Tooma's Annotated Health and Safety at Work Act 2015

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Compare: 1992 No 96 s 2(2); Model Work Health and Safety Act (Aust) s 15

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(1) More than 1 person may have the same duty imposed by or under this Act at the same time.

(2) Each duty holder must comply with that duty to the standard required by or under this Act even if another duty holder has the same duty.

(3) If more than 1 person has a duty for the same matter, each person—

(a) retains responsibility for that person's duty in relation to the matter; and

(b) must discharge that person's duty to the extent to which the person has the ability to influence and control the matter or would have had that ability but for an agreement or arrangement purporting to limit or remove that ability.

Compare: 1992 No 96 s 2(2); Model Work Health and Safety Act (Aust) s 16

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(1) If more than 1 PCBU has a duty in relation to the same matter imposed by or under this Act, each PCBU with the duty must, so far as is reasonably practicable, consult, co-operate with, and co-ordinate activities with all other PCBUs who have a duty in relation to the same matter.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction,—

(a) for an individual, to a fine not exceeding $20,000:

(b) for any other person, to a fine not exceeding $100,000.

Compare: Model Work Health and Safety Act (Aust) s 46

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In determining whether a duty imposed on a person by or under this Act is being or has been complied with, a person or a court may have regard to the requirements imposed under any other enactment (whether or not those requirements have a purpose of ensuring health and safety) that apply in the circumstances and that affect, or may affect, the health and safety of any person.

Subpart 2—Duties of PCBUs

(s 36 to s 43)

36 Primary duty of care

(1) A PCBU must ensure, so far as is reasonably practicable, the health and safety of—

(a) workers who work for the PCBU, while the workers are at work in the business or undertaking; and

(b) workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out the work.

(2) A PCBU must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

(3) Without limiting subsection (1) or (2), a PCBU must ensure, so far as is reasonably practicable,—

(a) the provision and maintenance of a work environment that is without risks to health and safety; and

(b) the provision and maintenance of safe plant and structures; and

(c) the provision and maintenance of safe systems of work; and

(d) the safe use, handling, and storage of plant, substances, and structures; and

(e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and

(f) the provision of any information, training, instruction, or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and

(g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing injury or illness of workers arising from the conduct of the business or undertaking.

(4) Subsection (5) applies if—

(a) a worker occupies accommodation that is owned by, or under the management or control of, a PCBU; and

(b) the occupancy is necessary for the purposes of the worker's employment or engagement by the PCBU because other accommodation is not reasonably available.

(5) The PCBU must, so far as is reasonably practicable, maintain the accommodation so that the worker is not exposed to risks to his or her health and safety arising from the accommodation.

(6) A PCBU who is a self-employed person must ensure, so far as is reasonably practicable, his or her own health and safety while at work.

Compare: Model Work Health and Safety Act (Aust) s 19

HS36.01 Overview of primary duty of care

The primary duty of care is the centrepiece of the reforms introduced by the Act. At its broadest, PCBUs owe a duty of care to all other persons to ensure that, so far as reasonably practicable, they do not exposes those persons to risks to their health or safety (s 36(2)). Categorised in that way, the duty which is owed to workers can be seen as a subcategory of the duty owed to others.

Section 36(1) imposes a duty on PCBUs to ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU and workers whose activities in carrying out work are influenced or directed by the PCBU. That duty is owed to those workers while the workers are at work in the business or undertaking.

Section 36 reflects its counterpart in the Australian Model Act and the architecture recommended by the Stewart-Crompton Review on this issue for the creation of a duty of care which requires PCBUs to capture broader categories of work arrangements: see recommendations 10–21 of the *First Report*. These recommendations built on the pre-Model-Act Queensland duty-of-care provisions, which from 2005 imposed the duty of care on "[a] person … who conducts a business or undertaking": Workplace Health and Safety Act 1995 (Qld), s 28(1).

See further Richard Johnstone and Michael Tooma *Work Health and Safety Regulation in Australia: The Model Act* (Federation Press, Sydney, 2012), particularly chs 1–2.

HS36.02 Overarching nature of "primary" duty

Importantly, the Stewart-Crompton Review recommended that the duty imposed on persons conducting a business or undertaking be the "primary duty". That is, the duty is overarching. While it is supplemented by the "further duties" in ss 37–43 of the Act, properly constructed, the duty is intended to be broad enough to capture all work arrangements as well as the further specific duties set out in those sections. In that sense, it is s 36 which is expected to be the duty most often relied upon by WorkSafe New Zealand in prosecutions under the Act.

The regime created by the Act is an "elaborate safety code", the objectives of which are to secure the health and safety of people at work and to protect other people from risks arising from work activities: *WorkCover Authority of New South Wales v Bros Bins Systems Pty Ltd* [2003] NSWIRComm 386, (2003) 130 IR 62 at [36]. The primary duty of care imposed by s 36 is at the apex of that code. Further duties are imposed by ss 37–43, but these duties are examples of specific circumstances already covered by s 36.

HS36.03 Principles of interpretation

(1) Non-delegable duties

The duties imposed by s 36 are non-delegable. That is, they cannot be transferred to another person (s 31). Indeed, any contractual provision that purports to contract out of the obligations imposed by the Act are void (s 28).

(2) Concurrent nature of duties

The duties are also concurrent and overlapping (ss 32–33). That is, more than one person can concurrently have the same duty, in which case each duty holder must comply with that duty to the standard required by the Act even if another duty holder has the same duty. Indeed, the case law is replete with examples of multiple duty holders found guilty of offences arising from the same factual circumstances, particularly in relation to serious incidents.

Nor can related bodies corporate escape liability merely by virtue of their interrelation. It is now commonplace for prosecutors to charge related bodies corporate separately in relation to their respective involvement in the same incident. That is, a company in a group may be charged as a PCBU in relation to an incident involving a worker, while another company in the same group may be separately charged as a PCBU which is in management or control of a workplace, plant or fixtures for failing to provide a safe plant to that same worker. Furthermore, the courts have held that the principle of totality does not apply to separate legal entities even if they are in the same group of companies: *WorkCover Authority (NSW) (Inspector Green) v Big River Timbers Pty Ltd* [2006] NSWIRComm 279, (2006) 156 IR 341.

(3) Control

If more than one person has a duty for the same matter, each person retains responsibility for their duty in relation to the matter and must discharge their duty to the extent to which they have the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity: see *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14, (2012) 246 CLR 92 in relation to interaction between "control" and "reasonably practicable".

(4) Broad approach

In interpreting sections such as these which are directed to guarding against accidents and to the preservation of human life, the courts will endeavour to carry out the objects of the legislature as far as the Act's language will permit: *Rice v Henley* (1914) 19 CLR 19 at 22 per Isaacs J; see also *Butler v Fife Coal Co Ltd* [1912] AC 149 (HL). This approach has been consistently applied by the courts in the context of the pre-Model-Act laws: see *Kirby v A & MI Hanson Pty Ltd* (1994) 55 IR 40 (NSWIC); *Rech v FM Hire Pty Ltd* (1998) 83 IR 293 (NSWIRComm); *WorkCover Authority (NSW) v Mainbrace Constructions Pty Ltd* (1999) 94 IR 451 (NSWIRComm); *Haynes v CI & D Manufacturing Pty Ltd* (1994) 60 IR 149 (NSWIC); and *Holmes v RE Spence & Co Pty Ltd* (1992) 5 VIR 119 (VSC).

(5) "Ensure" means to guarantee or make certain

In *Carrington Slipways Pty Ltd v Callaghan* (1985) 11 IR 467 (NSWIRComm) Watson J said at 470:

> "[T]here would appear to be no reason to make any implication that the words 'to ensure' are to be construed in any way other than their ordinary meaning of guaranteeing, securing or making certain."

(6) Duties concerned with risks to health and safety

The duties under pt 2 of the Act are concerned with risks to health, safety and welfare, not actual injury. It is not necessary for there to be an accident for a breach of s 36 to occur: see *Haynes v CI & D Manufacturing Pty Ltd* (1994) 60 IR 149 (NSWIC) and *Boral Gas (NSW) Pty Ltd v Magill* (1995) 37 NSWLR 150 (NSWIC). See also *Arrowcrest Group Pty Ltd v*

Stevenson (1990) AISHWC 52-863, *R v Australian Char Pty Ltd* [1999] 3 VR 834 (VCA) and *R v Board of Trustees of the Science Museum* [1993] 1 WLR 1171 (CA). The mere exposure of persons to risks to their health or safety can give rise to a breach of the primary duty of care. In *Haynes v CI & D Manufacturing Pty Ltd* (1994) 60 IR 149 (NSWIC) at 157 the Full Bench of the then Industrial Court of New South Wales said the following in relation to the predecessor duty of care provisions:

> "[The duties are] concerned with failures to ensure the health and safety of persons at workplaces in terms inter alia of 'risks' thereto; thus, the sections, even absent any actual accident causing death or bodily injury, nevertheless comprehend the commission of an offence where the relevant 'detriment to safety' … is but a risk … ."

Indeed, in many respects it is "risk" and not "workplace" which is the lynchpin of the duties imposed by s 36. This is an important feature of the legislation that gives it its expansive character.

Section 30(1) provides that a duty imposed on a person by or under the Act requires the person to eliminate risks to health and safety, so far as is reasonably practicable, and if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable. A person must comply with that obligation to the extent to which the person has, or would reasonably be expected to have, the ability to influence and control the matter to which the risks relate (s 30(2)).

"Risk" means the mere possibility of danger, and not necessarily actual danger: *R v Board of Trustees of the Science Museum* [1993] 1 WLR 1171 (CA) and *Abigroup Contractors Pty Ltd v WorkCover Authority of New South Wales* [2004] NSWIRComm 270, (2004) 135 IR 317.

The relevant risk is risk to health and safety. "Health and safety" means "soundness of body" rather than merely "freedom from illness or infection": *TTS Pty Ltd v Griffiths* (1991) 105 FLR 255 (NTSC) at 267 per Asche CJ.

In *R v Board of Trustees of the Science Museum* [1993] 1 WLR 1171 (CA) the Science Museum's air conditioning cooling tower was inspected by officers of the United Kingdom Health and Safety Executive and was found to contain legionella pneumophila, the bacterium which causes Legionnaires' Disease. The Board of Trustees of the Science Museum was charged with breaching s 3(1) of the Health and Safety at Work etc Act 1974 (UK) (the equivalent to s 36(2) of the 2015 Act), in that members of the public outside the Science Museum building had been exposed to risks to their health due to an inadequate system of maintenance of the air conditioning system.

This approach was confirmed in Australia by the Full Bench of the Industrial Relations Commission of New South Wales in *Abigroup Contractors Pty Ltd v WorkCover Authority of New South Wales* [2004] NSWIRComm 270, (2004) 135 IR 317. That case related to an appeal from the decision of Kavanagh J convicting the appellant, Abigroup Contractors, in relation to five charges arising from the 1995 Kogarah Gas Disaster. The Kogarah Gas Disaster involved two gas explosions near the railway station in Kogarah in South Sydney on 4 December 1995 which claimed two lives and resulted in 16 others being injured, including officers from the New South Wales Police Force and Fire Brigade who attended the scene.

The charges against Abigroup resulting from the Kogarah Gas Disaster included two charges for failing to ensure the health and safety of its employees and non-employees at its

place of work, starting from the day on which the gas supply was disconnected by AGL Gas Networks at Abigroup's request. The gas supply line was cut and capped within one metre of the alignment of the buildings intended for demolition, which left approximately two metres of the charged gas supply line within the Kogarah station site where construction was intended to occur.

The appellant submitted that Kavanagh J had erred in finding it guilty in relation to those two charges because any relevant "risk" would only arise from the presence of a charged gas line in the vicinity of demolition and construction work involving the use of heavy machinery and equipment. However, no such construction work took place on that day. In dismissing that aspect of the appeal, Wright P, Walton V-P and Staunton J said at [54]–[55]:

> "We do not consider that the appellant's submissions in this area of its appeal [should be] accepted. We consider that her Honour correctly found … that there was a relevant risk to the health and safety of employees and other persons … .
>
> "… The conclusion that [the duty of care provisions of the 1983 NSW Act] are concerned with not merely present danger but also risk to the health and safety of employees and non-employees, in the latter case, arising from the conduct of the employer's undertaking at the employer's place of work, is plain from the text of both statutory provisions."

In *Inspector Beacham v BOC Ltd* [2007] NSWIRComm 92 the defendant was convicted and fined AUD 140,000 in relation to an explosion in an acetylene plant on the defendant's site, notwithstanding that there was no one in the vicinity of the plant at the time of the explosion. This case involved an incident at the defendant's Wetherill Park premises in New South Wales. The defendant manufactured a number of industrial gases at the plant, including acetylene. On the day of the incident, an experienced operator neglected to close a water supply valve while shutting down the plant. However, the build-up of water over 13 hours resulted in water backfilling into the generator, producing acetylene and building pressure inside the feed hopper. The build-up resulted in an explosion blowing off the lid of the hopper. Acetylene gas escaped and its vapour ignited. There was a second ignition 20 minutes later. Kavanagh J held at [15]–[17]:

> "The defendant submitted it had an extensive system in place for ensuring safety in relation to the acetylene generation process.
>
> "…
>
> "… There must be the most rigorous implementation of the systems in place. Once again this offence shows that even where there are careful and considered safe procedures in place the rigorous training of employees in the implementation of that devised system on site is a key element to a commitment to a safe workplace. Maintenance, employee training and the procedures for safe working must be respected and adhered to."

(7) Inherently risky occupations and third party criminal conduct

The fact that a defendant operates in a high-risk environment or that the commission of the offence arose from an illegal act by a third party does not in any way reduce the defendant's obligations under the Act. To the contrary, the fact that the defendant operates in a high-hazard environment places a greater onus on them to ensure the health and safety of their employees (and others) in that environment. In *WorkCover Authority of NSW (Inspector Stothard) v Manildra Park Pty Ltd* [2007] NSWIRComm 35 Marks J said at [12]:

> "It is a trite observation that the more dangerous the activity being undertaken, the greater should be the level of care and vigilance utilised to ensure that the obligation to provide a safe working environment is met."

In *WorkCover Authority of New South Wales (Inspector Keelty) v Crown in Right of the State of New South Wales (NSW Police Service) (No 2)* [2001] NSWIRComm 90, (2001) 104 IR 268 the defendant submitted that the risk to health and safety of police officers was an inherent part of their occupation and that in those circumstances it could not be eliminated. In rejecting that submission, Hungerford J said at [23]–[24]:

> "I do not doubt, and neither do I think does the defendant, that police officers engaged on operational duties will be faced with risks to their safety. However, it is no answer to say … that 'the objective facts causing the detriment to safety were not the absence of speed loaders or a pistol or any deficiencies in the radio communication system or training, but the actions of McGowan … .' Workplaces in very many industries have the potential to be unsafe and, to meet that situation in the interests of the well-being of employees, the legislature has created the … duty on employers … to ensure the health, safety and welfare of those employees at their place of work. …
>
> "Although the defendant may not be able to 'control', or otherwise affect, the conduct of persons such as Mr McGowan who confront police officers from time-to-time in the performance of their duties, the defendant is able to directly control and dictate the measures which should properly be made in preparing and equipping police officers to perform operational duties which are of such a nature as will ensure the health, safety and welfare of those officers. In the same way, and notwithstanding the submissions of [counsel to the defendant] to the contrary, comparable steps should be taken by employers in satisfying the statutory duty in respect of their employees liable to the effects of unlawful action by criminals, such as, as identified by [counsel to the defendant], those employees engaged in 'service stations, pharmacies, shops, banks, cash delivery, cigarette trucks, buses and taxis'. In identifying those occupations, [counsel to the defendant] submitted as to them that 'there is a known history of violent and unlawful attacks by criminals, for which negligible precautions are provided by employers'. Senior counsel added that in the emergency services (fire brigade, bush fire brigade and emergency services) the 'employees are inevitably exposed to the risks of injury and death by the very nature of their duties' so that 'employees are routinely exposed to the risk of, and suffer, the risk of injury and death from fire and flood, for which negligible precautions are taken'. There is no evidence before me, I have to say, to support such a submission and, in any event, I would be most concerned that where employees are routinely exposed to risks to their safety that the employer concerned did not take the necessary steps to ensure their safety. The submission is no answer to the present charges. I reject it."

See also *Cahill v State of New South Wales (Department of Community Services) (No 3)* [2008] NSWIRComm 123, (2008) 182 IR 124, where the Department of Community Services was found guilty of breach of the general duty of care in relation to an incident where one of its employees was stabbed by a client during an access visit to her three children who had been removed from her care by the Department. The Department was fined AUD 200,000: *Cahill v State of New South Wales (Department of Community Services) (No 4)* [2008] NSWIRComm 201, (2008) 182 IR 231.

In *Derrick v Westpac Banking Corp* [2006] NSWIRComm 76 Staunton J said at [24]–[33]:

> "The day to day operations of retail banking have long been recognised in the community as prime targets for robbery. As such, they represent workplaces with inherent risks to safety for staff employed in them and the public who use them. …
>
> "…
>
> "… notwithstanding the security measures in place to deal with such an occurrence, the risk of a hold-up and breach of the cash handling area in a bank premises by an offender was foreseeable."

This case involved an armed hold-up by three men at Westpac's Avalon branch on 21 September 2004. One of them climbed onto the counter and over the anti-jump barrier and bulkhead to the employee side of the counter, and demanded access to the cash-handling area. A second man then gained access to that area and took money from the safe and removed money from three teller drawers. In total, approximately AUD 25,000 was stolen. Westpac was convicted of breaching the duty of care under the pre-Model-Act New South Wales laws and fined AUD 145,000.

Similarly, in *Derrick v Australian and New Zealand Banking Group Ltd* [2003] NSWIRComm 406 the defendant bank was prosecuted and convicted in relation to an armed hold-up at its Brookvale branch. The defendant's anti-jump barriers (barriers intended to protect staff and cash from armed offenders in the event of a hold-up) did not extend to the ceiling. The armed offenders gained access to cash-handling areas by climbing over barriers. A similar robbery at the defendant's Katoomba branch six months earlier had highlighted the hazard posed by the deficiency in the anti-jump barriers. The bank pleaded guilty and was fined AUD 156,000.

See also *Inspector Mayo-Ramsay (WorkCover Authority of NSW) v The Crown in Right of the State of New South Wales (NSW Fire Brigades)* [2006] NSWIRComm 356, where the New South Wales Fire Brigades were convicted of breaching the duty of care under the pre-Model-Act New South Wales laws in relation to its response to a fire at an edible oil refinery and seed oil extraction plant. The Fire Brigades were fined AUD 200,000 in relation to the incident: *Inspector Mayo-Ramsay (WorkCover Authority of NSW) v The Crown in Right of the State of New South Wales (NSW Fire Brigades) (No 2)* [2007] NSWIRComm 168.

(8) Duty extends to situations of civil disorder

In *WorkCover Authority (NSW) (Inspector Short) v Crown in Right of State of New South Wales (NSW Police)* [2007] NSWIRComm 138, (2007) 164 IR 198 the New South Wales Police Force was convicted and fined AUD 100,000 in relation to civil unrest in February 2004 in Redfern, an inner city suburb of Sydney (see discussion at [HS5.02]). In sentencing the defendant, Boland J said at [23]–[26]:

> "Dealing with incidents of public or civil disorder is obviously a dangerous business, even for police who are properly trained and equipped. …
>
> "The failures by the defendant to ensure safety as particularised in the charge amount to serious failures. Given the dangers faced by police officers in dealing with a riot there is no question that they should be provided with the equipment that best protects them from injury and training in the use of that equipment as well as training in dealing with civil disorder incidents. Whilst the OSG had

personal protective equipment, there was not enough of it. There was other personal protective equipment although it was defective or in some cases obsolete or otherwise inadequate or incomplete. As the prosecutor submitted, the very purpose of personal protective equipment was to protect employees against the risk of injury — the equipment that was provided did not achieve that result because it was either defective or incomplete.

"… some employees were trained in the use of that equipment, but again not all of them. Nor were all employees trained in dealing with civil disorder.

"… In the absence of adequate personal protective equipment there was every prospect of serious consequences for the health and safety of officers."

HS36.04 Proof of elements

(1) Onus of proof

Notwithstanding the nature of the primary duty, the prosecution must prove each element of the offence to the requisite criminal standard – that is, beyond reasonable doubt: *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249. This includes the reasonable practicability element.

(2) Charge must identify relevant failure

In *Kirk v Industrial Court of New South Wales* [2010] HCA 1, (2010) 239 CLR 531 the High Court of Australia held that a charge must identify the relevant failure on the part of the defendant which is said to constitute the offence. The case was concerned with the predecessor duty-of-care provisions in New South Wales. In their joint judgment, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ held at [14]:

> "A statement of an offence must identify the act or omission said to constitute a contravention of s 15 or s 16. It may be expected that in many instances the specification of the measure which should have been or should be taken will itself identify the risk which is being addressed. The identification of a risk to the health, safety and welfare of employees and other persons in the workplace is a necessary step by an employer in discharging the employer's obligations. And the identification of a risk which has not been addressed by appropriate measures must be undertaken by an inspector authorised to bring prosecutions under the Act (s 48). But it is the measures which assume importance to any charges brought. Sections 15 and 16 are contravened where there has been a failure, on the part of the employer, to take particular measures to prevent an identifiable risk eventuating. That is the relevant act or omission which gives rise to the offence."

HS36.05 PCBUs

The duties imposed by s 36 apply only to PCBUs. It follows therefore that one of the elements that the prosecution must prove beyond reasonable doubt is that the defendant was a person conducting a business or undertaking. "Person conducting a business or undertaking" is defined in s 17. See the discussion at [HS17.01] and following.

HS36.06 Reasonable practicability

The standard of care required by the primary duty is that of reasonable practicability. "Reasonably practicable" is defined in s 22. See the commentary at [HS22.01] and following.

In addition, the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016 require duty holders to follow the risk management process set out in regs 5–8 when managing a particular risk specified in the regulations. See the commentary at [HS22.03].

(1) Onus is on prosecution

Reasonable practicability is an element of the offence which the prosecution must prove beyond reasonable doubt: *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249.

Chugg related to a prosecution of Pacific Dunlop in relation to six charges under s 21 of the former Occupational Health and Safety Act 1985 (Vic) and one charge under the former Occupational Health and Safety (Machinery) Regulations 1985 (Vic). The prosecution related to a fatal accident at Pacific Dunlop's Footscray factory, where a fourth-year apprentice was killed while working on a machine. The machine had a hopper intake door and a discharge door. Electrical modifications had been made to the machine with a view to ensuring that the hopper door would automatically close and remain closed when the discharge door was open. When the machine was being used for production, a conveyor belt limited, but did not completely bar, access to the hopper door.

On the day of the accident, the machine was not being used for production and the conveyor belt had been pushed aside, leaving the hopper door unguarded. The deceased worker was required to modify the machine's pneumatic system so as to override the electrical modifications and allow the hopper door to be manually operated. This work was to be effected on a control panel near the machine. It did not require work on the machine itself. However, the deceased worker had occasion to go to the machine and was fatally injured when the hopper door closed, trapping the upper part of his body inside.

The charges were heard in the Broadmeadows Magistrates' Court at first instance. The Magistrate dismissed the charges under s 21 of the former Victorian Act but convicted Pacific Dunlop in relation to the charge under the former regulations.

The defendant and prosecutor both appealed against the Magistrate's decision. The Full Court of the Victorian Supreme Court (Kaye and Beach JJ; Ormiston J dissenting) dismissed the appeals. The parties appealed to the High Court. Dawson, Toohey and Gaudron JJ (with whom Brennan and Deane JJ agreed in separate judgments) held at 257:

> "The Act is silent as to the onus of proof in relation to the offence created by s 21. That is not unusual for the rule as to the onus of proof in a criminal proceeding is clear, namely, that 'it is the duty of the prosecution to prove [a defendant's] guilt subject … to the defence of insanity and subject also to any statutory exception' … ."

Their Honours then considered whether the words "so far as practicable" in s 21 of the former Victorian Act were such a statutory exception. In holding that "so far as practicable" was an element of the offence (and not a statutory exception), their Honours said at 262–263:

> "There is one matter which, in our opinion, tells decisively against a construction of s 21 of the Act which would place the onus of proof in relation to practicability on an employer. The obligation imposed by s 21(1) – even as elaborated in s 21(2) … – is perfectly general. And, as the definition of 'practicable' shows, the question of practicability is one which must be answered by a consideration of the means by which a risk can be removed or mitigated. … [W]here a general obligation is imposed, the means which might practicably be adopted are

> confined only by the nature of the risk or hazard. That is because … if it were established that one or even several methods were impracticable, it would not follow that the workplace was as safe as practicable. If the onus is on an informant, the issue is confined by the means which the informant claims were practicable in the circumstances. If the onus is on a defendant, the issue, if confined at all, is confined only by the 'means of making the place safer which the ingenuity of … counsel can suggest' in the course of cross-examination … . It is impossible to read into s 21 of the Act an intention to place the onus of proof of the issue of practicability on a defendant when that onus would entail the additional burden of anticipating and negating the practicability of every possible means of avoiding or mitigating a risk or accident that might be raised in the course of cross-examination."

HS36.07 Workers

The duty imposed by s 36(1) is owed to workers directly engaged by the PCBU, caused to be engaged by the PCBU, or workers whose activities can be influenced or directed by the PCBU.

"Worker" is defined in s 19 to mean anyone who performs work for a PCBU including an employee, a contractor, a subcontractor, an employee of a contractor or subcontractor, a labour hire worker, an outworker, a student on work experience, an apprentice or trainee and a volunteer. A "volunteer" is defined in s 16 as a person who is acting on a voluntary basis (whether or not the person receives out-of-pocket expenses). See the discussion at [HS19.01] and following.

(1) Volunteer workers

Certain volunteer workers are excluded from the definition, namely: volunteers participating in a fund-raising activity; volunteers assisting with sports or recreation for an educational institute, sports club or recreation club; volunteers assisting with activities for an educational institute outside the premises of the educational institution; and volunteers providing care for another person in the volunteer's home (s 19(3)(b)). See the discussion at [HS19.04].

(2) Overlap between duty to workers and duty to others

For a prosecution under s 36(1) to succeed, the onus is on the prosecution to prove, beyond reasonable doubt, that the person exposed to risk was a relevant worker of the defendant – that is, a worker engaged directly by them, caused to be engaged by them, or a worker whose activities the defendant could influence or direct. There is no such requirement for a s 36(2) offence. Since workers are persons, on one view every breach of s 36(1) could be prosecuted as a breach of s 36(2).

HS36.08 Risk from work carried out as part of conduct of business or undertaking

Section 36(2) is the broadest expression of the duty of care and in many respects subsumes the duty imposed by s 36(1). The lynchpin of liability under s 36(2) is risk arising from work in the conduct of the business or undertaking.

(1) Work

"Work" is not a defined term in the Act and therefore takes on its ordinary meaning of "exertion directed to produce or accomplish something": *Macquarie Dictionary* (5th ed, Macquarie Dictionary Publishers, Sydney, 2009).

(2) Conduct of business of undertaking

The question whether an activity is part of the conduct of a person's business or undertaking is a question of fact to be determined on a case-by-case basis, notwithstanding the need to interpret the duty broadly: *R v Associated Octel Co Ltd* [1996] 1 WLR 1543 (HL). See also *WorkCover Authority (NSW) v Technical and Further Education Commission* (1999) 92 IR 251 (NSWIRComm) and *Mainbrace Constructions Pty Ltd v WorkCover Authority (NSW)* [2000] NSWIRComm 239, (2000) 102 IR 84.

In *Associated Octel* Lord Hoffmann, who delivered the judgment of the House of Lords, said at 1547–1549:

> "The question, as it seems to me, is simply whether the activity in question can be described as part of the employer's undertaking. In most cases, the answer will be obvious. Octel's undertaking was running a chemical plant at Ellesmere Port. Anything which constituted running the plant was part of the conduct of its undertaking. …
>
> "…
>
> "… the question of whether an employer may leave an independent contractor to do the work as he thinks fit depends upon whether having the work done forms part of the employer's conduct of his undertaking. If it does, he owes a duty under section 3(1) to ensure that it is done without risk – subject, of course, to reasonable practicability, which may limit the extent to which the employer can supervise the activities of a specialist independent contractor."

In that case the appellant operated a chemical plant. During an annual shutdown of the plant for maintenance a contractor was engaged to repair the lining of a tank within the chlorine plant. One of the contractor's employees was badly burned during the process.

The appellant at first instance was convicted under s 3 of the Health and Safety at Work etc Act 1974 (UK), which imposes a duty of care on employers with respect to other persons exposed to risk arising from the conduct of the employer's undertaking.

The appellant appealed. The English Court of Appeal dismissed the appeal. On appeal to the House of Lords it was held that what had to be determined was whether the activity in question was part of the employer's undertaking at its plant to have the chlorine tank repaired. The House of Lords held that it was.

In *R v Mara* [1987] 1 WLR 87 (CA) Parker LJ considered whether the cleaning of a factory on a weekend was part of the factory owner's undertaking. The Lord Justice said at 90–91:

> "A factory, for example, may shut down on Saturdays and Sundays for manufacturing purposes, but the employer may have the premises cleaned by a contractor over the weekend. If the contractor's employees are exposed to risks to health or safety because machinery is left insecure, or vats containing noxious substances are left unfenced, it is, in our judgment, clear that the factory owner is in breach of his duty under section 3(1). The way in which he conducts his undertaking is to close his factory for manufacturing purposes over the weekend and to have it cleaned during the shut down period. It would clearly be reasonably practicable to secure machinery and noxious vats, and on the plain wording of the section he would be in breach of his duty if he failed to do so."

This passage was applied with approval by the House of Lords in *Associated Octel* (above). Lord Hoffmann (with whom Lord Mackay LC, Lord Goff, Lord Jauncey and Lord Mustill agreed) said the following at 1548 regarding the above passage:

> "I entirely agree and I draw attention to the language used by the judge. It is part of the conduct of the undertaking, not merely to clean the factory, but also to 'have the factory cleaned' by contractors. The employer must take reasonably practical steps to avoid risk to the contractors' servants which arise, not merely from the physical state of the premises (there are separate provisions for safety of premises in section 4), but also from the inadequacy of the arrangements which the employer makes with the contractors for how they will do the work."

In *WorkCover Authority (NSW) v Techniskil-Namutoni Pty Ltd* NSWIC CT1165/94, 10 July 1995, Cahill ACJ held at 8:

> "Although the work being performed at the time of the accident may have been the direct responsibility of a sub-contractor, who had engaged direct employees to assist in performing such work, that does not detract from the overall concept of an undertaking being conducted by Techniskil of which the work in question forms part. The same reasoning applies when considering whether the relevant area was Techniskil's 'place of work'.
>
> "In my opinion, the circumstances of a particular work site may reasonably lead to the conclusion that it is the place of work of more than one employer and also that more than one employer is conducting an undertaking thereon."

In *Whitaker v Delmina Pty Ltd* (1998) 87 IR 268 (VSC) the Victorian Supreme Court considered the meaning of the phrase "conduct of the employer's undertaking". Hansen J said at 280–281:

> "The expression is broad in its meaning. In my view such a broad expression has been used deliberately to ensure that the section is effective to impose the duty it states. … The word must take its meaning from the context in which it is used. In my view it means the business or enterprise of the employer … and the word 'conduct' refers to the activity or what is done in the course of carrying on the business or enterprise. A business or enterprise, including for example that conducted by a municipal corporation, may be seen to be conducting its operation, performing work or providing services at one or more places, permanent or temporary and whether or not possessing a defined physical boundary. The circumstances must be as infinite as they may be variable."

The case was an appeal from a Magistrates' Court decision dismissing an improvement notice. The improvement notice sought to require a horse-riding ranch, which was hiring out horses to the public for rides outside its premises, to have their customers accompanied by a supervisor. Hansen J overturned the decision, holding that the scope of the ranch's undertaking extended beyond ranch premises and required the ranch to ensure that riders were not exposed to risks to their health or safety during the ride.

In *Inspector Maltby v Harris Excavation and Demolition Pty Ltd* NSWIRComm CT1144/95, 2 May 1997 Cahill V-P said:

> "… I am of the view that the defendant's connection with the site cannot be regarded as being at an end until a handover to the proprietor had been effected in circumstances where the proprietor's project manager signified his satisfaction that the work required had been satisfactorily completed. Until that occurred, the

demolisher, in this case the defendant, in my opinion was to be regarded as possessing a place of work, and as conducting an undertaking in relation to that place of work, within the meaning of s 16(1) of the Act."

In that case the defendant was a demolition and excavation business. It was contracted to demolish the Seabreeze Hotel near Tom Ugly's Bridge in South Sydney. In order to prevent debris from falling onto the footpath or roadway of the adjacent Princes Highway, the defendant hired a company to erect a hoarding. The hoarding was erected and secured to the face of the building to be demolished. The structural integrity of the hoarding was such that it would not be stable if it were a freestanding structure. The hoarding, when in that condition, was not stable and was not erected in accordance with the relevant Australian standards. In due course the connection between the hoarding and the building was severed by the defendant so as to allow the building to be demolished. No steps were taken by the defendant to contact the scaffolder to have them secure the structure of the hoarding (or remove it), and the defendant took no steps to itself secure the hoarding. Two days prior to the handover of the property to the owners, the hoarding collapsed in high winds onto the adjacent footpath and roadway, causing damage to passing vehicles and minor injuries to the vehicles' occupants. At the time of the accident, most but not all of the defendant's work under the contract had been completed. However, the balance of the work was to be completed under a separate contract. Notwithstanding this, the defendant was held to have been conducting an undertaking at the relevant time, and the risk to health and safety was held to have arisen from that undertaking.

Similarly, in *WorkCover Authority of NSW (Inspector Farrell) v Morrison* [2001] NSWIRComm 325 Walton V-P held that a swimming pool builder was conducting an undertaking at a building site even though he had completed the construction of a swimming pool to the extent possible (given the state of other construction at the site) and had left the site some five months before the date of the accident.

HS36.09 Codes of practice

An approved code of practice is admissible in proceedings under the Act as evidence of whether or not a duty or obligation under the Act has been complied with (s 226(2)). In that respect, the court may (1) have regard to the code as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code relates and (2) rely on the code in determining what is reasonably practicable in the circumstances to which the code relates (s 226(3)).

HS36.10 Enforcement

The offence provisions for the purpose of ss 36–45 – the duty-of-care provisions – are contained in ss 47–49.

(1) Maximum penalties

Where a person commits a breach of the general duty which exposes any individual to whom that duty is owed to a risk of death or serious injury or serious illness, and the person is reckless as to the risk to an individual of death or serious injury or serious illness, they commit an offence under s 47, which is generally known as a category 1 offence. A person found guilty of a category 1 offence faces a maximum penalty of:

- a fine of $3,000,000 for a PCBU which is a corporation or a body corporate;
- a fine of $600,000 and/or five years' imprisonment for individual officers (and PCBUs who are natural persons); or
- a fine of $300,000 and/or five years' imprisonment for workers and others (s 47(3)).

If a person commits a breach of the general duty and that failure exposes any individual to a risk of death or serious injury or serious illness, they commit a category 2 offence (s 48). The maximum penalty for a category 2 offence is:

- for an individual who is not a PCBU or an officer of a PCBU, a fine of $150,000;
- for an individual who is a PCBU or an officer of a PCBU, a fine of $300,000; and
- for any other person (such as corporations and body corporates), a fine of $1,500,000 (s 48(2)).

A mere breach of the general duty is a category 3 offence and attracts a maximum fine of:

- $50,000 for an individual who is not a PCBU or an officer of a PCBU;
- $100,000 for an individual who is a PCBU or an officer of a PCBU; and
- $500,000 for any other person (such as a corporation or body corporate) (s 49).

(2) Additional orders on sentencing

In addition to monetary penalties and custodial sentences, a court may make:

- adverse publicity orders (s 153);
- orders for restoration (s 154);
- work health and safety project orders (s 155);
- orders for release on the giving of court-ordered enforceable undertakings (s 156);
- injunctions (s 157); and
- training orders (s 158).

(3) Prosecutions

Prosecutions for these offences may be brought by the regulator (s 143). However, where the regulator chooses not to prosecute, private prosecutions may be brought (s 144). Section 142 provides the mechanism by which an interested party may be kept informed of the regulator's intentions, primarily for that purpose. Prosecutions by the regulator must be brought within 12 months, but upon application the District Court may extend the limitation period by a further 12 months (ss 146–147). The regulator also has six months from a Coronial inquest in which to bring a prosecution (s 146(1)(b)). The time limitation for private prosecutions is (1) two years, (2) six months after a Coronial inquiry, or (3) three months after the expiry of an extension given to the regulator in relation to their time limitation (s 148).

37 Duty of PCBU who manages or controls workplace

(1) A PCBU who manages or controls a workplace must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace, and anything arising from the workplace are without risks to the health and safety of any person.

(2) Despite subsection (1), a PCBU who manages or controls a workplace does not owe a duty under that subsection to any person who is at the workplace for an unlawful purpose.

(3) For the purposes of subsection (1), if the PCBU is conducting a farming business or undertaking, the duty owed by the PCBU under that subsection—

(a) applies only in relation to the farm buildings and any structure or part of the farm immediately surrounding the farm buildings that are necessary for the operation of the business or undertaking:

(b) does not apply in relation to—

(i) the main dwelling house on the farm (if any); or

(ii) any other part of the farm, unless work is being carried out in that part at the time.

(4) In this section, a **PCBU who manages or controls a workplace**—

(a) means a PCBU to the extent that the business or undertaking involves the management or control (in whole or in part) of the workplace; but

(b) does not include—

(i) the occupier of a residence, unless the residence is occupied for the purposes of, or as part of, the conduct of a business or undertaking; or

(ii) a prescribed person.

Compare: Model Work Health and Safety Act (Aust) s 20

HS37.01 Overview of duty of PCBU who manages or controls workplace

Section 37 provides an example of the operation of the primary duty of a PCBU in the specific context of a business or undertaking involving the management or control of a workplace. That category of PCBU is defined as a person with management or control of a workplace.

The person with management or control of a workplace must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace, and anything arising from the workplace are without risks to the health and safety of any person.

HS37.02 Principles of interpretation

(1) Broad approach

In interpreting sections such as s 37, which are directed to guarding against accidents and to the preservation of human life, the courts will endeavour to carry out the objects of the legislature as far as the Act's language will permit: *Rice v Henley* (1914) 19 CLR 19 at 22 per Isaacs J; see also *Butler v Fife Coal Co Ltd* [1912] AC 149 (HL).

(2) Non-delegable duties

The duties imposed by s 37 are non-delegable. That is, they cannot be transferred to another person (s 31). Indeed, any contractual provision that purports to contract out of the obligations imposed by the Act are void (s 28). However, in the context of the management or control duty of care, it is useful for parties with overlapping control to define the extent of their respective control and the responsibility that they will each take for managing the risks arising from the relevant workplace.

(3) Concurrent nature of duties

The duties are also concurrent and overlapping (ss 32–33). That is, a person may have a duty under s 37 as well as another further duty under ss 38–43 or indeed s 36.

Furthermore, more than one person can concurrently have the same duty, in which case each duty holder must comply with that duty to the standard required by the Act even if another duty holder has the same duty. Indeed, the case law is replete with examples of multiple duty holders found guilty of offences arising from the same factual circumstances, particularly in relation to serious incidents.

Nor can related bodies corporate escape liability merely by virtue of their interrelation. It is now commonplace for prosecutors to charge related bodies corporate separately in relation

to their respective involvement in the same incident. That is, a company in a group may be charged as a PCBU in relation to an incident involving a worker, while another company in the same group may be separately charged as a PCBU which is in management or control of a workplace, plant or fixtures for failing to provide a safe plant to that same worker. Furthermore, the courts have held that the principle of totality does not apply to separate legal entities even if they are in the same group of companies: *WorkCover Authority (NSW) (Inspector Green) v Big River Timbers Pty Ltd* [2006] NSWIRComm 279, (2006) 156 IR 341.

(4) Control

If more than one person has a duty for the same matter, each person retains responsibility for their duty in relation to the matter and must discharge their duty to the extent to which they have the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity: see *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14, (2012) 246 CLR 92 in relation to interaction between "control" and "reasonably practicable".

HS37.03 Management or control of workplace

The duty imposed by s 37 relates to persons who have management or control of a workplace. In its *First Report* the Stewart-Crompton Review observed at [7.30]–[7.31]:

> "The question of what is meant by 'management or control' is central to determining who owes the duty of care and in relation to what.
>
> "The approaches and findings of the courts on the issue of 'control' have been inconsistent and resulted in confusion. This inconsistency has to some degree resulted from the many uses to which 'control' is put in current OHS legislation."

The Stewart-Crompton Review recommended at [7.32] that the Australian Model Act "should define 'management or control', either in the duty of care provision or in the definition section".

This did not occur in Australia or New Zealand. Neither s 37 nor the definition section (s 16) defines "management or control".

(1) Control in the case law

The word "control" in s 37 extends to various degrees of control: *Inspector Page v Woolworths Ltd* NSWIC CT1044/93, 9 September 1994. More than one person can have "control" over premises, within the meaning of s 37, at any one time. In *Woolworths* a four-year-old child was killed by a falling timber column which was part of a barrier dividing the trading areas of two stores in the Carlingford Court Centre. The defendant, Growth Equities Services Pty Ltd, was the manager of the complex. The columns had been left in a storeroom in a retail store in the complex by the previous occupier of that store. The store was adjacent to the Woolworths, Grace Bros and Best & Less stores. Woolworths sought and was granted permission to use part of the vacant store. Both Grace Bros and Best & Less also sought to use other parts of the store. A representative of the defendant arranged a meeting between representatives of the three companies and let them come to their own security arrangements in relation to the store. The column barrier was part of that arrangement. The barrier was comprised of 10 timber columns connected by a lengthy strip of plastic shadecloth approximately one metre wide. The shadecloth was suspended between the columns a metre above the ground.

The defendant did not authorise the use of the columns as barriers; however, it was aware of it. It was charged with breaching the duty of care of controllers of premises used as a place of work. One of the issues which the court had to determine was whether the defendant had control of the columns. Peterson J held that it did:

> "[T]he possession of the columns by Woolworths may not obviate control by Growth Equities unless possession is a requirement of 'control under s 17(2)(b) [of the Occupational Health and Safety Act 1983 (NSW)]. In my opinion the language of the section suggests the contrary. The qualification of control imported by the words 'to any extent' should not be read as confined to a duality of control … but naturally extends to cover various degrees of control."

In *WorkCover Authority of New South Wales (Inspector Callaghan) v Rowson* NSWIC CT1156/93, 30 June 1994 the defendant operated a chicken farm situated at Mangrove Mountain in New South Wales. One of the chicken sheds needed to have the insulation in its roof replaced. The shed was of corrugated iron construction with a corrugated iron roof. The defendant contracted with a contractor who was a licensed builder to perform the work with the assistance of two subcontractors. On the day of the accident, the contracting team arrived at the site and commenced work. After the work had proceeded for two hours, one of the subcontractors fell from the roof to the concrete floor of the shed and suffered fatal head injuries. While acknowledging the absolute nature of the duty, Cullen J dismissed the charges nevertheless. His Honour said:

> "The evidence in this case indicates that the Defendant had no control over the method of work which resulted in the fatality. This was a matter under the control of a licensed builder contracted to perform the work. The Defendant relied on the competence and skill of such builder and the control of persons working under his direction. This raises questions such as whether the accident which occurred was reasonably foreseeable to the occupier of the premises; whether the occupier should be liable for the omissions of contractors and the manner of work performed under the latter's guidance; and whether the occupier had a duty to provide such materials as 'adequate safety wire, safety nets, handrails and scaffolding' and safety harnesses.
>
> "…
>
> "There is no issue that the Defendant was the occupier of the intact premises before the maintenance or repair work commenced pursuant to s 17(1) of the [Occupational Health and Safety Act 1983 (NSW)]. The evidence established that the intact roof of the premises was safe to walk on and work on. The premises had been emptied and the power had been disconnected.
>
> "The question which has to be addressed … was whether the Defendant was the occupier at the time it was alleged the premises became unsafe. This time occurred when the contractor commenced work by removing the fixing nails and the sheets of roofing by a method of work adopted by him. The contractor thereby became the occupier for the purposes of liability under s 17(1). The liability for safety for the performance of this work is not a joint liability of the Defendant and contractor but a distinct and separate liability of the contractor, pursuant to s 17(2) and (3)."

(2) Ability to compel is sufficient

In *McMillan Britton and Kell Pty Ltd v WorkCover Authority of New South Wales (Inspector Blake)* (1999) 89 IR 464 (NSWIRComm) the Full Bench of the Industrial Relations Commission of New South Wales (Wright P, Hungerford and Marks JJ) held at 480–481:

> "The importance of the decision in *Rowson* was that it emphasised the high standard of care required by s 17(1) [of the Occupational Health and Safety Act 1983 (NSW)] by its use of the words 'shall ensure' so as to qualify the nature of the 'control' to which the section was directed. The decision has significance also in illustrating the shifting of 'control' in a total sense, and thus shifting the liability to ensure safety, from one person to another where control arises under s 17(2) from a contractual obligation.
>
> "It is worth repeating, we think, that the obligation cast on relevant persons to 'ensure' the safety of others is indeed strict and necessarily of a high standard. …
>
> "The obligation imposed by s 17(1)(b) on the appellant to ensure the plant was safe and without risks to health is to be so viewed and as assisting in the determination of whether it had at the relevant time the requisite degree of control over the subject plant as would make it liable. In other words, the proper operation of the section requires, in our view, the degree of control which a defendant has over plant or substances or non-domestic premises, as the case may be, to be to the extent to which that person is able to ensure safety by guaranteeing, securing or making certain. For that reason, the applicable meaning of 'control' in the context of s 17, by reference to its ordinary meaning as earlier outlined, must, it seems to us, have about it the sense of not mere 'sway', 'checking' or 'restraint' but rather controlling in the sense of 'directing action' or 'command' – the ability of a person to compel corrective action to ensure safety, having in mind the context and purpose of the statute, clearly seems to be necessary in order to enable safety to be ensured. … [H]owever, and comformably with the context of the section, the phrase 'to any extent, control' means no more than … the person liable being able to compel (or direct or command) to any extent."

The scope of the duty under s 37 of the 2015 Act is therefore very broad, and the section extends to any person who can to any extent compel, direct or command activities at premises or in relation to plant or substances used at a workplace: *WorkCover Authority of New South Wales (Inspector Ankucic) v McDonald's Australia Ltd* (2000) 95 IR 383 (NSWIRComm).

HS37.04 Workplace

Section 37 applies to persons with management or control of a "workplace". Section 20 defines "workplace" as a place where work is carried out for a business or undertaking. Crucially, the section defines a "workplace" to include "any place where a worker goes, or is likely to be, while at work". "Place" is defined to include a vehicle, vessel, aircraft or other mobile structure, and any waters and any installation on land, on the bed of any waters or floating on any waters (s 20(2)). "Work" is not defined in the Act and therefore takes on its ordinary meaning of "exertion directed to produce or accomplish something": *Macquarie Dictionary* (5th ed, Macquarie Dictionary Publishers, Sydney, 2009).

"Workplace" is broad enough to encompass any place where the work activity requires the worker to be (s 20(1)). It includes all parts of the premises which an employee might use in performing acts normally and reasonably incidental to her or his work duties: *Inspector Collaghan v Starr* (1992) AISHWC 52-909. It also includes the immediate environs which may have been affected by the conduct of the business or undertaking: *Inspector Page v Woolworths Ltd* NSWIC CT1044/93, 9 September 1994 at 7 per Peterson J.

HS37.05 Occupier of residence exemption

Section 37 does not apply to the occupier of a residence, unless the residence is occupied for the purposes of or as part of the conduct of a business or undertaking such as a home business (s 37(4)(b)(i)).

(1) Common area

In *Westminster City Council v Select Management Ltd* [1985] 1 WLR 576 (CA) the English Court of Appeal held that common areas of a residential block of flats were not premises occupied only as a private dwelling and as such fell within the scope of s 4 of the Health and Safety at Work etc Act 1974 (UK) (the equivalent of s 37 of the 2015 Act).

HS37.06 Standard of duty

The standard of care required by s 37 is that of reasonable practicability. "Reasonably practicable" is defined in s 22. See the commentary at [HS22.01] and following.

In addition, the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016 require duty holders to follow the risk management process set out in regs 5–8 when managing a particular risk specified in the regulations. See the commentary at [HS22.03].

Reasonable practicability is an element of the offence which the prosecution must prove beyond reasonable doubt: *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249.

HS37.07 Enforcement

The offence provisions for the purpose of ss 36–45 – the duty-of-care provisions – are contained in ss 47–49.

(1) Maximum penalties

Where a person commits a breach of the general duty which exposes any individual to whom that duty is owed to a risk of death or serious injury or serious illness, and the person is reckless as to the risk to an individual of death or serious injury or serious illness, they commit an offence under s 47, which is generally known as a category 1 offence. A person found guilty of a category 1 offence faces a maximum penalty of:

- a fine of $3,000,000 for a PCBU which is a corporation or a body corporate;
- a fine of $600,000 and/or five years' imprisonment for individual officers (and PCBUs who are natural persons); or
- a fine of $300,000 and/or five years' imprisonment for workers and others (s 47(3)).

If a person commits a breach of the general duty and that failure exposes any individual to a risk of death or serious injury or serious illness, they commit a category 2 offence (s 48). The maximum penalty for a category 2 offence is:

- for an individual who is not a PCBU or an officer of a PCBU, a fine of $150,000;
- for an individual who is a PCBU or an officer of a PCBU, a fine of $300,000; and
- for any other person (such as corporations and body corporates), a fine of $1,500,000 (s 48(2)).

A mere breach of the general duty is a category 3 offence and attracts a maximum fine of:

- $50,000 for an individual who is not a PCBU or an officer of a PCBU;
- $100,000 for an individual who is a PCBU or an officer of a PCBU; and
- $500,000 for any other person (such as a corporation or body corporate) (s 49).

(2) Additional orders on sentencing

In addition to monetary penalties and custodial sentences, a court may make:

- adverse publicity orders (s 153);
- orders for restoration (s 154);
- work health and safety project orders (s 155);
- orders for release on the giving of court-ordered enforceable undertakings (s 156);
- injunctions (s 157); and
- training orders (s 158).

(3) Prosecutions

Prosecutions for these offences may be brought by the regulator (s 143). However, where the regulator chooses not to prosecute, private prosecutions may be brought (s 144). Section 142 provides the mechanism by which an interested party may be kept informed of the regulator's intentions, primarily for that purpose. Prosecutions by the regulator must be brought within 12 months, but upon application the District Court may extend the limitation period by a further 12 months (ss 146–147). The regulator also has six months from a Coronial inquest in which to bring a prosecution (s 146(1)(b)). The time limitation for private prosecutions is (1) two years, (2) six months after a Coronial inquiry, or (3) three months after the expiry of an extension given to the regulator in relation to their time limitation (s 148).

38 Duty of PCBU who manages or controls fixtures, fittings, or plant at workplaces

(1) A PCBU who manages or controls fixtures, fittings, or plant at a workplace must, so far as is reasonably practicable, ensure that the fixtures, fittings, or plant are without risks to the health and safety of any person.

(2) Despite subsection (1), a PCBU who manages or controls fixtures, fittings, or plant at a workplace does not owe a duty under that subsection to any person who is at the workplace for an unlawful purpose.

(3) In this section, a **PCBU who manages or controls fixtures, fittings, or plant at a workplace**—

(a) means a PCBU to the extent that the business or undertaking involves the management or control of fixtures, fittings, or plant (in whole or in part) at a workplace; but

(b) does not include—

(i) the occupier of a residence, unless the residence is occupied for the purposes of, or as part of, the conduct of a business or undertaking; or

(ii) a prescribed person.

Compare: Model Work Health and Safety Act (Aust) s 21

HS38.01 Overview

Section 38 is a specific example of the application of the primary duty of care in the context of management or control of fixtures, fittings, plant and structures. The duty in s 38 is

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