WORK HEALTH AND SAFETY – WHAT IS REASONABLY PRACTICABLE?[1]

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INTRODUCTION

1. One of the key amendments to New South Wales safety legislation in 2011 was the introduction of the requirement for the regulator to prove all elements of the offence, including that the control measures a duty holder should have implemented to eliminate or minimise a risk to worker's health and safety were *"reasonably practicable"* measures.[3]

2. Not surprisingly, since the legislative amendments the most common issues that arise in work health and safety matters relate to the control measures particularised in the pleadings (or the Summons).

3. *"Reasonably practicable"* is a fluid concept. It requires consideration of all relevant matters, including the non-exhaustive list of matters in section 18 of the *Work Health and Safety Act 2011 (NSW)* (**the WHS Act**). Recent case law demonstrates that a relevant consideration is the degree of control a duty holder has over a particular work activity. The court, when considering all relevant factors, may consider the whether it was appropriate for a duty holder to rely on another person to meet its statutory obligations.

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[1] Paper initially prepared for NSW Law Society Young Lawyers Annual One Day CPD Seminar: Workplace and Safety Law (19 March 2016).
[2] http://www.denmanchambers.com.au/barristers/nicholas-read
[3] Prior to 7 June 2011 a defence provision existed whereby the defendant bore the onus of proving that it was not it was not reasonably practicable for it to comply with its duty under the Act, or alternatively, that the commission of the offence was due to causes over which it had no control and against the happening of which it was impracticable for the person to make provision: s28 *Occupational Health and Safety Act 2000* (NSW).

KEY LEGISLATIVE PROVISIONS

4. Section 19 of the WHS Act sets out the primary duty of Persons Conducting Businesses or Undertakings (referred to in this paper as duty holders), and relevantly provides:

> **19 Primary duty of care**
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> (1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:
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> (a) workers engaged, or caused to be engaged by the person, and
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> (b) workers whose activities in carrying out work are influenced or directed by the person,
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> while the workers are at work in the business or undertaking.
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> (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.
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> (3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:
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> (a) the provision and maintenance of a work environment without risks to health and safety, and
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> (b) the provision and maintenance of safe plant and structures, and
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> (c) the provision and maintenance of safe systems of work, and
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> (d) the safe use, handling, and storage of plant, structures and substances, and
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> (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 illness or injury of workers arising from the conduct of the business or undertaking.

5. Section 18 of the WHS Act provides a statutory declaration of *"reasonably practicable"*:

18 What is *"reasonably practicable"* in ensuring health and safety

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 relevant matters including:

(a) the likelihood of the hazard or the risk concerned occurring, and

(b) the degree of harm that might result from the hazard or the risk, and

(c) what the person concerned knows, or ought reasonably to know, about:

(i) the hazard or 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.

6. There are three categories of offences and penalties under the WHS Act (see sections 30 – 33 WHS Act). I am not aware of any prosecutions having been brought in NSW for a

Category 1 offence (section 31), which requires the prosecutor to prove an additional element of recklessness.

7. Section 32 of the WHS Act provides that the maximum penalty that a Court may impose on a body corporate that breaches a Category 2 health and safety duty is $1,500,000.

ELEMENTS OF THE OFFENCE

8. In a prosecution for breach of section 19(2) of the WHS Act the regulator must prove the following:

    a. The accused is a Person Conducting a Business or Undertaking (**PCBU**) (see section 5 WHS Act).

    b. The accused owed a duty to workers engaged, or caused to be engaged, by it (see section 7 WHS Act).

    c. That a risk arose from work carried out as part of the business or undertaking (and not from another source).[4]

    d. The measure/s particularised in the Summons (or Court Attendance Notice if the prosecution has been brought in the Local Court) would cause the risk to be eliminated or minimised.

[4] See recent consideration of the issue of whether a worker was at work *"in the business or undertaking"* in *WorkCover Authority of NSW (Inspector Moore) v EA & AT Bricklaying Pty Ltd* [2015] NSWDC 369 (16 December 2015), per Kearns DCJ at [45] – [47].

e. In all the circumstances, including, but not limited to the matters listed in section 18, it was reasonably practicable for the defendant to adopt the measure/s.

9. Proceedings for breaches of duties under the WHS Act are criminal proceedings. The standard to which the prosecution must prove the matters is beyond reasonable doubt.[5]

10. If the prosecution is unable prove each element of the offence beyond reasonable doubt, the prosecution will be dismissed.

COMMON ISSUSE WITH CONTROL MEASURES

11. The *"control measures"* are the steps that the prosecutor alleges the defendant should have taken to eliminate or minimise the risk of an incident taking place.

12. As noted above, frequently disputes arise in relation to the control measures the regulator alleges should have been taken. Generally, the main points of contention are:

a. Whether the measures have been <u>properly particularised</u> in the Summons.

b. Whether the failure to implement the measures (or a combination of measures) caused the incident (<u>causation</u>).

c. Whether the measures were <u>reasonably practicable</u>, taking into account all relevant matters, including the non-exhaustive matters in section 18.

[5] See section 141(1) of the *Evidence Act 1995*.

Proper particulars

13. The common law requires that a defendant be entitled to be told not only the legal nature of the offence with which he or she is charged, but also of the particular act, matter or thing alleged as the foundation charge. A Summons must identify what measures an accused could have taken but did not take with precision: *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (3 February 2010) (***Kirk)*** at [26] – [28].

14. In *Archer v Simon Transport Pty Ltd* [2015] QDC 263 (21 October 2015) the District Court of Queensland dismissed a prosecutors appeal of a Magistrate's decision to dismiss a complaint on the basis of it being non-compliant with *Kirk*. The measures particularised by the prosecutor included a measure that the defendant failed to *"develop and implement adequate work procedures to manage the hazards for sole transport drivers."* The District Court dismissed the appeal noting that the complaint failed to identify how the relevant work procedures fell short of what was alleged to have been reasonably practicable.

Criminal causation

15. The failure to adopt the measure/s alleged in the Summons must have given rise to the risk. In other words, the court must be satisfied beyond reasonable doubt that, had the control measure been implemented by the duty holder, the risk would have been eliminated or minimised. This is more than a *"but for"* test. The failure to implement the measure/s must have been a substantial or significant cause of the incident.

16. In *WorkCover (Inspector Battye) v Patrick Container Ports Pty Ltd [2014] NSWDC 171 (17 February 2014)* (***Patrick's Containers***) Curtis DCJ considered a matter where a worker was fatally injured following removal of heavy vehicle tyre without first deflating the tyre. The

worker's actions were contrary to a system of work that was known to him. A blood sample was taken from the deceased worker post-mortem and it was found to have present methamphetamine. In considering the charge laid against the accused, His Honour said:

> [16] …it is necessary to identify with some precision the risk to health alleged by the informant. In the present case this was the risk that the air in the tyre may be released explosively because an ignorant or poorly trained employee, in this case Mr May, failed to deflate it.
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> [17] Put another way, it was a risk that Mr May may fail to follow safe procedure in removing the tyre. It is the informant's case that this failure was caused by the neglect of the defendant in the particulars specified. It is no part of the informant's case that the defendant was, or should have been, aware of Mr May's intoxication, which was on the evidence also a cause of the risk.
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> [18] Cause is essentially a question of fact to be determined by the application of common sense. In criminal law an act or omission causes an event if it is a substantial or significant cause of that event. It may not be the sole, direct or immediate cause but must be sufficiently cogent to justify the serious finding that the accused is morally culpable (*Royall v The Queen* (1991) HCA 27, *R v Wright* [2009] NSWDC 251).
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> [19] Each particular of the defendant's failures is contingent upon a general allegation that the defendant failed to so control the mind of Mr May as to substantially obviate the danger. If Mr May's mind was already sufficiently alerted to that danger then there is no causal nexus between the failures alleged and the failure of Mr May to advert to that danger.

17. His Honour considered each alleged omissions particularised against the defendant and found that in light of the worker's knowledge of the risk and the *"vastly more immediate cause of the risk to health and safety constitute by his intoxication"* any failures by the

accused would not justify the serious finding that those failures had any substantial or significant effect on the cause of the event, or that the defendant was morally culpable.

Reasonably practicable control measures

18. In determining whether a measure is reasonably practicable, the court will take all relevant matters into account and weigh them up.

19. In *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304 the High Court held that *"reasonably practicable"* required consideration of whether the time, trouble and expense of the precaution suggested are disproportionate to the risk involved. Gaudron J observed: *"The words "reasonably practicable" have, somewhat surprisingly, been the subject of much judicial consideration. It is surprising because the words "reasonably practicable" are ordinary words their ordinary meaning. And the question whether a measure is or is not reasonably practicable is one which requires no more than the making of a value judgement in light of all the facts."*

20. Importantly, *"practicability"* does not require duty holders to ensure that accidents never happen. It requires them to take such steps that practicable to provide and maintain a safe working environment.[6]

21. In *WorkCover Authority of NSW v Eastern Basin Pty Ltd* [2015] NSWDC 92 (9 June 2015) (***Eastern Basin***) an employee of Newcastle Stevedores Pty Limited (**Newcastle Stevedores**) was killed when he was crushed by a collapsing stack of aluminium ingots, known as a Gauchi Pack, inside the hold of a ship. Eastern Basin, the accused, operated a cargo storage and assembly facility on land adjacent to the wharf where the worker was killed. Eastern

[6] *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14 at [15].

Basin had received small packs of aluminium ingots and assembled them into the larger Gauchi Packs.

22. The prosecutor asserted that Eastern Basin had failed to ensure the safety of the deceased worker, so far as was reasonably practicable, in that:

    a. It failed to configure the Gauchi Packs so as to ensure that they had a low height to width ratio to ensure they did not topple (the first preventative measure), and

    b. That additional strapping should have been provided (the second preventative measure).

23. In dismissing the charge, Curtis DCJ found that the first preventative measure did not satisfy the requirements in *Kirk* because it did not stipulate the reasonably practicable height to width ratio necessary to reduce or eliminate or minimise the risk. There was an absence of any cogent evidence (expert or otherwise) that supported that that the Gauchi packs should have been configured differently.

24. In respect of the second preventative measure, His Honour found that the evidence did not support that placing additional straps was a reasonably necessary control measure because the cause of the incident was that the Gauchi Pack had not been placed in such a manner so as to lean backwards against the preceding packs and therefore placement of additional straps would not have eliminated or minimised the risk of the pack toppling.

Control and reliance on other duty holders

25. In *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14 (30 March 2012) (***Baiada***) the High Court confirmed that the extent of control a duty holder has over the workplace or the workers is a necessary element in the consideration of what is reasonably practicable.

26. The High Court confirmed that in some circumstances, a duty to do what is reasonably practicable can be discharged by engaging specialist contractors, and that the duty can be discharged even if the duty holder has not taken every possible step that it was capable of taking. This is particularly so where the contractor engaged has greater expertise in performing the work than the principal and the contractor has its own safety systems and procedures in place. In these circumstances it is often not apparent what reasonably practicable measures a duty holder could have taken to prevent an accident.[7]

27. This does not mean that a duty holder faced with the task that is beyond its area of expertise can, by contracting out the work to another, relieve itself of any responsibility under the WHS Act to ensure the safety of workers – the duty to ensure the safety of workers is non-delegable.[8]

28. Prior to *Baiaida* the issue of control was considered by the Supreme Court of Western Australia in *Kirwin v The Pilbara Infrastructure Pty Ltd* [2012] WASC 99 (23 March 2012) (***Kirwin***). *Kirwin* concerned the 2007 tropical cyclone George which hit a railway camp in East Pilbara. Workers at the camp took shelter in the prefabricated accommodation buildings, known as dongas. The winds caused some of the dongas to lift and pull away from their footings. Some dongas collided with each other and others flipped over. As a

[7] See for example, *Complete Scaffold Services Pty Ltd v Adelaide Brighton Cement Ltd* [2001] SASC 199.
[8] *Tobissen v Reiley* [2009] WASCA 26 at [62].

consequence, a number of the workers were injured, including some fatally. An investigation after the event revealed that the dongas and the means by which they were secured to the ground did not meet relevant building standards. The dongas were not designed and built to withstand winds specified in design standards for that region. The regulator commenced proceedings under the *Occupational Safety and Health Act 1984 (WA)* against a number of entities, including the principal contractor at the site. The issue was whether it was sufficient, having regard to the nature of the statutory duty, for the principal contractor to act on the basis that the dongas provided a safe refuge.

29. At first instance the complaint was dismissed on the basis that it was reasonable for the principal contractor to rely upon the specialist contractor that had been engaged to design and construct the camps (including the dongas).

30. The Magistrate's decision was upheld on appeal by the Supreme Court of Western Australia. The Court found the principal contractor's step in retaining appropriately qualified and experienced builders to construct camp (who had the obligation to either undertake themselves, or subcontract to appropriate experts, the necessary design work) was a reasonably practicable measure. Hall J observed at [158]:

> Whilst it is true that the policy which the Act imposes upon principals and employers is a duty to be proactive in pursuit of safety for their workers, the offences with which the respondents were charged are still criminal in nature. The obligation on employers and principals is not to ensure that accidents never occur, but rather to ensure that everything that is reasonably practicable is done to ensure that workers are safe from hazards. In the present case, the question was whether the respondents had done all that it was reasonably practicable for them to do to ensure that the dongas were properly designed. They met that duty by engaging qualified and experienced experts.

31. The Court also found that it was not necessary for the principal contractor to independently verify that the camp had been constructed in accordance with the relevant building codes and Australian Standards (at [165] – [166]):

> It is not contested that the work as a whole, involving as it did the construction of work camps in a remote area, required the respondents to retain the services of a builder. Part of those services included, on the magistrate's findings, applying the appropriate design specifications. This is a matter that was integrally connected to the specialist work of constructing the camp. It would be reasonable to expect that an experienced builder would be familiar with the relevant standards and with their meaning and application. In these circumstances it would clearly not be reasonable to expect that principals in the position of the respondents should independently determine whether the dongas met the appropriate specifications, rather than rely upon the specialist builder they had retained for that purpose.
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> In some circumstances it might be reasonably possible for an employer to ascertain whether its assumptions are correct. However, in other circumstances the relevant factors will be outside the employer's knowledge and control: *Laing O'Rourke v Kirwin* [67] [70] (Murphy JA). Given that NT Link had assumed responsibility for the design process and for obtaining Shire approval, this was not a case where the respondents could be reasonably have been expected to undertake for themselves the task of determining the appropriate wind region.

32. In *Laing O'Rourke (BMC) Pty Ltd v Kirwin* [2011] WASCA 117, an earlier prosecution arising from the same set of facts, the Supreme Court of Western Australia rejected the regulator's submission that the appellant should have carried out its own enquiries and investigations, including obtaining engineering evidence, regarding the design and fabrication of the shelters for the purpose of assessing their suitability for cyclone conditions. The court noted there was nothing to indicate to the appellant prior to the accident that the shelters were unsuitable for use as a safe refuge or anything to suggest that the accommodation was not

properly designed and built to withstand the weather conditions that affected the area in which was located.

33. *Baiada* concerned a fatality during the process of catching chicks for processing. Baiada had engaged subcontractors to round up and pack chickens into crates and to transport the crates to one of its processing plant. During the operation, an unlicensed forklift driver used a forklift to load steel pallets carrying the crates onto a trailer. The forklift driver asked another worker to help shift the steel pallets to even up the load and as this task was being performed one of the steel pallets fell on the worker and killed him. Baiada was charged under the *Occupational Health & Safety Act 2004 (Vic)* with failing to provide and maintain, so far as was reasonably practicable, a safe working environment (attributed to its failure to control how the forklift was to be operated).

34. At first instance, the trial judge rejected Baiada's argument that it was practicable for it to rely upon the loading and unloading measures the contractors had put in place. Baiada was convicted and fined $100,000.

35. The High Court unanimously overturned the conviction holding that consideration should have been given to whether Baiada had fulfilled its duty by contracting work to an experienced third party:

> "…The words "reasonably practicable" indicate that the duty does not require an employer to take every possible step that could be taken. The steps that are to be taken in performance of the duty are those that are reasonably practicable for the employer to take to achieve the identified end of providing and maintaining a safe working environment. Bare demonstration that a step could have been taken and that, if taken, it might have had some effect on the safety of a working environment does not, without more, demonstrate that an

> employer has broken the duty imposed by s 21(1). The question remains whether the employer has so far as is reasonably practicable provided and maintained a safe working environment.[9]

36. Whilst the High Court accepted that Baiada, as the principal, had a legal right to issue instructions this did not amount to a breach of the duty:

> As the reasons of the majority in the Court of Appeal reveal by their reference to Baiada *checking* compliance with directions it gave to DMP and Azzopardi Haulage, the question presented by the statutory duty "so far as is reasonably practicable" to provide and maintain a safe working environment could not be determined by reference only to Baiada having a legal right to issue instructions to its subcontractors. Showing that Baiada had the legal right to issue instructions showed only that it was *possible* for Baiada to take that step. It did not show that this was a step that was reasonably practicable to achieve the relevant result of providing and maintaining a safe working environment. That question required consideration not only of what steps Baiada could have taken to secure compliance but also, and critically, whether Baiada's obligation "so far as is reasonably practicable" to provide and maintain a safe working environment obliged it: (a) to give safety instructions to its (apparently skilled and experienced) subcontractors; (b) to check whether its instructions were followed; (c) to take some step to require compliance with its instructions; or (d) to do some combination of these things or even something altogether different. These were questions which the jury would have had to decide in light of all of the evidence that had been given at trial about how the work of catching, caging, loading and transporting the chickens was done.[10]

37. Justice Heydon noted that in some circumstances engaging contractors *"may be the only reasonably practicable way of ensuring and maintaining a safe working environment."*[11]

[9] *Baiada*, per French CJ, Gummow, Hayne and Crennan JJ at [15].
[10] Ibid at [33].
[11] Ibid, per Heydon J at [65].

38. In *Eastern Basin*, Curtis DCJ considered whether the prosecutor had disproved that it was unreasonable for the defendant to rely upon the expertise of Newcastle Stevedores, the site operator, to ensure the Gauchi Packs were safely loaded. Referring to the standard of proof required in criminal matters, His Honour was not persuaded that it was unreasonable for Eastern Basin to rely upon the skill and expertise of Newcastle Stevedores. In considering the question, His Honour referred to the contractual agreement in place between the parties (which expressly stated that Newcastle Stevedores were responsible for managing and controlling all operations and work activities connected with stevedoring), Newcastle Stevedores obligations under the *Navigation Act 2012 (Cth)* in relation to loading and unloading vessels and the steps taken by Eastern Basin with respect to safety and verifying that Newcastle Stevedores had in place relevant safe work procedures.

39. Relevant matters as to whether it is reasonably practicable for a duty holder to rely upon the skills and experience of a contractor to discharge its obligations under the WHS Act include:

    a. Whether the tasks the contractor was engaged to perform may be described as *"specialist services"* that are beyond the area of expertise of a duty holder.

    b. The degree of control the duty holder has in respect of the work activity.

    c. Whether there are any contractual arrangements in place which detail the obligations of the parties. Although it should be noted that obligations under the WHS Act are non-delegable, and further that duty holders have an obligation to consult, cooperate and coordinate with other duty holders in relation to the common matters.[12]

[12] Section 46 WHS Act.

d. Whether other parties have specific obligations in respect of managing workplaces and/or activities under other legislation (as Newcastle Stevedores did in *Eastern Basin*).

e. What steps, if any, the duty holder has taken steps to develop its own safety systems.

f. What steps, if any, the duty holder has taken to verify that the contractor has in place safety systems of its own.

40. The above matters are not exhaustive. Each case will turn on its own facts.

CONCLUSION

41. The recent case law shows that there may be a degree of uncertainty as to whether a prosecutor can prove that control measures were *"reasonably practicable"*. The concept of *"reasonably practicable"* is fluid and each case will turn on its own facts.

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