also use this machine. An employee of International Stores was electrocuted while using the machine which was seriously defective. Mara was prosecuted and convicted in the Crown Court of an offence of consenting or conniving to a breach by his company of s.3 I HSWA. He was fined £200.

R v. Board of Trustees of the Science Museum [1993] ILR 876

Prosecutions under section 3 have been brought where the defendant is accused of spreading the bacterium *Legionella pneumophila* (LP) in such a way as to cause risk to the general public. An inspection disclosed that these bacteria existed in the water in the air-cooling system at the Science Museum. The trustees of the museum were convicted in the Crown Court of a s. 3 offence, in that they failed to institute and maintain a regular regime of cleansing and disinfections, failed to maintain in operation an efficient chemical water treatment regime and failed to monitor the efficacy of the regime, so that members of the general public were exposed to risks to their health from exposure to the bacteria. They appealed, arguing that there was no proof that members of the public inhaled LP, or even that LP had escaped into the atmosphere to be inhaled. The appeal was dismissed. There was a risk to the public, whether or not it could be proved to have materialized. The primary purpose of the HSWA was preventive, in comparison with the civil law which provides compensation only where the plaintiff can prove damage. The defendants were fined £500 and ordered to pay prosecution costs of £35,000.

Conduct his undertaking

Aitchison v Howard Doris Ltd [1979] SLT (Notes) 22

It was held that s. 3 relates solely to protection from danger accruing from the conduct of the undertaking. The section was not therefore applicable to an individual's access to a place of work.

R v Associated Octel Company Ltd [1996] 4 All ER 846

The court ruled that an employer was liable under s.3(1) HSWA 1994 when a visiting contractor caused an accident when failing to follow the permit to work procedure required by the safety case at a major hazard installation, even though the employer's own employees were not on site at that time

RMC Roadstore Products Ltd v Jester [1994] 4 All ER 1037

It was held that in certain circumstances the work of an independent contractor could fall within the scope of an employer's undertaking in terms of s. 3(1) of the Act. However, for this to occur it is necessary for the employer either to exercise actual control over the activity of the independent contractor or be under a duty to do so. Complete control is not necessary.

Section 18: Duties of an occupier of a place of work to persons other than his employees

Westminster CC v. Select Managements [1985] 1All ER 897

The court held this section relates not to employers but to 'controllers' of premises who make available non-domestic premises as a place of work to those who are not employed by them. It is the duty of the person in control of such premises to take such measures as it is reasonable for a person in his position to take to ensure, so far as is reasonably practicable, that the premises and means of access and egress thereto are safe and without risks to health. A lift in a block of flats, which needed repair by electricians, has been held to fall within this section.

Note: Section 18 OSHA 1994 equivalent to Section 4 HSWA.

Austin Rover Ltd v Inspector of Factories [1990] 1 AC 619

Lord Jauncey of Tullichettle held: Section 4 applies to anyone who is in occupation of non-domestic premises and who calls in tradesmen to carry out repairs, it applies to those tradesmen in relation to the employees of others, and it applies to anyone who makes the premises available on a temporary basis for others to carry work out in. Thus organisations varying from multinational corporations to the village shop are brought under the umbrella of the section.

Section 20: General duties of manufactures, etc. as regards plant for use at work

West Bromwich Building Society v. Townsend [1983] ILR 257

An environmental health officer served an improvement notice alleging that a building society was in breach of its duty to do what was reasonably practicable to protect its employees against robbers. It was ordered to fit anti-bandit screens. The tribunal in confirming the notice disregarded evidence that there was a difference of professional opinion about the value of such screens. On appeal to the High Court, the improvement notice was quashed.

Note: This case also related Section 15 and Section 32 OSHA 1994. But under OSHA 1994, the Appeal Committee decision is final.

Wright v Dunlop Rubber Co Ltd [1972] 13 KIR 255

The action can lie against architects, distributors, retailers, repairers and second-hand goods dealers. To be able to sue in negligence, the employee need not be using the plant, equipment or substance it is enough, for ample, that the use of a dangerous substance by a fellow employee exposes the employee to disease.

Section 24: General duties of employees at work.

Reasonable care

Hamzah D494 & Ors v Wan Hanafi bin Wan Ali [1975] 1 MLJ 203

Wan Suleiman FJ: In ordinary circumstances, or where simple operations are being performed, persons are not as a rule required to guard against every conceivable result of their actions, nor are they bound to exercise scientific care or to take extravagant precautions. They must have regard both to the probability of injury resulting, and to the probable seriousness of the injury. They may weigh the cost and the difficulties of the precautions. They are in general entitled to assume that others will comply with statutory regulations.

Abdul Rahim b. Mohamad v Kejuruteraan Besi Dan Pembinaan Zaman Kini [1998] 4 MLJ 323

This is a claim for damages arising out of an accident which occurred while the plaintiff was carrying out repair work to the ceiling of the school hall of Sekolah Menengah Sains, Cheras, Kuala Lumpur. The facts may be briefly stated as follows. According to the plaintiff, in the morning of 21 April 1992, he was asked by the defendant to go to the Sekolah Menengah Sains, Cheras to do some repair work to the ceiling of the school hall. He went there with two co-workers, namely Fauzi bin Ariffin ('SP3') and Abdullah bin Hassan ('SB2').

On arrival, the three of them put up the necessary scaffolding to carry out the work. Soon after that, SP3 left the place leaving the plaintiff and SB2 to do the work. On the day in question, five pieces of the scaffolds were used, each one with a height of 4 feet, so the total height of the scaffolding was around 20 feet. At the top of the scaffolding, there was a metal platform for the worker to sit on while attending to the work. There was no railing around the platform. There was a gap of about 1 foot between the ceiling and the head of the workman seated on the platform.

While the plaintiff was on top of the scaffolding, he requested SP3 to push the scaffolding to another part of the hall. As SP3 was pushing the scaffolding, the plaintiff said, it started to shake so he held on to the platform. He then told SP3 to slow down and SP3 replied by telling him to be careful. When he thought that the scaffolding was about to tumble, he jumped towards the wall where there was a wooden box and tried to hold on to the box, but the box gave way and he fell to the floor. At about the same time, the scaffolding tumbled to the floor.

Going back to the scene of the accident, SP3 told the court that when he was about to push the scaffolding, he asked the plaintiff to come down but the plaintiff refused to do so. He saw the plaintiff sitting at the edge of the platform on the side close to the wall of the school hall. SP3 further told the court that when he pushed the scaffolding, it started turning and after that it fell to the floor. At about the same time, he also saw the plaintiff fell to the floor close to the wall.

The other eyewitness, SB2, gave a slightly different version of the accident. He told the court that after the plaintiff had finished working in one part of the ceiling, the plaintiff asked SP3 to push the scaffolding to another area. He and SP3 then told the plaintiff to come down first before SP3 push the scaffolding but the plaintiff told SP3 that he would hang on to the wooden box on the wall while SP3 push the scaffolding. When the plaintiff attempted to do so, he said, the wooden box gave way and that had prompted the plaintiff to jump back onto the platform and as a result the scaffolding tumbled. He said the plaintiff only manage to hang on to the box for less than two minutes when the box gave way.

The plaintiff claims that the personal injury suffered by him arose out of the negligence of the defendant. The particulars of the defendant's negligence were stated as follows:

- (a) Gagal untuk menyediakan tempat kerja yang selamat kepada plaintiff;
- (b) Mendedahkan plaintif kepada risiko kecederaan yang mana defendan telah tahu atau sepatutnya tahu;

- (c) Menyediakan scaffolding yang tidak selamat untuk kegunaan plaintiff walaupun defendan telah tahu bahawa alat tersebut tidak selamat untuk digunakan dan tidak berfungsi dengan sempurna;
- (d) Defendan gagal untuk menyediakan alat-alatan kerja yang sempurna dan sesuai kepada plaintiff untuk menjalankan kerja-kerja yang diarahkan oleh defendan.

It is submitted for the plaintiff that by reasons of the above, the defendant had committed breaches of both his common law and statutory duties, which the defendant as an employer owed to the plaintiff.

It is submitted on behalf of the defendant that according to the testimonies of SP3 and SB2, the normal procedure is for the worker to come down from the scaffolding before it is pushed to another part of the hall. What had happened here was that the plaintiff, after finishing work in one part of the ceiling, refused to come down from the scaffolding despite being asked to do so by SP3. It is contended that the plaintiff's refusal to come down from the scaffolding while the same was being pushed by SP3 constitutes a negligent conduct on his part. The defendant also draws my attention to s 24(1) of the Occupational Safety and Health Act 1994 which provides:

- (1) It shall be the duty of every employee while at work—
 - (a) to take reasonable care for the safety and health of himself and of other persons who may be affected by his acts or omissions at work;
 - (d) to comply with any instruction or measure on occupational safety and health instituted by his employer or any other person by or this Act or any regulation made thereunder.

It is alleged that the conduct of the plaintiff here was also in breach of s 24(1)(a) and (d) of the Occupational Safety and Health Act 1994 and such breach of statutory duty by the plaintiff as much as any carelessness, amounts to contributory negligence on his part.

Arifin Zakaria J held:

“At common law, a master is under a duty, arising out of the relationship of master and servant, to take reasonable care for the safety of his workpeople in all the circumstances of the case so as not to expose them to unnecessary risk. Having perused the evidence, I agree with the submission of learned counsel for the plaintiff that the defendant failed to comply with both his common law and statutory obligations to ensure the safety and welfare of his employees while carrying out the work on the fateful day.

First, I find that there was a breach of regulation 74(1) of the Factories and Machinery (Safety and Health and Welfare) Regulations 1970, since no designated person was appointed to supervise the erection of the scaffolding. The scaffolding was also not adequately secured to prevent movement as required by reg 77(3)(c). There is also no evidence to show that the scaffolding had been inspected by a designated person within the preceding seven days as required by reg 85(1). The scaffolding was also not provided with guard rail and toe-board as required by reg 88(1). Further, I find there is no proper supervision by a competent person of

the work to ensure that all the safety measures were being complied with by the employees. Had there been proper supervision, I am sure the plaintiff would not be allowed to remain on top of the platform while his co-worker was pushing the scaffolding. However, in my opinion, reg 12 of the Factories and Machinery (Safety, Health and Welfare) Regulations 1970 is not applicable to this case.

Having regard to the conduct of the plaintiff in this case, I am inclined to agree with the defendant that the plaintiff is partly to blame for the accident. The plaintiff ought to have known that, by remaining on the scaffolding while the same was being pushed, he was exposing himself to the unnecessary risk of injury to himself should the scaffolding were to collapse or fall for some reasons or other. The conduct of the plaintiff also, as submitted by the defendant, constitutes a breach of s 24(1)(a) and (d) of the Occupational Safety and Health Act 1994. For the above reasons, I am driven to the conclusion that there was contributory negligence on the part of the plaintiff.

Section 25: Duty not interfere with or misuse things provided pursuant to certain provisions.

Intentionally.

Govinda Mudaliar Sons Govindasamy [1967] 2 MLJ 5

Gill J: An intention to my mind connotes a state of affair which the party “intending”.... does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition.

Recklessly.

Yap Liow See v Public Prosecutor [1937] MLJ 225.

The word ‘reckless’ connotes a positive, active, mental condition, a certain wilfulness, a conscious disregard of consequences in doing an act.

Negligently

Anthonsamy v Public Prosecutor [1956] MLJ 247

The test for determining negligence is whether a reasonable man in the circumstances would have realised the prospect of harm and would have stopped or changed his course so as to avoid it: the test is the same in tort and ‘criminal intention’ or ‘wicked mind’ are immaterial.

Section 28: Duty to provide health surveillance

Wright v. Dunlop Rubber Co. [1972] 13 KIR 255

Employers can be held civilly liable at common law for failing to introduce health surveillance even in the absence of specific statutory regulation. The employers used an anti-oxidant called Nonox S in their process. ICI, the manufacturers, then discovered that it contained free betanaphthylamine, a known carcinogen and now a prohibited substance, and withdrew it. In 1960 a circular from the Rubber Manufacturers Employers’ Association warned that all employees who had been exposed should be screened and tested for bladder, cancer, a disease with a long latency period which can be successfully treated if caught in the early stage. Dunlop stopped using Nonox in 1949 but did not introduce urine tests for workers

who had been exposed until 1965. Only then was it discovered that the plaintiff had cancer of the bladder (hundreds of other cases subsequently came to light). It was held that in addition to the liability of the manufacturer the employer was liable in negligence for failing to institute tests quickly enough. This should have been done in 1960. At that time there was no statutory obligation (it was later introduced by the COSHH Regulations 1988).

Note: Section 28 of OSHA 1994 is equivalent to Regulation 5 of the Management of Health at Work Regulation 1992(UK).

This case also related to S. 21 of OSHA 1994.

Section 48: Improvement and prohibition notice

ANI Engineering v Bolton [1987] 3 VIR 76.

The Industrial Relations Commission of Victoria was called upon to interpret the expression “immediate risk” in section 44 of the OSHA (Vic), an expression which is also found in some of the other statutes. The Commission stated that:

“In our view there is no ‘standard’ level of risk against which the acceptability of a prohibition notice can be determined. What is an ‘acceptable’ risk will depend upon the nature of the threat. An inspector and this Commission on appeal will need to make a judgment which involves a consideration of the risk and the nature of the potential detriment. Undoubtedly this may be a difficult task on occasions, but similar difficulties are not unknown to the law. One may envisage circumstances when an activity would be prohibited even though the risk is extremely small....

Under s 44(1) the risk is to be immediate. In our view ‘immediate’ does not relate to the degree of risk associated the work in question. Rather, it is concerned with whether the risk associated with the work is present, or very nearly so. It is the exposure to the risk which is to be immediate.

Note: S.48 of OSHA 1994 is equivalent to S. 44 OSHA Victoria, Australia).

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