

CASE STUDY



LITIGATION & DISPUTE RESOLUTION

WORK HEALTH & SAFETY

Orr v LakeCoal Pty Ltd (in liquidation) (No. 2) [2019] NSWDC 360

Introduction

The defendant was charged with a Category 2 offence under section 32 of the New South Wales Work Health and Safety Act 2011. The sections of the Act, insofar as relevant, mirror the same sections of the Queensland Work Health and Safety Act 2011.

The facts are irrelevant. Suffice it to say a worker employed by the defendant was severely injured. The decision contains a careful and useful summary of the relevant law.

Section 32 of the Act provides:

“A person commits a Category 2 offence if:

- (a) the person has a health and safety duty, and*
- (b) the person fails to comply with that duty, and*
- (c) the failure exposes an individual to a risk of death or serious injury or illness.”*

Relevant Law

The objects of the Act, found in section 3, to the extent applicable in the circumstances here, include:

“(1) The main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by:

- (a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant, and*
- (b) - (g)...*
- (h) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction.*

(2) In furthering subsection 19(1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of substances or plant as is reasonably practicable.”



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The offence is one of strict liability.¹

The content of the duty is set out in section 19 of the Act. Relevantly, it provides:

- “(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:
- (a) workers engaged, or caused to be engaged by the person, and
 - (b) workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking.
- (2) A person conducting a business or undertaking 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 subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:
- (a) the provision and maintenance of a work environment without risks to health and safety, and
 - (b) ...
 - (c) the provision and maintenance of safe systems of work, and
 - (d) the safe use, handling, and storage of plant, structures and substances; and
 - (e) ...
 - (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 illness or injury of workers arising from the conduct of the business or undertaking.”

¹ section 12A of the WHS Act



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The requirement to “ensure” means to guarantee or make certain.²

Relevantly, Worker is defined in section 7(1) of the Act in the following terms:

“A person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking, including work as:

- (a) an employee, or
- (b) a contractor or sub-contractor, or
- (c) an employee of a contractor or sub-contractor, or
- (d) - (i) ...”

A duty imposed by the Act is not transferrable.³ Section 16 provides:

- “(1) More than one person can concurrently have the same duty.
- (2) Each duty holder must comply with that duty to the standard required by this Act even if another duty holder has the same duty.
- (3) If more than one person has a duty for the same matter, each person:
 - (a) retains responsibility for the person’s duty in relation to the matter, and
 - (b) must discharge the person’s duty to the extent to which the person has 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.”

Section 17 of the Act addresses the management of risks. It provides:

“A duty imposed on a person to ensure health and safety requires the person:

- (a) to eliminate risks to health and safety, so far as is reasonably practicable, and
- (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.”

Safety cannot be ensured if there exists a risk to the health and safety of a worker. The existence of the risk constitutes a breach of section 19 of the Act. It is not necessary that there is an accident or that a person is injured.⁴

² Carrington Slipways Pty Limited v Callaghan (1985) 11 IR 467, at 470

³ section 14 of the Act

⁴ Kirk v Industrial Court of New South Wales (2010) 239 CLR 531, at [13]



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The relevant risk for the commission of the section 32 offence is the risk of death or serious injury.

The word “risk” is not defined in the Act. It means the mere possibility of danger and not necessarily actual danger.⁵

An incident causing injury may be evidence of the presence of a risk and may be relevant to sentencing as a measure of the severity of the harm suffered as a result of the risk. But a distinction must be drawn between the specific risk that manifested in the incident and the general class of risk that the analysis must focus on. Paying too close attention to the specific risk resulting in an incident can lead to error.⁶

The prosecution bears the onus of proving as an element of the offence that at the time of the offence it was reasonably practicable to ensure the health and safety of the persons alleged to be at risk. The risk should be identified with enough precision to determine if it was reasonably practicable to eliminate the risk or, if not, if it was reasonably practicable to minimise it. In this way the application of reasonable practicability may arise more than once.

Reasonably practicable is defined in section 18 of the Act. The section provides:

“In this Act, reasonably practicable, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all the relevant matters including:

- (a) the likelihood of the risk concerned occurring, and
- (b) the degree of harm that might result from the risk, and
- (c) what the defendant knows or ought reasonably to know about:
 - (i) the risk, and
 - (ii) ways of eliminating or minimising the risk, and
- (d) the availability and suitability of ways to eliminate or minimise the risk, and
- (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.”

⁵ R v Board of Trustees of the Science Museum [1993] 1 WLR 1171 and Thies Pty Limited v Industrial Court of New South Wales [2010] 78 NSWLR 94 at [67]

⁶ Tangerine Confectionery Ltd and Veolia ES (UK) Ltd v R [2011] EWCA Crim 2015



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The state of knowledge applied to the definition of practicable is objective. It is that possessed by persons generally who are engaged in the relevant field of activity and not the actual knowledge of a specific defendant in particular circumstances.⁷

The reasonably practicable requirement applies to matters which are within the power of the defendant to control, supervise and manage.⁸

The duty imposed by section 19 requires knowledge of the risk emanating from the activities of the defendant.⁹ Foreseeability of the risk to persons from the activity is an element of this question of knowledge. It would not generally be practicable to take measures to guard against a risk to safety that was not reasonably foreseeable.¹⁰

The statutory duty is not limited to simply preventing foreseeable risks of injury. The duty is to protect against all risks, if that is reasonably practicable. Reasonably practicable means something narrower than physically possible or feasible.¹¹

The words “reasonably practicable” indicate that the duty does not require a defendant to take every possible step that could be taken. The steps to be taken in performance of the duty are those that are reasonably practicable for the employer to achieve the provision of and maintenance of a safe working environment. Bare demonstration that a step might have had some effect on the safety of a working environment does not, without more, demonstrate a breach of the duty.¹²

A duty holder must have a proactive approach to safety issues. The question is not doing the duty holder envisage a particular danger, but rather should it have.¹³

A duty holder must have a structured and systematic approach to risk management.¹⁴

A defendant must have regard not only for the ideal worker, but for one who is careless, inattentive or inadvertent.¹⁵ If there is a foreseeable risk of injury arising from the employee’s negligence in carrying out his or her duties, then this is a factor which the employer must take into account.¹⁶ It may not always be possible to foresee various acts of inadvertence by workers but defendants must conduct operations on the basis that such acts will occur and they must be guarded against to the fullest extent practicable.

⁷ Laing O’Rourke (BMC) Pty Ltd v Kinwin [2011] WASCA 117 at [33]

⁸ Slivak v Lurgi (Aust) Pty Ltd (2001) 205 CLR 304, per Gleeson CJ, Gummow and Hayne JJ at [37]

⁹ Slivak v Lurgi (Aust) Pty Ltd (supra)

¹⁰ Genner Constructions Pty Ltd v WorkCover Authority of New South Wales [2001] NSWIRComm 267, at [68]

¹¹ Slivak v Lurgi (Aust) Pty Ltd (supra), per Gaudron J at [53]

¹² Baiada Poultry Pty Ltd v R (2012) 246 CLR 92, per French CJ, Gummow, Hayne and Crennan JJ at [15] and [38]

¹³ WorkCover Authority of New South Wales v Kellogg (Aust) Pty Ltd [1999] NSWIRComm 453

¹⁴ WorkCover Authority of NSW v Atco Controls Pty Limited (1998) 82 IR 80, at 85; Inspector Ching v Bros Bins Systems Pty Limited [2004] NSWIRComm 197, at [32]

¹⁵ Dunlop Rubber Australia Ltd v Buckley (1952) 87 CLR 313, per Dixon CJ at 320

¹⁶ Smith v Broken Hill Pty Ltd (1957) 97 CLR 337, at 343



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The unforeseeable behaviour of a disobedient worker may well lead to the happening of an event that could not be reasonably foreseen and therefore it was not reasonably practical to guard against it.¹⁷

The prosecution must prove that the act or omission of the defendant was a significant or substantial cause of the worker being exposed to the risk of injury.¹⁸

The question is to be determined by the application of common sense to the facts, bearing in mind that the purpose of the inquiry is to attribute legal responsibility in a criminal matter.¹⁹

Regard must be had to the scope and objects of the Act.²⁰ The relevant question is not whether the particularised failures of the defendant were the cause of the death or injury, but rather whether there was a causal relationship between the act or omission and the risk to which a worker was exposed.²¹

Section 275 of the Act provides that an approved code of practice is admissible in proceedings for an offence against the Act as evidence of whether a duty under the Act has been complied with. The court may have regard to the code as evidence of what was known about a risk or the measures available to control a risk and may rely on the code to determine what is reasonably practicable in the circumstances to which the code relates.

Part 13 of the Act provides for legal proceedings. Section 244 provides:

“Imputing Conduct to Bodies Corporate

For the purposes of this Act, any conduct engaged in on behalf of a body corporate by an employee, agent or officer of the body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, is conduct also engaged in by the body corporate.”

Section 244(1) is a deeming provision that has the effect of facilitating proof of the responsibility of a corporation and it is designed to attribute conduct to the corporation for which it would not otherwise be responsible.²² The words “engage in conduct” are defined to include an omission.²³

¹⁷ WorkCover Authority of NSW v Kirk Group Holdings Pty Limited [2004] 135 IR 166, at [129]

¹⁸ Bulga Underground Operations v Nash [2016] NSWCCA 37, at [127]

¹⁹ Royall v The Queen (1991) 172 CLR 378

²⁰ Simpson Design Associates Pty Ltd v Industrial Court of New South Wales [2011] NSWCA 316, at [79] - [102]

²¹ Bulga Underground Operations v Nash (supra), at [130]

²² Walplan Pty Limited v Wallace (1985) 8 FCR 27, at 38; Houghton v Arms (2006) 225 CLR 553, at [37] - [38]

²³ section 4 of the WHS Act



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How we can help you

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