

JUDICIAL INTERPRETATIONS OF GENERAL DUTIES OF CARE: SOME HIDDEN PROBLEMS IN OCCUPATIONAL HEALTH AND SAFETY LEGISLATION

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I. INTRODUCTION

The Australian occupational health and safety legislation¹ is incontestably modelled on the *British Health and Safety at Work etc Act 1974* (the British Act), albeit with 'home-grown' additions; all the 'general duties' statutes in Australia are incontestably derived from the principles of the 1972 Robens Report.² That Report introduced a new approach to the legislative regulation of workplace health and safety - the statutory requirement of conformity to a general standard of "reasonable care". In so doing, the Robens-based legislation has vastly extended the range of statutory duty beyond that created by the specific obligations, admittedly numerous, but far from comprehensive, imposed by the older

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1 *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth); *Occupational Health and Safety Act 1983* (NSW); *Workplace Health and Safety Act 1989* (Qld); *Occupational Health, Safety and Welfare Act 1986* (SA); *Industrial Safety, Health and Welfare Act 1977* (Tas); *Occupational Health and Safety Act 1985* (Vic); *Occupational Health, Safety and Welfare Act 1984* (WA); *Work Health Act 1986* (NT); *Occupational Health and Safety Act 1989* (ACT).

2 Great Britain, *Report of the Committee on Safety and Health at Work*, 1970-1972 (The Robens Report).

legislation. However, the apparent simplicity of the various 'general duty' sections, as currently formulated, conceals a number of difficulties which have emerged in judicial interpretation. As a result, that interpretation has resulted on a number of occasions in the Acts being given a meaning which is, arguably, not that which was intended by those who instituted the policy for the application of which they were drafted.

Given that there are nine Australian Acts, when making general observations about provisions which appear in all or most of the Acts, the relevant British sections are referred to. A Table setting out the equivalent section numbers follows part IX.

II. PERSONS ON WHOM 'GENERAL' DUTIES ARE IMPOSED

The Australian and British Acts impose duties of care on the same categories of person: on employers (in relation to employees); on employers (in relation to persons not their employees); on contractors and the self-employed; on persons in control of premises made available as workplaces; on manufacturers of plant and substances for use at work; and on employees. Variations of detail in the way sections are worded and the way key words and phrases are defined, result in variations in the scope of particular sections. In some Acts, contractors will be covered by the sections corresponding to s 2 of the British Act; in other Acts, they will be covered by sections corresponding to s 3.³ However, while the exact scope of particular sections may differ, the scope of the general duties sections, is largely (if not completely) the same.

In addition, similar difficulties in interpreting the meaning and scope of the duties have arisen in British and Australian courts. Moreover, both in Britain and in the various Australian jurisdictions, much of the interpretation of the sections is effectively hidden, since it takes place at the level of prosecutions before magistrates. There are few appeals to superior courts, where a more extensive interpretation will take place and be reported. This, of course, parallels the situation which existed with the old specifications-standards Acts, such as the Factories Acts (variously titled), Construction Safety Act, Mines Acts and so on. However, in the case of these Acts, actions for damages for breach of statutory duty brought the Acts before the superior courts for interpretation. To take the example of the 'classic' specifications-standard requirement, the obligation to fence dangerous parts of factory machinery, the meaning of the provision was spelt out not in prosecutions for breach, but in actions for damages, such as in the British cases of *Hindle v Birtwhistle*,⁴ *Nicholls v F Austin (Leyton) Ltd*,⁵ *Carroll v Andrew Barclay & Sons Ltd*,⁶ and *Close v Steel Company of Wales Ltd*,⁷ and the

3 As to these variations, see A Brooks, *Australian Occupational Health and Safety Law*, CCH (4th ed, 1993).

4 [1897] 1 QB 192.

5 [1946] AC 493.

6 [1948] AC 477.

Australian cases of *Mummery v Irvings Pty Ltd*,⁸ *O'Reilly v Commonwealth Hostels*,⁹ and *Dairy Farmers' Co-operative Ltd v Azar*.¹⁰ In the case of the Robens-style Acts, on the other hand, in Britain and in a number of Australian jurisdictions,¹¹ the availability of actions for breach of the statutory duties imposed by those Acts is expressly negated. In the case of *these* statutes, therefore, extended judicial interpretation of the meaning and scope of statutory duties will be forthcoming only in the rare cases where prosecutions are appealed, and consequently the full glare of judicial and academic publicity will be trained on any superior court decisions on such appeals.

III. PERSONS IN CONTROL OF WORKPLACES

Arguably, the most opaque of the 'general duties' provisions is in s 4 of the British Act and its equivalents. It is, therefore, gratifying that this duty has been subjected to superior court interpretation in Britain and in Australia. Whether that interpretation has in fact been helpful is, however, questionable.

Section 4 states:

1. This section has effect for imposing on persons duties in relation to those who:
 - (a) are not their employees; but
 - (b) use non-domestic premises made available to them as a place of work or as a place where they use plant or substances provided for their use there, and applies to premises so made available and other non-domestic premises used in connection with them.
2. It shall be the duty of each person who has, to any extent, control of premises to which this section applies or of the means of access thereto or egress therefrom or of any plant or substances in such premises to take such measures as it is reasonable for a person in his [or her] position to take to ensure, so far as is reasonably practicable, that the premises, all means of access thereto or egress therefrom available for use by persons using the premises and any plant or substance in the premises or, as the case may be, provided for use there, is or are safe and without risks to health.

Much of the difficulty with s 4 and its Australian equivalents comes down to the identification of the persons to whom it is directed. Those persons, it is suggested, are persons who make premises available for a work undertaking with which they are in no way involved, other than in the provision of the accommodation, by lease, sub-lease, licence and so on. This is the only sensible interpretation of the section, because all other instances of the making available of premises to non-employees

7 [1961] 2 All ER 953.

8 (1956) 96 CLR 99.

9 [1964-65] NSW 636.

10 (1990) 64 ALJR 535.

11 The Commonwealth, New South Wales, Victoria, the Northern Territory and the Australian Capital Territory.

are covered by other sections, ss 3(1) and (2). However, s 4 as worded, and if read alone, could encompass those instances. When in 1983, s 17(1) was enacted in New South Wales in almost the same words as ss 4(1) and (2) of the British Act, a perceptible shiver went around middle management. Persons in those positions saw themselves as persons having, to some extent, control of premises made available to persons not their employees as a place of work, in that they had control of their employer's premises which were made available by their employers to other persons, their fellow employees, as places of work. Again, the wording of s 17(1), read alone, could encompass such managers, but their position is covered in New South Wales in s 19 which imposes duties on employees.

The confusions engendered by the 'persons in control' section of the British Act, as exemplified by superior court consideration, have, however, centred not on the position of managerial employees, but on the scope of s 3 (which covers the duties of contractors and self-employed persons) as contrasted to s 4. This question arose in the Scottish case of *Aitchison v Howard Doris Ltd.*¹² Briefly, the facts were that an employee of a sub-contractor was injured when on a concrete barge used as access to a construction site. The main contractor was charged with a breach of s 3 of the 1974 Act, for failure to provide a safe means of access, and the Sheriff dismissed the charge on the grounds that the facts disclosed a breach of s 4, arguing that the two sections were mutually exclusive. On appeal, the High Court of Justiciary held that no breach of s 4 was disclosed, since there was no evidence that the head contractor was in control of the barge. The Court stated:

The distinction between ss 3 and 4 seems to us to be that, although s 3 is general in its terms, it covers the conduct of an undertaking, and prima facie that covers all systems of work. Section 4 relates to the control of premises. This complaint is plainly based on defective access, for which the person who controls the relevant premises would be liable under s 4(2) of the Act: but the complaint is silent on the matter of control.

It was argued that ss 3 and 4 are not mutually exclusive and that a given set of facts could involve A, as the controller of non-domestic premises, in a contravention of s 4(2), and also B, as the conductor of an undertaking, for a breach of s 3(1). We do not say that such a case could never arise, but we do say that this is not such a case...

This is a penal statute which must be strictly construed; and s 4 very clearly defines not only the class of persons to whom the duty is owed, but also the matters to which the duties relate, one of which is access. If the legislature had intended that the main contractor should be under a duty to take care that means of access to or from premises should be guilty of an offence for which the controller was primarily responsible, [*sic*]¹³ we think it would have been more clearly spelled out. We find it significant that the duty imposed by s 2(2)(d) on employers quoad safe means of access for their own employees is restricted to: "any place of work under the employer's control". We see grave difficulties in the conductor of an undertaking

12 [1979] SLT 22. Some portions of the discussion of this case, and of the subsequent discussion of the *Austin Rover* decision, are reproduced from A Brooks, note 3 *supra*, ch 6.

13 There is, fairly obviously, an omission here in the transcription of the judgement: as printed, it does not make sense. The author suggests, given the thrust of the argument, that the passage was intended to read: to or from premises *should be safe and* should be guilty of an offence... The same comment applies to the smaller quotation, in note 17 *infra*.

exercising powers over another party who controls premises upon which the undertaking is going on.¹⁴

With respect, this analysis fails to properly identify the liabilities imposed on the various parties concerned in the case. The situation *did* involve a possible breach of s 3 because access to a place at which a work undertaking is carried on *is* a matter within the responsibility of the person whose undertaking it is. Even if the means of access are primarily within the control of others, the obligation cast by s 3 exists. It has long been established that an employer's duty of care extends to employees working at the premises of others,¹⁵ even though the fact that the premises are not within the direct control of the employer will have an effect on the steps the employer must take to fulfil the duty in that situation.

There was an obligation on the head contractor under s 3; whether or not it had been adequately carried out depended on whether or not, if the barge was not directly within the head contractor's control, there were reasonably practicable precautions open to the head contractor to eliminate risks to the employees of the sub-contractor when using the barge. There could not be any breach by the head contractor of s 4, not because of lack of evidence of control, but because the head contractor had no obligation under s 4 which could be breached. Its obligations with regards to the barge were under ss 2 and 3(1). The existence of those obligations did not depend on control of the barge, although the steps to be taken in fulfilment of the obligations would be affected by the extent to which the head contractor had control of the barge.

Moreover, it was not enough to argue that s 4 relates to "the control of premises". To make sense, s 4 must relate to a control other than that exercised by an employer, under s 2 and s 3(1), or by a self-employed person, under s 3(2). The High Court of Justiciary conceived that the situation of dual responsibility might arise, but they gave no clues as to when and how. Their failure to do so results from a concentration on control of means of access, and a correlative disregard of the issue of control of the place of work. To a large extent, that failure is a result of the particularisation in s 2(2),¹⁶ of instances of failure of the employer to comply with the duty in s 2(1), a problem which is addressed later.

Even more questionable, however, is the apparent opinion of the High Court of Justiciary that the general duties, or some of them at least, are mutually exclusive. The major, and perhaps the only, innovation deriving from the Robens Report was the recognition that industrial injuries and diseases or the risks thereof, are not attributable to a single causative influence; that everybody involved in a workplace may be jointly responsible for them, that everybody so involved is therefore subject to statutory duties, and that, in the situation of the risk of an injury occurring or of

¹⁴ *Ibid* at 22-3.

¹⁵ See for example, *Wilson v Tyneside Window Cleaning* [1958] 2 QB 110; *General Cleaning Contractors v Christmas* [1953] AC 180; *Sinclair v William Armott* (1964) 64 SR (NSW) 88.

¹⁶ For criticism of the use of s2(2) and the Australian equivalents, see A Brooks, note 3 *supra*, pp 365, 601, 812.

a disease being contracted, each person involved may be severally statutorily responsible.

Industrial injuries and diseases, by their very nature, result from the failure of care by a number of persons or groups. It is true, however, that a single failure of care cannot result in one person being guilty under general duties legislation for breach of more than one section.¹⁷ A person is guilty for that failure as employer, or as contractor, or as person in control of premises, but not as both employer and person in control of premises, and not as both contractor and person in control of premises. The legislation thus requires us to identify the duty-bearer by identifying his or her connection with the workplace and the risk. The legislation clearly contemplates dual (even triple or quadruple) responsibility, but not double jeopardy.¹⁸

Moreover, it is not enough to talk of a "failure of care" by a duty-bearer; the particular failure of which that duty-bearer is guilty, must also be identified. An employer has a duty under s 2(1) to take care for the health and safety of employees. He or she has a separate duty under s 3(1) to take care for the safety of persons at the workplace who are not his or her employees. Where the employer's conduct is such that it results in a situation which presents a risk to the health and safety of employees and non-employees at the workplace, there have been *two* actionable breaches of duty. To prosecute the employer for both breaches is not to put the employer in a situation of double jeopardy. The employer is in jeopardy of one conviction for breach of one duty and in jeopardy of one conviction for breach of the other duty. It does not relate to the work situation which constitutes the two breaches.¹⁹

However, the judgment of the High Court of Justiciary in *Aitchison* was apparently clear on one point; the persons on whom a s 4 obligation lay were *different* persons from those who would have obligations under s 2, although they appeared to accept that persons having obligations under s 3 could be covered by s 4 when the matter in question was control of access to premises. The judges drew a distinction between the employer's obligation to insure safety of access, which is, by virtue of s 2(2), a breach of s 2(1), and 'the persons in control of premises's' obligation as to the same matter, which arises under s 4. This outcome means is possible, *on the wording of s 4 read alone*, for certain classes of persons including: an employer making his or her premises available as a workplace to contractors or the employees of a contractor; or a contractor making his or her premises available as a workplace to other contractors; or to the employees of another who is a *person who has to (some) extent control of premises* made available to those who are not his or her employees as a place of work.

However, when s 4 is read in the context of the surrounding sections, we see that, since the obligations in s 4, which are imposed if that section is applicable to employers and contractors, are merely a subset of the obligations imposed on those

17 Subject to the arguments discussed below in relation to duplicitous informations.

18 See again the arguments in note 16 *supra*.

19 *Ibid.*

persons by s 3. Therefore, the persons on whom the duty in s 4 is imposed *cannot* include the persons bound by s 3.

IV. THE AUSTIN ROVER DECISION

One of the abiding problems in presenting and understanding the web of obligations created by the 'general duties' Acts is the identification of the persons covered by the equivalents of s 4, and this problem underlies another major decision on the meaning of that section, the decision of the House of Lords in *HM Inspector of Factories v Austin Rover Group Ltd.*²⁰ It was also a precipitating problem in the fiasco of the major case on s 17 of the *Occupational Health and Safety Act 1983* (NSW), *Collins v State Rail Authority*,²¹ which is discussed later. The *Austin Rover* case is of interest for the pronouncements of Lords Jauncey of Tullichettle and Goff of Chieveley on the matters necessary to prove for a successful prosecution for breach of s 4. It is also of interest due to their Lordships' apparent satisfaction that the case was a proper one to be brought under s 4. The case is therefore of importance in relation to two matters: first, on whom do s 4 and its equivalents impose obligations, and secondly, what is the extent of the obligations they impose.

The facts on which the prosecution in *Austin Rover* was based were briefly as follows: the Austin Rover works at Cowley contained a number of paint spray booths. Excess paint and thinners produced by operations in the booths drained through downpipes in the floor of the booths to a sump below. Austin Rover had a contract with Westleyshire Industrial Services Ltd to carry out regular cleaning of the sumps. The cleaning was done at weekends when the plant was not operating and the ventilation system was switched off. On the date in question, Eldridge, an employee of Westleyshire, was working in the sump under the No 2 Sealer Booth, and Mackie, another Westleyshire employee, was working in the booth itself. A flash fire erupted in the sump and Eldridge died.

The contract between Austin Rover and Westleyshire required that Westleyshire provide their own thinners for cleaning purposes. Westleyshire had instructed its employees to use only the thinners that it provided and not those available in the paint booths; not to enter the sump when other cleaning operations were under way in the booth above; and to use approved safety lamps when working in the sump. Following the fire, it was established that Mackie had been using the thinners available in the booth and that these were draining into the sump in substantial quantity; that Eldridge was working in the sump at the same time that Mackie was working in the booth; and that the lamp that Eldridge was using in the

20 [1989] IRLR 404.

21 (1989) 5 NSWLR 209.

sump was not an approved safety lamp. Westleyshire, as employers, were prosecuted under s 2 and convicted. Austin Rover was prosecuted for breach of s 4. It was also convicted. It appealed successfully to the Divisional Court. The prosecutor then appealed to the House of Lords.

On the argument alluded to above, as to the division of obligations between ss 3 and 4, Austin Rover should have been acquitted on the grounds that it did not, in these circumstances, have any obligations under s 4; in other words, that the prosecution had been based on the wrong section. What Austin Rover had, allegedly failed to do, was what was required of it by s 3(1), which states:

It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not exposed to risks to their health and safety.

The point that s 3(1) rather than s 4 was the appropriate section, was not raised. By implication, then, the House of Lords accepted that in these circumstances, Austin Rover was a person (corporate) making available non-domestic premises as a place of work to persons who were not its employees. As argued, on the ordinary meaning of those words, read alone, Austin Rover was such a person. But since the duties which s 4 would impose on it as such a person were already imposed on it by s 3(1), s 4 cannot be read as including it in that group of 'persons'. Why was it thought appropriate in this situation to use s 4 rather than s 3(1)? In the author's opinion this was because, at the time of the fatal accident, the Austin Rover plant was not operating for productive processes. No Austin Rover employees (except, presumably the watchmen) were working at the plant. It is of interest, that in the *Collins* case which was also (again, in the author's opinion, mistakenly) brought under the "persons in control" section of the relevant Act, the SRA workshop, where an employee of a contractor suffered a fatal accident, was not operating.²² However, that is surely of no legal relevance; the risk to the employees of the contractor in each case still arose from the (allegedly improper) *conduct of the undertaking* by the "employer" in relation to the premises - Austin Rover in one case, the SRA in the other. The sections do not impose a duty "to conduct [the] undertaking *during normal working hours* so as to ensure..." safety. The conduct of the undertaking involves the condition in which the premises are left while the employer's productive operation are in abeyance just as much as the conditions which apply while productive operations are going on. The conduct of the undertaking involves necessary cleaning and maintenance just as much as it involves the pursuit of directly productive operations.

This point has significance in Australia because a number of the Australian Acts are less than transparent as to the scope of their equivalents of s 4.²³ The point is

²² See note 64 *infra*, and accompanying text.

²³ For example, *Occupational Health and Safety Act 1985* (Vic), s 23 states merely:

An occupier of a workplace shall take such measures as are practicable to ensure that the workplace and the means of access to and egress from the workplace are safe and without risks to health.

Occupational Health, Safety and Welfare Act 1986 (SA), s 23 states:

The occupier of a workplace shall ensure so far as is reasonably practicable -

(a) that the workplace is maintained in a safe condition; and

also significant because it was the *particular wording* of s 4 of the British Act which complicated the determination of whether Austin Rover were in breach of duty, or more precisely, whether the prosecution had discharged their onus of establishing a breach. The complications are enhanced by the fact that, although all of the members of the House of Lords were in agreement that the appeal should be dismissed, only two judgments, those of Lord Jauncey of Tullichettle and Lord Goff of Chieveley, contained any interpretation albeit conflicting interpretation. Since Lords Mackay of Clashfern, Bridge of Harwich and Brandon of Oakbrook agreed with the reasoning of Lord Jauncey of Tullichettle, it is Lord Jauncey's interpretation which represents the *ratio decidendi* of the case; but the existence of Lord Goff of Chieveley's conflicting interpretation demonstrates the difficulties which have been experienced in designing a satisfactory statutory formulation for this duty.

Both Lord Jauncey's and Lord Goff's judgements identify (the same) three elements or stages in the statutory formula used to set out the s 4 duty. It is a duty:

1. to take such measures as it is reasonable for a person in his [or her] position to take to ensure;
2. so far as is reasonably practicable;
3. that the premises are safe and without risks to health.²⁴

There is potential for confusion, through the repetition of the concept of reasonableness, by dividing up the duty in this way. The question arises as to whether the reasonableness issue can be satisfied at one stage but not satisfied at another. Can one "envisage a situation in which it would be reasonable for a person to take measures but not reasonably practicable for him to do so"?²⁵ The further confusion that results from such a duty in the context of the British Act, is that the general duties themselves are expressed as being duties to do things so far as reasonably practicable, but s 40 reverses the onus of proof, so that it is for the accused to prove it was *not* reasonably practicable to do more than was done rather than for the prosecution to prove that it *was* reasonably practicable to do more.

Lord Jauncey compared ss 2 and 3, which impose duties on a single person "who is in a position to exercise complete control over the matters to which the duties extend", with s 4, which "recognises that more than one person may have a degree of control of premises at any one time:

The words [of s 4] "to any extent" and "to take such measures as it is reasonable for a person in his position to take" point to the distinction between the unified control

(b) that the means of access to and egress from the workplace are safe.

There is no reference in these sections (nor in the relevant sections of the Western Australian, Northern Territory or ACT legislation). Acts to the workplace in question being one made available as a place of work to persons not the occupier's employees, and the sections as worded, if read alone, would clearly cover employers.

²⁴ Note 20 *supra* at 406, per Lord Goff.

²⁵ *Ibid* at 410.

contemplated in ss 2 and 3 and the possible divided control contemplated in s 4.²⁶

With respect, this is an accurate comparison. The crucial difference between the persons covered by ss 2 and 3 on the one hand and s 4 on the other is not the *unification* or *division* of control but the *breadth* or *restriction* of control. Moreover, it is not true to suggest that control in the situations covered by ss 2 and 3 will be 'unified' in the context of the workplace itself. Where employees of contractor A are performing work in a factory operated by 'employer' B, both A and B have control over those employees and their working environment. Furthermore, where C, a self-employed person without employees is also working at that factory under a contract for services with B, C also has control over his or her work undertaking but their work environment is also subject to control by B and possibly also by A. We can introduce s 4 into this scenario if we hypothesise that B's factory is situated in part of an industrial complex owned by D, who has some residual control over the premises, for example, responsibility for the maintenance of the common stairways, passages and lifts. In fact, the underlying concept of a net of overlapping responsibilities, to which reference was made earlier, inevitably recognises the frequent, perhaps even usual, *division* of control.

Returning from this example to the text: having thus contrasted ss 2 and 3 with s 4, Lord Jauncey turned to the interpretation of the three constituent elements of s 4 set out earlier. His Lordship asked what was meant by the words "safe and without risks to health" in the third element, and held that these words meant safe, in relation to the use for which the premises were being used. The effect of that interpretation is that the concept of foreseeability was introduced, the question being whether the premises were in such condition that they presented a foreseeable risk if used in that way. He rejected the narrower argument that the premises need only be safe for the purposes for which they were originally made available. Thus, a variation in the use to which premises are in fact put after the commencement of their use will affect what risks are foreseeable. His Lordship proffered the example of an upper floor of a warehouse designed to a loading capacity of xlbs per square foot - the premises are safe if loaded to that capacity but unsafe if loaded to 2 xlbs per square foot. He stated that, at the time of making that floor space available as storage to B, it could not be said that warehouse owner A was in breach because:

B might at some future date exceed the designed loading capacity contrary to A's instructions. If however B in fact overloaded the floor the premises would thereby become unsafe for the purposes of the subsection.²⁷

Again with respect, this conclusion is questionable. What "B might at some future date" do is relevant to whether the premises are safe if it is *foreseeable* that B might do that; and carelessness and disobedience to safety instructions can be foreseeable.²⁸ It is not suggested that a future unsafe overloading in disregard of

26 *Ibid.*

27 *Ibid.*

28 See for example, *Watson v Australian Telecommunications Commission* (1985) SASR 221; *Work v The Readymix Group (SA)* (unreported, Supreme Court of South Australia, Bollen J, No 2628 of 1982, 23 November 1984); *Moustakas v Public Transport Commission* (unreported, Supreme Court of New South

instructions is *inevitably* foreseeable in such a situation, but merely pointed out that it *could* be possible. Whether or not it will *prove to be*, will depend on other factors, including what B intends to store, and how much, and the degree to which A knows or ought to know or suspect what and how much B intends to store. However, a future overload will not be necessarily excluded from foreseeability at the moment of leasing the storage space merely because it is contrary to instructions.

Lord Jauncey then directed his attention to the question of what measures it was reasonable for a person in the accused's position to take to ensure safety, the first of the three constituent elements set out above. Here, there are serious questions raised by his judgment, which stem in part at least, from the erroneous suggestion with regard to the persons who may be covered by s 4. His Lordship said:

The ambit of s 4 is far wider than that of ss 2 and 3. It applies to anyone who is in occupation of non-domestic premises and who calls in tradesmen to carry out repairs, it applies to those tradesmen in relation to the employees of others, and it applies to anyone who makes the premises available on a temporary basis for others to carry out work in. Thus, organisations varying from multi-national corporations to the village shop are brought under the umbrella of the section.²⁹

With the greatest respect to His Lordship, this analysis is almost totally misconceived. Section 4 may *sometimes* apply to multi-national corporations, *if* those corporations are in the business of leasing out commercial and industrial properties. It is almost inconceivable that it could apply to the village shop, because the village shop is highly unlikely to be leasing out accommodation to employers or the self-employed. It will *never* apply where anyone who is in occupation of non-domestic premises calls in tradesmen to carry out repairs because that person will be calling in tradesmen for the purposes of the person's undertaking; and that will be true even where an owner of property, which that owner leases out or intends to lease out as workplace accommodation, calls in tradesmen; because in that context, the tradesmen will be there for the purposes of that owner's undertaking; for the purpose of making the premises suitable for the owner's business of leasing them out. In such a case, the owner of the premises will be subject to obligations under s 3(1) or (2).³⁰

Lord Jauncey went on immediately to refer back to his warehouse example

Wales Court of Appeal, Priestly JA, Appeal No 291 of 1984, 1 May 1987); *McLean v Tedman and Brambles Holdings* (1984) 155 CLR 306.

29 Note 20 *supra* at 410.

30 The earlier decision of the Court of Appeal in *Westminster City Council v Select Management Ltd* [1985] 1 All ER 897 is worth noting at this point. The Court of Appeal held there that premises which are not in the exclusive occupation of the occupants of private dwellings, for example lifts and stairwells in private apartment blocks, would be premises made available as places of work to persons coming to repair them. This decision is also questionable; if the person engaging the persons doing repair is the owner of the apartment block whose income is, in part at least, derived from the leasing of the apartments, then the repairers are engaged for the purpose of the owner's business; the owner is involved in the *undertaking* which the premises represent, and the owner's obligation are to be found in s 3, not in s 4.

however, that situation was completely different. That was, in fact, a *true s 4* situation, and it had nothing to do with ‘persons’ calling in tradesmen. Thus, the juxtaposition of the calling in of tradesmen to do repairs and the leasing of the upper house of the warehouse indicates a confusion about the scope of s 4. The point made in Lord Jauncey’s return to the warehouse example is also, as first stated, unacceptable:

In the example of the warehouse to which I have already referred, it would be contrary to common sense and justice that A should be prosecuted if B had acted contrary to his instructions and without his knowledge.

However, such prosecution would not be “contrary to common sense and justice” if such action by B was foreseeable,³¹ and practically preventable by A. The continuation of the passage does, however, accept that qualification:

...it was to deal with such a situation...that the middle words were included in s 4(2). These words require consideration to be given not only to the extent to which the individual in question has control of the premises, but also to his knowledge and reasonable foresight at all material times. Thus when a person makes available premises for use by another, the measures which he requires to take [*sic*] to ensure the safety of those premises must be determined in the light of his knowledge of the anticipated use for which the premises have been made available and of the extent of his control and knowledge, if any, of the actual use thereafter. If premises are not a reasonably foreseeable cause of danger to anyone acting in a way in which a human being may reasonably be expected to act in circumstances which may reasonably be expected to occur during the carrying out of the work or the use of the plant or substance for the purpose of [*sic*] which the premises were made available, I think that it would not be reasonable to require an individual to take further measures against unknown and unexpected events towards their safety.³²

Given the qualification involved in that passage, it is acceptable *up to a point*. That *point* is whether this is the relevant moment to be discussing foreseeability, which, as will be argued, is a significant question. It is accepted that the person to whom s 4 properly applies (for example, the warehouse owner) should not be liable for risks which result from a misuse of the premises which is genuinely unforeseeable. However, use contrary to instructions is not, for that reason alone, unforeseeable.

Lord Jauncey stressed that the word “reasonable” in the first element listed above, to take such measures as it is reasonable for a persons in his position to take to ensure, “relates to the persons and not to the measures”:

The question is not whether there are measures, which are themselves reasonable which could be taken to ensure safety and the absence of risks to health but whether it is reasonable for a person in the position of the accused to take measures with these aims... Approaching the matter in this way, content may be given to the words ‘so far as reasonably practicable’. It could, having regard to his degree of control and knowledge of likely use, be reasonable for an individual to take a

31 Since the test of foreseeability is objective, it is not a question of what A knew or foresaw, but of what a reasonable and prudent person in A’s position *would have* foreseen.

32 This passage is interpreted as recognising the relevance of *foreseeability* of the use to which the premises will be put; Lord Jauncey refers initially to “knowledge and reasonable foresight”, although His Lordship later speaks only of *knowledge* of anticipated use and of actual use: note 20 *supra* at 410.

measure to ensure the safety of premises, but it might not be reasonably practicable for him to do so having regard to the very low degree of risk involved and the very high cost of taking the measure.³³

This passage encapsulates the effect of his Lordship's interpretation. It means that foreseeability of risk or, as in this case, the foreseeability of misuse, is part of the prosecution case; the prosecution must establish that the premises were unsafe and that such lack of safety was foreseeable to a person in the defendant's position and with his or her opportunities of control. The reasonable practicability of measures to avoid that foreseeable risk is the question which s 40 requires the defence to establish. Thus, Lord Jauncey's interpretation lessens the effect of the reversal of onus in s 40. Putting this together with the constituent elements of the common law action for damages on which the general duties are based (as necessarily adapted to the statutory obligation),³⁴ the following conclusion results:

- (i) causation: here (in contrast to the common law action) the question is causation of *risk*, rather than causation of *injury*, since injury is not a necessary element of breach of the statutory duty.³⁵ The prosecution must establish that the accused "caused" the risk;³⁶
- (ii) foreseeability: in cases under s 4, the prosecution must establish that the risk was foreseeable;
- (iii) possible and practicable precautions;³⁷ and
- (iv) the "reasonableness" of taking those precautions in the circumstances of the case;³⁸ these two matters are for the accused to rebut as a result of the reversal of onus in s 40, the phrase "reasonably practicable" representing an amalgam of those two.

This breakdown resurrects the query made above as to the moment at which it is relevant to discuss foreseeability. If foreseeability is seen as a constituent of the determination of what "measures...it is reasonable for a person in [the accused's] position to take" (the first of the listed elements), it becomes a matter for the prosecution to prove. If it is seen as a constituent of what is "reasonably practicable" for the accused to do (the second element), it becomes a matter for the

33 *Ibid.*

34 There is little doubt that the "general duties" of care in these statutes are based on the common law duty imposed on employers: this was the intention of the Robens Committee, although the Committee envisaged that the duties would not be statutorily enforceable but rather an educative statement.

35 *Arrowcrest Group Pty Ltd v Stevenson* (Industrial Court of South Australia No I 72 of 1990, 23 August 1990), *CCH Australian Industrial Safety, Health and Welfare Vol 1* [52-735].

36 At least to the level of 'legal' causation: that is, that *but for* the accused's actions, the risk would not have existed - that the accused's actions are a *causa sine qua non*.

37 That is, precautions which are not inordinately costly in relation to the production process, do not inordinately interfere with the production process, and do not give rise to separate and equivalent or greater risks.

38 Ascertained by weighing and balancing the degree of the risk, the severity of the injury risked, and the cost and inconvenience of the precautions; a process of weighing and balancing exemplified by *Paris v Stepney Borough Council* [1951] AC 367.

accused to negative. The final point about Lord Jauncey's positioning of the foreseeability issue within the three-element breakdown of s 4, is that His Lordship had earlier treated it as an issue going to whether the premises were "safe and without risks to health" and one for the prosecution to prove. Thus, the decision makes s 4 much less onerous for persons accused, and much more onerous for the prosecution.

But does the wording of s 4 necessitate such an interpretation? It is argued that it does not, but that the repetition of the concept of 'reasonableness' introduces a confusion that explains, if not justifies, that interpretation. The confusion arises, of course, because "reasonable" in the first element and "reasonably" in the second element must be given separate effect, and "reasonably practicable" is the *exact* phrase used in s 40. Therefore, the reasonableness of the measures which a person in the accused's position could or should take is something quite separate from the reasonable practicability; the onus of disproving rests on the defence, and the onus as to the reasonableness of the measures must lie with the prosecution. Section 40 can only reverse the *specific* onus it refers to. What, then, is a logical interpretation of the reasonable measures to be taken by a person in control of premises made available as a place of work, to persons not his or her employee?

The answer must be "those measures within that person's power *given the extent of his or her residual control*". It is here that the particular nature of s 4 takes effect; some 'persons' will have substantial residual control, some will have very little. It has already been argued that Lord Jauncey misstated the particular nature of s 4 by his reference to *divided* control, when what was significant was *limited* control. On this argument, "reasonable" in the first element in the breakdown of the section refers to the extent of that limited control. Thus the questions would become:

- (i) did the premises cause a risk?
- (ii) was action to avert that risk within the person's power?
[questions for the prosecution]
- (iii) was that action "reasonably practicable", in the sense that the risk was foreseeable, the precautions were possible, practicable, and were reasonable for a person in that position to take?
[questions for the defence].

This deconstruction of Lord Jauncey's judgment may seem unnecessarily pedantic. One might ask "what does it matter in which of three elements of the action foreseeability is placed"? The answer is that it matters enormously. It was exactly because the foreseeability issue was placed in element one, which was for the prosecution to establish, that the case against *Austin Rover* failed. The House of Lords held that the prosecution had not established that it was foreseeable to Austin Rover that the Westleyshire employees would act as they did in contravention of their instructions. There was no express finding that it was not foreseeable; merely that the prosecution had not led evidence or presented argument to establish that it was foreseeable. It is not possible to say, without further evidence, which is not raised in the decision, whether Austin Rover would

have been able to disprove foreseeability, had the onus of doing so been cast upon it. However, this evidence was not raised *simply* because, on the interpretation adopted, the need to do so did not arise.

Had the case been brought under s 3(1), as argued, then it would seem it would have been successful, because s 3(1) does not involve the confusing repetition of the word “reasonable” which precipitated Lord Jauncey’s conclusion. Section 3(1) requires the employer to conduct the undertaking so as to ensure, so far as reasonably practicable, that it does not create a risk to non-employees who may be affected. The only point at which questions of foreseeability could arise under that formulation is in the determination of what is ‘reasonably practicable’, and that is a matter for the defence. That observation, of course, introduces a further reason for criticism of the decision of Lord Jauncey. In *Austin Rover*, it was held that foreseeability under s 4, is not covered by the phrase “so far as reasonably practicable”, but that the phrase refers merely to the possibility of precautions and the relationship of the cost and inconvenience of the precautions to the degree of likelihood of the risk eventuating. If the section which requires an employer to *ensure* that the conduct of undertaking is not a risk (*so far as reasonably practicable*), foreseeability cannot logically be relevant to the prosecution’s task of establishing that the absence of risk has not been ensured; and if it is not part of the issue of reasonable practicability (as Lord Jauncey argued in relation to what is “reasonably practicable” under s 4), it is not relevant at all. There will be a breach if a risk exists, and where it can be determined after the event, that the risk could have been prevented without unreasonable expense, *even if* until the risk eventuated it was unforeseeable! It is impossible to believe that the intention of the legislation is to make employers and contractors liable for unforeseeable risks. Therefore, foreseeability must be relevant in ss 2 and 3, and the only way in which it can be introduced into those sections is as one of the considerations in determining if ensuring safety was “reasonably practicable”. But if “reasonably practicable” includes considerations of foreseeability in ss 2 and 3, why should *the same phrase* not include such considerations in s 4? That is contrary to basic canons of statutory interpretation. If then, foreseeability in s 4 *is* covered by the reference to what is reasonably practicable (and therefore a matter for the defence under s 40), there must be some other implication to be drawn from the reference to measures that it is “reasonable” for a person in the position of the accused under s 4 to take. Thus, a consideration of the implications of ss 2 and 3 give added support to the suggestion above as to the meaning of “reasonable” in that context.

The above analysis relates to the judgment of Lord Jauncey. Lord Goff adopted the same three element breakdown of s 4. However, Lord Goff’s interpretation of each of those three elements is preferable to that of Lord Jauncey. The author’s only dissent from Lord Goff’s interpretation relates to the (admittedly fundamental) question whether s 4 was the appropriate section for this prosecution.

In relation to the meaning of the requirement that the premises be “safe and

without risks to health”, His Lordship argued that foreseeability was not an issue:

I do not for my part see how the unforeseeable nature of the defect...can nevertheless mean that the premises...are safe... It may be that, if the danger in question is not foreseeable, the defendant will not be held to have been in breach of his duty; but, if so, that will not be because...the premises...are to be regarded as safe, but because the qualified nature of the duty may not give rise to any liability in the particular circumstances.³⁹

In relation to whether the defendant has discharged the onus of proving that it was not reasonably practicable to eliminate the risk, he argued that:

...there has to be taken into account (inter alia) the likelihood of that risk eventuating. The degree of likelihood is an important element in the equation. It follows that the effect is to bring into play foreseeability in the sense of likelihood of the incidence of the relevant risk, and the likelihood of such risk eventuating has to be weighed against the means, including cost, necessary to eliminate it.⁴⁰

In relation to the meaning of “such measures as it is reasonable for a person in [the defendant’s] position to take...”, he argued:

I have come to the conclusion that it is not a function of the word “reasonable” in this passage to qualify the duty of the defendant with reference to reasonable foreseeability by him of the incidence of risk to safety. This is because the question of reasonable foreseeability in the sense of likelihood arises at a later stage, by the introduction of the qualifying words “so far as is reasonably practicable”...the phrase is only concerned to qualify the defendant’s duty with reference to the *extent of control which he has of the relevant premises*, so as not to impose upon him a greater duty than is reasonable having regard to the extent of his control.⁴¹

And therefore:

...the complainant has only to prove that the defendant has failed to ensure (so far as he can reasonably do so, having regard to the extent of his control) that the relevant premises are safe...the onus then passes to the defendant to prove, if he can, that it was not reasonably practicable for him to eliminate the relevant risk. It is at this stage that reasonable foreseeability becomes relevant...⁴²

His Lordship’s eventual decision that the appeal should be dismissed rested on the question whether the premises were safe. He found that they were, given the relevant use by Westleyshire and the rules and instructions given by them to their employees in relation to that use.

It is not utterly convincing *on the facts* that such a conclusion follows. The premises were clearly *not* safe if the relevant use was “carrying out a contract to clean the sumps” because the accident occurred as a result of employees acting in performance of that contract. The fact that they acted by cleaning, other than in

39 Note 20 *supra* at 406.

40 *Ibid* at 407.

41 *Ibid*. The rule in Australia as to foreseeability is set out in the High Court decision in *Council of the Shire of Wyong v Shirt* (1979-80) 146 CLR 40 at 47-8; foreseeability is not a question of probability or improbability, likelihood or unlikelihood. It is a question of whether a matter is a real and genuine possibility or whether it is far-fetched and fanciful; it can be foreseeable even though unlikely. In Britain, as Lord Goff’s judgment shows, the language of likelihood is still used.

42 Note 20 *supra* at 407.

the manner directed, does not necessarily alter the matter. Indeed, His Lordship appears to be reintroducing here, by an unspoken and back-door method, something which he had earlier denied; the relevance of foreseeability of risk to the 'safety' of the premises. If foreseeability is not relevant at that point, then it is obvious that the premises were not safe; the use was cleaning; the accident resulted from cleaning. To hold that these premises were safe for "cleaning" necessitates qualifying "cleaning" as "cleaning according to the instructions which, under the contract, would be given to the contractor's employees as to the allowable methods for cleaning". If that qualification is acceptable, the operation of the section would be stultified and open to avoidance by standard exclusion clauses, unless a further qualification was introduced, so that the use would be "cleaning according to instructions or by methods in foreseeable disregard of those instructions". Whether the methods used in this instance were foreseeable would then depend on matters such as, whether it was easier and quicker for Westleyshire's employees to clean using Austin Rover's thinners which were effectively "on tap" in the paint spray booths rather than by using the special thinners, provided to Westleyshire's employees. If so, such disregard of instructions would be foreseeable. It would seem fairly obvious that there would be a time value to Westleyshire employees in disobeying the instruction that the sump should not be cleaned while the booth above was being cleaned. Whether it was foreseeable that an employee in the sump would be using a non-approved safety lamp would depend on other factors, of which no evidence was forthcoming, such as relative weights and ease of use. It does seem, however, after enumeration of these possibilities, that a disregard of instructions in the nature of that which occurred was foreseeable.

Ultimately then, Lord Goff's *decision* on the facts difficult to accept. However, with the various qualifications made, his interpretation of s 4, the matters involved in the three elements into which it can be dismantled, and who (prosecution or defence) must prove those matters, is much more compelling than that of Lord Jauncey. A further attraction of Lord Goff's judgment, relating to the initial qualification raised as to the appropriateness of s 4 to such a case, is that His Lordship identifies the measures which "it is reasonable for a person in [the defendant's] position to take..." as determined by the defendant's degree of control. This would direct attention to the determinative feature of s 4 and encourage a proper allocation of charges between ss 3 and 4.

Austin Rover is thus a troubling decision with a number of dangerous effects or implications. The first is the cutting-down of the effect of the reversal of onus, excluding the issue of foreseeability from its operation. The second is the accepted transfer of proper s 3 situations into the reach of s 4, and thus the transfer to the prosecution of the onus regarding foreseeability *in those situations also*. The failure of the High Court of Justiciary in *Aitchison* resulted from too great an attention on control of means of access, in contrast to control of the workplace itself. Similarly, the errors in the governing judgment in *Austin Rover* result from

too great an attention to the reference in s 4, to control of *premises*, leading to a disregard for the fact that ensuring the health and safety of employees under s 2 and ensuring that the conduct of the undertaking is not a risk to health and safety of non-employees under s 3, necessarily involves control of premises and elimination of risks to which those premises give rise. It is not control of premises that is the significant element in s 4; it is control of *premises only*. Finally, *Austin Rover* is troubling because it suggests, by implication, that disregard of, or inattention to instructions is not foreseeable, at least outside a direct employment relationship.

All of these implications need to be speedily displaced. Perhaps the best route for that is the argument, advanced above, that the *Austin Rover* interpretation logically excludes foreseeability from any bearing on situations coming under ss 2 and 3. A short cogitation on the ramifications of that should encourage a re-assessment of Lord Jauncey's judgment at the earliest moment the question, or related questions, next come before the House of Lords, and until then, a vigorous exercise by the lower courts of their powers of 'distinguishing' the *Austin Rover* decision.

V. QUESTIONS OF ONUS UNDER THE AUSTRALIAN ACTS

As discussed above, s 40 of the British Act places the onus of establishing what is or is not reasonably practicable, on the defence. All of the Australian Acts except that of New South Wales⁴³ place that onus on the prosecution. The duties are expressed in terms of doing what is practicable or reasonably practicable. For example:

An employer must take all reasonably practicable steps to protect the health and safety at work of the employer's employees;⁴⁴

or

An employer shall provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health;⁴⁵

or

An employer or a self-employed person shall take reasonable care - ...to avoid adversely affecting the health or safety of any other person (not being an employee employed or engaged by the employer or the self-employed person) through an act or omission at work;⁴⁶

or

43 And possibly that of Queensland - see below.

44 *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth), s 16(1).

45 *Occupational Health and Safety Act 1985* (Vic), s 21(1).

46 *Occupational Health, Safety and Welfare Act 1986* (SA), s 22.

A person who has, to any extent, control of

- (a) a workplace;
- (b) a means of access to, or egress from, a workplace; or
- (c) plant or a substance at a workplace;

shall take all reasonably practicable steps to ensure that it is safe and without risks to health.⁴⁷

This is, of course, the approach taken in the equivalent sections of the British Act, but the Australian statutes under consideration have no equivalent to s 40 of the British Act reversing the onus of proof as to practicability.

There is, however, a variation in the formulae of which examples are given above. The Commonwealth and ACT formulations (and also the Tasmanian),⁴⁸ clearly state the duty as being one to take reasonably practicable steps, so that the duty is clearly one to do what is reasonably practicable. The South Australian, Victorian, Western Australian⁴⁹ and Northern Territory⁵⁰ formulae, on the other hand, express the concept of practicability in a separate phrase qualifying that duty, such that, for example, it is only necessary to "ensure so far as is reasonably practicable". In *Chugg v Pacific Dunlop Ltd*,⁵¹ the High Court held, in relation to a prosecution under s 21(1) of the Victorian Act, that even where the statute refers to practicability in a separate and apparently qualifying phrase in that way, the onus of proof as to practicability is on the prosecution. Justices Dawson, Toohey and Gaudron described the phrase "so far as is practicable" in s 21(1) as "forming part of the statement of a general rule", rather than as constituting:

...a statement of some matter of answer, whether by way of exception, exemption, excuse, qualification or exculpation or otherwise (called an 'exception'), which serves to take a person outside the operation of a general rule.⁵²

As to what would constitute an exception, their Honours suggested:

One indication that a matter may be a matter of exception rather than part of the statement of a general rule is that it sets up some new or different matter from the subject matter of the rule... Such is ordinarily the case where...there is a prohibition on the doing of an act "save in specified circumstances"...⁵³

Thus, under the Acts of the Commonwealth, South Australia, Tasmania, Victoria, Western Australia, the Northern Territory and the Australian Capital Territory, it is for the prosecution to establish not only that the duty-bearer has failed to ensure absence of risk to health and safety, but also that it was reasonably practicable for him or her to have ensured the absence of risk.

Section 9(1) of the *Workplace Health and Safety Act 1989* (Qld) states, for

47 *Occupational Health and Safety Act 1989* (ACT), s 29.

48 For example, *Industrial Safety, Health and Welfare Act 1977* (Tas), s 32.

49 For example, *Occupational Health, Safety and Welfare Act 1984* (WA), s 19(1).

50 For example, *Work Health Act 1986* (NT), s 29(1).

51 (1990) 95 ALR 481.

52 *Ibid* at 486.

53 *Ibid* at 487.

example in relation to the duty of the employer that:

An employer who fails to ensure the health and safety at work of all his employees, except where it is not practicable for him to do so, commits an offence against this Act.⁵⁴

This was the very wording which, in the passage quoted above, Dawson, Toohey and Gaudron JJ proffered as an indication of a matter of exception, the onus as to which would lie on the defence. However, their Honours stated that it “is *ordinarily* the case” [emphasis added] that such phrasing indicates a matter of exception, and Brennan J argued that:

...the elements of the supposed qualification [in the Victorian formulation] relate to elements of the same character as the elements of the obligation, namely the taking of precautions required to make a working environment safe and without risks to health...⁵⁵

Despite the “except [save] where...” phrasing of the Queensland formulation, Brennan J’s comment is equally applicable to the wording of the Queensland Act as to the Victorian. It is therefore uncertain where the onus of proof as to practicability under the Queensland Act lies, and it will remain so until the High Court pronounces directly on the interpretation of that Act.

The New South Wales Act provisions imposing duties on employers, the self-employed, manufacturers of plant and substances for use at work, and persons in control of premises make no reference to practicability. Section 15(1), for example, states:

Every employer shall ensure the health, safety and welfare at work of all his employees.

However, that section is subject to s 53 whereby:

It shall be a defence to any proceedings against a person for an offence against this Act or the regulations for the person to prove that -

- (a) it was not reasonably practicable for him to comply with the provision of this Act or the regulations the breach of which constituted the offence; or
- (b) the commission of the offence was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision.

Under this approach, it is absolutely clear that the onus of proof as to practicability lies on the defence. In terms of what persons covered by the Acts must do, and in terms of the *practicalities* of prosecution, it would seem then that the New South Wales Act has the same effect as the British Act; a duty-bearer must do what is reasonably practicable to ensure safety and health; he or she will be liable for a failure to do what is reasonably practicable to ensure safety and

54 Until amendment in 1993, the word “save” was used in place of “except”, but both words carry the same meaning.

55 Note 51 *supra* at 482.

health, and it will be for the duty-bearer to prove that he or she has *not* failed to do what is reasonably practicable, rather than for the prosecution to prove that he or she *has* failed to do so.

However, while that may be the practical effect, the courts have stressed that the New South Wales Act does not merely produce a duty of reasonable care with the onus of proof reversed. In *Carrington Slipways Pty Ltd v Inspector Callaghan*,⁵⁶ Watson J stated:

Had the legislature intended to restate the common law obligations devolving on an employer to take reasonable care for the safety of his employees, it would have been open for it to have adopted wording such as... 'shall take all reasonable precautions to ensure'... In their context and purpose there 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.

His Honour further stated that s 53:

...does not simply reverse any onus which might otherwise fall on the prosecution under s 15(1). Rather s 53 affirmatively expresses and delimits defences not otherwise open under s 15(1). It makes clear at the same time that those defences are to be proved by the person against whom the proceedings are instituted.

Justice Watson expressed the same views in *Gardner Bros Pty Ltd v Inspector McAuliffe*.⁵⁷

Subsequent decisions of the Chief Industrial Magistrate and of the Industrial Commission⁵⁸ have consistently held that it is for the defence to prove, under s 53, that it was not reasonably practicable to ensure safety and health. However, the standard of proof under s 53 is the civil standard of proof on the balance of probabilities; whereas the standard of proof applicable to s 15(1) is the criminal standard of proof beyond reasonable doubt.⁵⁹

There has, however, been no direct discussion of the location of the onus of proof as to *foreseeability*, the very point on which the reasoning of the majority in *HM Inspector of Factories v Austin Rover Group Ltd*⁶⁰ was open to criticism. Logically, questions of foreseeability do not arise, in a section such as s 15(1) which requires an employer to *ensure* health and safety as the obligation, as in *Carrington Slipways*, is stated to be *absolute*. If the prosecution establishes that

56 Industrial Commission of New South Wales, No 1518 of 1984, 13 February 1985, *CCH Australian Industrial Safety, Health and Welfare Selected Cases* (1984-1988) [52-152].

57 Industrial Commission of New South Wales, No 1595 of 1985, 18 July 1986, *CCH Australian Industrial Safety, Health and Welfare Selected Cases* (1984-1988) [52-249].

58 Proceedings are, by s 47(1), to be dealt with summarily before a local court constituted by a Magistrate, before an Industrial Magistrate or before the (now) Industrial Court (formed by the division, under the *Industrial Relations Act* 1991 (NSW), of the functions of the Industrial Commission and their allocation to an Industrial Relations Commission and an Industrial Court). Appeals from the decisions of the Industrial Magistrate go to the Industrial Court.

59 See *Sydney County Council v Inspector Coulson* (1987) 21 IR 477; *Italo Constructions Pty Ltd v Inspector Parkes* (1988) 24 IR 428; *Inspector Ford v North West County Council* (1987) 23 IR 155.

60 Note 20 *supra*.

the workplace was not safe, then it has discharged its onus, and it is for the defence, in showing it was not reasonably practicable to ensure safety, to prove that the risk was not foreseeable. Furthermore, while there has been no express decision to that effect, it is implicit in the argument of CIM Miller in *Inspector Foreman v Alcan Australia Ltd.*⁶¹ Chief Magistrate Miller, noting the employer's lack of knowledge of the worker's particular susceptibility to upper respiratory tract irritants present at the place of work (at a level not a risk to persons of normal susceptibility), stated that "reasonable practicability" under s 53 does not impose a duty to do all that is reasonably possible, and that there was no duty to take extraordinary precautions to protect the particular employee "as if the employer were aware of the employee's disabilities".⁶²

The one provision of the New South Wales Act which now refers to a duty to do what is reasonably practicable is s 19, whereby:

Every employee while at work -

- (a) shall take reasonable care for the health and safety of persons who are at his place of work and who may be affected by his acts or omissions at work...

However, prior to 1987, s 17(1) (the equivalent of s 4(1) and (2) of the British Act) also expressly referred to what was reasonable. As then formulated, s 17(1) stated (in basically the same terms as s 4(1) and (2)):

Each person who has, to any extent, control of -

- (a) non-domestic premises which have been made available to persons (not being his employees) as a place of work, or the means of access thereto or egress therefrom; or
 (b) any plant or substance in any non-domestic premises which has been provided for the use or operation of persons at work (not being his employees),

shall take such measures as it is reasonable for a person in his position to take to ensure that the premises, the means of access thereto or egress therefrom or the plant or substance as the case may be, are or is safe and without risks to health.⁶³

It was argued above that, as stated by Lord Goff in *Austin Rover*,⁶⁴ the reference to measures which it is reasonable for such a person to take is directed to the restrictions on that person's control of the premises and therefore on the measures it is in that person's power to take. The same argument would apply to the limitation of the employee's duty to one of reasonable care. Since an employee operates subject to the control and instructions of the employer and has a limited

61 Chief Magistrate's Court of New South Wales, No 13 of 1988, 18 August 1988, *CCH Australian Industrial Safety Health and Welfare Selected Cases* (1984-1988) [52-464].

62 Though, as noted earlier, it is not necessary to establish actual knowledge of a risk, but merely that a risk was foreseeable as a genuine possibility.

63 The section now states:

Each person who has, to any extent, control of -

- (a) non-domestic premises...
 (b) any plant or substance...

shall ensure that the premises, the means of access thereto or egress therefrom or the plant or substance as the case may be, are or is safe and without risks to health [emphasis added].

64 Note 20 *supra*.

authority, the measures the employee can take to avoid risk to others at the workplace are limited. In support of this interpretation of the scope of "reasonable" in s 19 and in the previous version of s 17(1) is the fact that these provisions, along with those imposing 'absolute' duties on employers and the self-employed etc, are subject to s 53, so that it is a defence to proceedings for an offence against s 19 and was a defence to proceedings for an offence against the previous version of s 17(1), to show that it was not reasonably practicable to comply. Again, "reasonable" in s 19 and the former s 17(1) must mean something different from "reasonably practicable" in s 53; and since the other duties are 'absolute', issues of foreseeability, the practicability of precautions and the reasonability in the particular circumstances of taking, or not taking, those practicable precautions must fall within the concept of "reasonably practicable" in s 53, so that "reasonable" in s 19 and the former s 17(1) can only refer or have referred to the limitations imposed by the degree of control exercisable.

VI. THE COLLINS DECISION

The case of *Collins v State Rail Authority of New South Wales*⁶⁵ was referred to earlier as a *fiasco*. This case was a prosecution under s 17(1) in its original formulation, requiring the person in control of premises made available to non-employees to take such measures as it was reasonable for a person in his or her position to take. The elements of its *fiasco* status were compound.

The first of those elements relates to the actual conduct of hearings. At the time the prosecution was launched, s 47(1) of the Act provided for proceedings to be dealt with summarily before a Magistrate, Industrial Magistrate or the Supreme Court in its summary jurisdiction (rather than, as now, before a Magistrate, Industrial Magistrate or the Industrial Court). The maximum penalty for breach of the duties of employers, the self-employed, manufacturers and persons in control of premises was at that time \$50,000; but the maximum penalty which could be imposed by a magistrate or industrial magistrate was \$5000.⁶⁶ Thus, where the prosecuting authority considered that the offence merited imposition of a penalty greater than \$5000, it was necessary to institute proceedings in the Supreme Court, despite the fact that such proceedings would be more costly to prosecute and subject to greater delay. The *Collins* case was the first in which the prosecuting authority decided to institute proceedings in the Supreme Court in its summary jurisdiction. The defendant State Rail Authority (SRA) engaged senior counsel, and the prosecution felt it necessary to follow suit. Hearings commenced and continued for two weeks. Justice O'Brien then stated a case on a question of law

65 Note 21 *supra*.

66 The maximum under the Act is now \$250,000, and the maximum which may be imposed by a magistrate or Industrial Magistrate is \$10,000.

for the consideration of the Court of Criminal Appeal. Before the Court of Criminal Appeal had considered the stated case, O'Brien J retired from the Bench. In order to avoid the necessity for further expense and delay in a rehearing, the Court of Criminal Appeal took over the matter:

We have accordingly, with the assent of counsel, taken the facts to be as found by his Honour... We shall vacate the determination to state the case presently before us and proceed, in the light of those facts, to make the determination that this Court in its summary jurisdiction could have made. In short, we have, on the facts as found, undertaken the determination of guilt or otherwise of the charges under consideration.⁶⁷

However, this procedure was merely a response to the particular circumstances:

The case is not to be regarded as a precedent in a procedural sense which would indicate that a similar course would be followed in different circumstances.⁶⁸

The facts leading to the prosecution were as follows: the SRA engaged BT Bradley Pty Ltd (Bradley) to carry out roofing repairs at the SRA workshop at Eveleigh in Sydney. Employees of Bradley worked on the repair job on a Sunday and the following Monday which was a public holiday. Both were days on which the workshop was closed as regards its normal operations. The roofing repairs were to be done in close proximity to the 600 volt and 450 volt mains supplying electricity to the workshop. The electricity mains should have been shut off while the repairs were proceeding, but in the event were not shut off, and the SRA's insulation procedures were not effective. An employee of Bradley came into contact with uninsulated clamps of the terminals of a sub-main and was electrocuted.

The prosecution was launched on the basis of s 17(1), rather than s 16(1), the equivalent to s 3(1) of the British Act, whereby:

Every employer shall ensure that persons not in his employment are not exposed to risks to their health or safety arising from the conduct of his undertaking while they are at his place of work.

As argued above in relation to *Austin Rover*,⁶⁹ the SRA was the employer as regards the Eveleigh workshop, the employees of Bradley were persons not in SRA employment but at the SRA's place of work and they were there exposed to risks arising from the conduct by the SRA of its undertaking, namely, its failure, in arranging for the repair work on the Sunday and Monday, to ensure that the electricity mains were shut off and that the clamps on the terminals were taped for effective insulation. It may be that the choice of s 17 was made because the normal operations of the workshop were suspended over the Sunday and Monday, but again as argued earlier, that is not a relevant consideration. The judgment of the Court of Criminal Appeal, delivered by Street CJ, made no reference to the applicability of s 16(1) to the situation, nor to the argument, expressed earlier, that s 17 can only sensibly apply to persons whose provision of premises is their *only*

67 Note 21 *supra* at 210-11, per Street CJ.

68 *Ibid.*

69 Note 20 *supra*.

connection with the work undertaken in those premises, although it did involve "some consideration of the scope of the liability of the Authority under s 17".⁷⁰

There were two particulars of the charge under s 17(1); first the failure to isolate the building by switching off the mains; and secondly, the failure to insulate the clamps on the terminals by taping. In relation to the first particular, the trial judge had found as fact that:

It was the established practice...at the Eveleigh Workshops...that, when work was to be done on or near conductors, whether by employees of the Department or by an outside contractor, the circuits involved would be isolated by opening the main switches controlling the supply of current to the switches...

It was furthermore the established practice...that when a switch normally closed was 'opened' for any such purpose, there was placed upon the switch a 'danger tag' ... This danger tag...set out the date, time of day and the reason for the switch being 'open', especially the presence and identification of the workmen involved, and it identified the name of the electrician who opened the switch and fixed the danger sign. It was only with his authority that the tag...could be removed and he would not remove the tag...or close the switch until the purpose for which it had been affixed had been completed...⁷¹

In relation to the second particular, it was established as a fact that it was the practice of the SRA to bind the clamps with insulation tape because of the risk that over the years the clamps might wear through the insulation on the cable to which they were affixed, thereby coming in contact with the conductor in the cable.⁷²

Chief Justice Street alluded to the submissions of counsel for the prosecuting authority as to other provisions of the Act "constituting the context" of s 17. Counsel argued that where a person has entire control over the premises (as had the SRA), s 17 imposes almost absolute liability to ensure the premises are safe, seeking to substantiate the argument by reference to s 15, which, as seen earlier, imposes absolute liability on employers as regards the health and safety of employees; and s 18, which imposes absolute liability on manufacturers of plant and substances for use at work; and s 53 which provides a defence. Chief Justice Street, "recognise[d] the logical attractions of the argument"⁷³ although, with respect, it is suggested that the argument merely exposed the illogicality of bringing the proceedings under s 17; if the SRA had *entire control* over the workshop, it became even more obvious that s 16(1) was the appropriate section. Ultimately, however, Street CJ rejected the submission:

The offence as formulated is in perfectly normal straightforward English. It is an offence not to take such measures as it is reasonable for a person in the defendant's position to take to ensure the safety of the premises. This, in my view, imports a well-travelled and quite widely recognised obligation upon employers and occupiers of premises. It imports also the recognition *that an employer with a very*

70 Note 21 *supra* at 213.

71 *Ibid* at 212-13.

72 *Ibid* at 215-16.

73 *Ibid* at 214.

*substantial undertaking under his or its responsibility may well act reasonably or, put more precisely, may well not be properly held to have failed to act reasonably if that employer has responsibly delegated within its work-force the due performance of obligations such as are imposed by this section [emphasis added].*⁷⁴

It is true that the duty of an employer to take reasonable care for safety *may* be fulfilled by the setting up of a system of work under which the taking of necessary measures for safety are allocated to managerial and supervisory employees. In terms of the common law duty of care, on which the duty in the statute is clearly based, this would amount to saying that it is not a *practicable* precaution for the employer to oversee the performance of their duties by the managers or supervisors, or that, although practicable, the *failure* to take that precaution is *in accord with the manner in which the reasonable and prudent employer would act* in the circumstances, given the balancing of the degree of risk, the severity of the injury risked, and the cost and inconvenience of enhanced supervision. This may be the case, although in this regard it is worth noting the increasingly strict requirements as to supervision imposed by the High Court in recent years.⁷⁵ But these are matters imported by s 53, *not* by s 17. This ‘well-travelled’ road is not imported by the reference to “such measures as it is reasonable for a person in the defendant’s position to take”, although the SRA may have been successful in travelling that road in putting forward a s 53 defence. What Street CJ apparently ignored was the double reference to “reasonable”, first in s 17(1) and secondly in s 53. Similarly, the scope and effect of the double reference received different interpretations by Lords Jauncey and Goff in *Austin Rover*.⁷⁶

The Chief Justice went on to state that: “[t]he concept of requiring measures to be taken as are reasonable is by no means unusual in legislation of this nature...”, and cited as one example the obligation (unspecified) in the *Factories Act 1961* (UK), that a place of work shall as far as is reasonably practicable be made and kept safe.⁷⁷ But, wherever the onus lies, *that* reference to reasonable practicability is the equivalent of s 53, not of the “reasonable measures” required by s 17. That is even more obvious in relation to the Chief Justice’s second example: a British provision that:

...came under consideration by the House of Lords in the matter of *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153. That case arose out of a prosecution under the *Trade Descriptions Act 1968* (UK) which imposes certain obligations upon persons and provides that it shall be a defence if the person could prove that

74 *Ibid.*

75 In cases such as, for example, *Bankstown Foundry v Braistina* (1986) 65 ALR 1; *McLean v Tedman and Brambles Holdings* (1984) 155 CLR 306.

76 Note 20 *supra*.

77 Note 21 *supra* at 214. There is, of course, no such provision in the *Factories Act 1961*, although there is a more limited provision referring to the taking of steps “so far as is reasonably practicable”. Section 29 requires, in subsection (1), that “there shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work”, and, in subsection (2), that secure hand-holds and footholds be provided where any person has to work at a place from which he or she is liable to fall a distance of more than six feet six inches. This provision is paralleled almost word for word by s 40(1) and (2) of the *Factories, Shops and Industries Act 1962* (NSW).

“he took all reasonable precautions” to avoid the commission of an offence.⁷⁸

Not only does this comparison continue the elision of the concept of measures that it is reasonable to take, under s 17, with what is reasonably practicable, under s 53; an elision which can lead to an interpretation of s 53 insupportable when the defence is to a charge under ss 15, 16 or 18 (as pointed out in the discussion of *Austin Rover*), but, even in relation to s 53 alone, it is inappropriate. It is suggested that, even though the words of the two defences may be very similar, the subject and context of the statutes is too different; if we are to determine what will be “reasonably practicable” for the purposes of s 53 (or s 4 of the British Act), the appropriate source of guidance is in common law cases based on the employer’s duty of care, and in particular in the consideration in such cases whether delegation of performance of an obligation is a sufficient discharge of that obligation.

It is not suggested that the *principle* as stated in *Tesco Supermarkets Ltd v Natrass* is totally inappropriate to statutory duties to take reasonable care for health and safety, or indeed to the employer’s common law duty of care from which the statutory duty is derived. The principle is much the same principle as expounded as far back as *Wilsons & Clyde Coal Co Ltd v English*.⁷⁹ Chief Justice Street quoted Viscount Dilhorne in *Tesco Supermarkets*:⁸⁰

That an employer, whether a company or an individual, may reasonably appoint someone to secure that the obligations imposed by the Act are observed cannot be doubted. Only by doing so can an employer who owns and runs a number of shops or a big store hope to secure that the Act is complied with, but the appointment by him of someone to discharge the duties imposed by the Act in no way relieves him from having to show that he has taken all reasonable precautions and had exercised all due diligence if he seeks to establish the statutory defence.

He cannot excuse himself if the person appointed fails to do what he is supposed to do unless he can show that he himself has taken such precautions and exercised such diligence. Whether or not he has done so is a question of fact and while it may be that the appointment of a competent person amounts in the circumstances of a particular case to the taking of all reasonable precautions, if he does nothing after making the appointment to see that proper steps are in fact being taken to comply with the Act, it cannot be said that he has exercised all due diligence.⁸¹

The passage quoted by Street CJ from Lord Diplock⁸² is even more to the point as regards the taking of care for health and safety by the establishment of safe systems of work:

...in a large business...it may be quite impracticable for the principal personally to undertake the detailed supervision of the work of inferior servants. It may be reasonable for him to allocate these supervisory duties to some superior servant or hierarchy of supervisory grades of superior servants... If the principal has taken all

78 *Ibid.*

79 [1938] AC 57.

80 [1972] AC 153 at 186.

81 Note 21 *supra* at 214-15.

82 In *Tesco Supermarkets*, note 80 *supra* at 197-8.

reasonable precautions in the selection and training of servants to perform supervisory duties and has laid down an effective system of supervision and used due diligence to see that it is observed, he is entitled to rely upon a default by a superior servant in his supervisory duties as a defence...⁸³

The principle as outlined is much the same as that developed in *Wilsons & Clyde Coal Co*, although it could be argued that less scope for the discharge of duty by the delegation of performance, was suggested in that case.⁸⁴

But while the statement in *Wilsons & Clyde Coal Co* and the statements in *Tesco Supermarkets Ltd* may be reconciled to the extent that the principle as stated by Viscount Dilhorne and Lord Diplock might be an appropriate principle to be applied to the employer's performance of duty under the British Act, that principle is arguably inadequate for application to the employer's performance of duties under Australian occupational health and safety statutes, such as the *Occupational Health and Safety Act 1983* (NSW), with which Street CJ was concerned. The reason for that inadequacy lies in the expanded interpretation of the *Wilsons & Clyde Coal Co* principle developed in recent years by the Australian High Court,⁸⁵ and in particular the statements in *Kondis v Transport Authority*.⁸⁶ The plaintiff employee's injuries in that case were directly caused by the employee of a contractor engaged by the plaintiff's employer. The High Court held that the employer was responsible for the negligence of the contractor and the contractor's employees because the employer's duty was non-delegable. In the course of his judgment, Mason J, with whom Brennan and Deane JJ agreed, made an exhaustive examination of the nature of the employer's duty of care, as first comprehensively laid down in *Wilsons & Clyde Coal Co v English*. Mason J argued:

The principal objection to the concept of personal duty is that it departs from the basic principles of liability in negligence by substituting for the duty to take reasonable care a more stringent duty to ensure that reasonable care is taken... However, when we look to the classes of case in which the existence of a non-delegable duty has been recognised, it appears that there is some element in the relationship between the parties that makes it appropriate to impose on the defendant a duty to ensure that reasonable care and skill is taken for the safety of the persons to whom the duty is owed...

That such an element exists in the relationship of employment is beyond serious challenge. The employer has the exclusive responsibility for the safety of the appliances, the premises and the system of work... In the case of the employer, there is no unfairness in imposing on him a non-delegable duty; it is reasonable that he should bear liability for the negligence of his independent contractors in devising a safe system of work.⁸⁷

It is of note that in *Collins*, the judgment of Street CJ, with whom the other members of the Court of Criminal Appeal, Slattery and Yeldham JJ agreed without discussion or addition, makes no reference to any of the cases on the nature of the employer's duty of care.

83 Note 21 *supra* at 215.

84 Note 79 *supra* at 83-4.

85 See, for example, note 75 *supra* and the cases there referred to.

86 (1984) 55 ALR 225.

87 *Ibid* at 234-5.

Applying the principle drawn from *Tesco Supermarkets Ltd*, Street CJ concluded that it answered the essential question. In relation to the first particular, the failure to isolate the building, the Chief Justice stated that:

It was found as a fact that the Authority laid down a safe practice. There is no suggestion either in the particulars or in the findings of fact of failure by the Authority to use 'due diligence' to see that it is observed" (Lord Diplock). Failure by inferior employees, even those of a supervisory rank, to observe that practice on the particular occasion will not render the Authority criminally liable for the offences charged against it.⁸⁸

With respect, this conclusion is inadequate. Admittedly, the practice of opening the switches and affixing a 'danger tag' was a safe *practice* as regards the method of isolating the building, but that practice *alone* does not amount to the existence of a *safe system of work*. For there to be such a *system* in existence, it is necessary that there are also adequate measures to ensure that the *practice* is followed at all times. In that respect, Mason, Wilson, Brennan and Dawson JJ stated in *McLean v Tedman and Brambles Holdings Limited*:⁸⁹

The employer's obligation is not merely to provide a safe system of work; it is an obligation to establish, *maintain and enforce* such a system... And in deciding whether an employer has discharged his common law obligation to his employees the Court must take account of the power of the employer to prescribe, warn, command and enforce obedience to his commands [emphasis added].

Chief Justice Street found in the facts as set out by the trial judge, "no suggestion" of a failure by the Authority to use due diligence to see that the practice was observed. On the other hand, there is no evidence (at least on the facts found, as quoted by the Chief Justice) of any steps being taken to see that it was observed. Nor is there any evidence as to: how the switches came to be closed at the relevant time; whether they had not been opened at all, and if so, why they had not been opened; whether they had been opened but not tagged, and if so, why they were not tagged; or whether they had been opened and tagged but the tag removed other than in accordance with proper procedure, and if so, how this came about. Without such evidence, it is impossible to say that the SRA had discharged a duty to provide *and maintain* a safe system of work.

Of course, the preceding discussion has been in relation to an *employer's* duty to *employees*. That duty is imposed by s 15(1) of the New South Wales Act. Similar principles would also apply under s 16(1), with respect to an employer's duty to non-employees, namely the employees of contractors engaged by the employer to carry out work on the employer's premises. But the charge laid against the SRA was for breach of s 17(1), relating to persons in control of premises. It has already been asserted that s 17(1) was not appropriate to the situation, and that the charge should have been laid under s 16(1). But if we accept for the moment that an

88 Note 21 *supra* at 215.

89 (1984) 56 ALR 359 at 364.

employer engaging contractors *is* a person in control of premises under s 17(1), then the approach developed above in relation to employer's duties to employees should apply equally to the employer's duties as a person in control of premises to the persons to whom the premises were made available as a place of work, particularly since in such a situation, as here, the employer has entire control over the premises. In that respect, the principle considered applicable by Street CJ, as derived from *Tesco Supermarkets Ltd*, is stated in terms of an *employer's* duty to establish a practice suitable for compliance with the statutory obligation in question (which in that case related to price labelling of goods).

If, as argued, the applicable duty is that outlined in *Kondis v Transport Authority*,⁹⁰ then the correctness of Street CJ's decision on the first particular, the failure to isolate the building, depends on the location of the onus of proof. In other words, the same issue arises as in the conflict between the judgments in *Austin Rover*.⁹¹ If the division of onus is as suggested by Lord Goff, so that the reference in s 17(1) to "such measures as it is reasonable for a person in [the SRA] to take" to ensure that the premises were "safe and without risks to health", involves only the proof that the premises caused a risk and that action to avert that risk was within the SRA's *power*, then the prosecution had discharged its onus, since it is clear that the premises were not safe and that the only person with power to make them safe, was the SRA. It would then have been for the SRA, in raising the defence in s 53, to establish that it had done all that was reasonably practicable to prevent the risk (in the sense that the risk was not foreseeable, or that further precautions were not possible or practicable, or that it was not reasonable for the SRA in the circumstances of the case to take further precautions). On the evidence as set out by Street CJ, the SRA had not discharged the onus of establishing that it had done all that was reasonably practicable, since there was no evidence as to the system for supervision and enforcement of the isolation practice nor of why, in this instance, that 'practice' was not followed.

If, on the other hand, the division of onus is as argued by Lord Jauncey, then it was for the prosecution to establish that there was a *foreseeable* risk preventable by measures within the SRA's control, and for the SRA to establish that there were no further possible or practicable precautions which it could have taken, or that it was not reasonable for it in the circumstances of the case to take further precautions. If there was a proper system of supervising and enforcing the isolation procedure, then it could be argued that the risk was not foreseeable; if there was not such a system, then the risk was obviously foreseeable. It appears from the judgment of Street CJ that the prosecution had *not* led any evidence as to the system of supervision and enforcement of the isolation practice, and thus had not discharged the onus of showing that the risk was foreseeable. However, had these facts led to a claim for damages by the dependants of the deceased worker, given the obvious dangers of work in the proximity of live conductors, and the fact that the electrical system was entirely within the control of the employer/occupier

90 Note 86 *supra*.

91 Note 20 *supra*.

of the premises, the occurrence of the electrocution would have raised a strong opportunity for an argument of *res ipsa loquitur*.⁹² In the normal course of events, conductors will not be left live while work is proceeding in their vicinity without negligence (constituted by an inadequate system of supervision) on the part of the employer in control of the premises!

In relation to the second particular, the failure to take reasonable precautions to ensure that the clamps were properly insulated, the conclusion of Street CJ is, with respect, even more dubious. His Honour stated that:

There was evidence that no inspections of the Crosby clamps were carried out but there was no evidence and no finding of fact to the effect that ordinary and proper practice required periodical inspection of the ends of the mains to confirm the existence of insulation on the Crosby clamps.

It is apparent from the findings of fact...that it was the practice in this establishment to bind the Crosby clamps with insulating tape. There was therefore no defective practice proved. How these particular clamps came to be bare of tape was not established in the evidence and there is every indication that this was due, as was the failure to isolate the foundry, to failure by one or more of the employees of the Authority in the fulfilment of the duties imposed upon them in respect of the ordinary practice of the electrical installations at the foundry.⁹³

It is hard to accept that periodical inspection of the clamps to check the insulation would not be an essential element of a proper 'practice' or system. Moreover, the evidence as to industry practice on that matter, or expert evidence as to the need for inspection, would not be required. The need for inspection as part of a proper practice is, in this case, something on which the court could form its own opinion.⁹⁴ Since there was evidence that the system did *not* involve inspection, it would seem to follow that it had been established that the risk was foreseeable and that the prosecution would have discharged its onus of proof, even assuming (as is contested) that the onus as to foreseeability lies on the prosecution. It follows also from the evidence that the system did not involve inspection, that the SRA had not established that there were no possible and practicable precautions open to it, nor that a reasonable employer in the circumstances would not have taken those precautions. Thus, even on a narrow reading of what is required to establish a defence under s 53, the SRA would have failed to establish a defence.

92 See for example, *Scott v London & St Katherine Docks Co* (1865) 3 H & C 596 at 661:

Where the thing [which causes the accident] is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

See also *Woods v Duncan* [1946] AC 401; *Mummery v Irving* (1956) 96 CLR 99; *Anchor Products v Hedges* (1966) 115 CLR 493.

93 Note 21 *supra* at 216-17.

94 As to matters on which expert evidence is needed, and matters on which a jury or court can form its own opinion, see *Carlyle v Commissioner for Railways* (1954) 54 SR (NSW) 238; *Kingshott v Goodyear Tyre and Rubber Co Australia Ltd (No 2)* [1987] 8 NSWLR 707; *Moustakas v Public Transport Commission*, note 28 *supra*.

In summary, the conclusion of Street CJ as to both particulars, that the failure in question was due to failure by one or more employees to carry out established practice, is not an answer to the charge. What is important is whether that failure resulted from the absence of a proper system of supervision or was truly “casual” negligence by the employee(s), unpreventable even by a proper, or stringent system of supervision. By looking only to the requirement of “due diligence” as outlined in *Tesco Supermarkets*, rather than to the application of that requirement in cases concerned with health and safety at work, the Court of Criminal Appeal failed to take account of the High Court’s opinion on what “due diligence” in the context of health and safety at work involves. Furthermore, the failure to note the ramifications of the repeated reference to “reasonableness” when s 17(1) (as it then stood) was read with s 53, resulted in the failure to recognise that the prosecution *had* in fact discharged its onus under s 17(1) and that the SRA *had not* discharged its onus under s 53.

Therefore, *Austin Rover* and *Collins* both involve an erroneous acceptance of the applicability of the “persons in control” section to employers who engage contractors; and both the majority decision in *Austin Rover* and the decision of the full Court in *Collins* involve an illogical allocation of the onus of proof of the various elements of the ‘persons in control’ section. *Collins* also involved an erroneous interpretation of what constitutes ‘due diligence’ and ‘a proper system’ in relation to an employer’s duty as regards health and safety. In that final respect, the ‘error’ may have been facilitated by the fact that the Appeal Bench which heard the *Collins* case did not contain any of those Judges of Appeal with greatest experience in cases involving matters of workplace health and safety, but instead judges whose primary expertise was in the commercial area. This may explain the otherwise bizarre reliance on *Tesco Supermarkets Ltd*, rather than on the various High Court decisions on the employer’s duty of care, referred to above.

As to the ‘error’ in the allocation of onus of proof, in Britain that ‘error’ is now the authoritative interpretation, until the House of Lords departs from it. In New South Wales, however, the ‘error’ has been obviated by amendment, prompted by the *Collins* decision, to s 17(1) in 1987,⁹⁵ to omit the reference to measures that it is reasonable for a person in the defendant’s position to take. As mentioned earlier, s 17(1) now requires a person in control of premises made available to non-employees as a workplace, to “ensure that the premises...are...safe and without risks to health”. This amendment means that the prosecution need only establish that the premises constituted a risk to health. It will then be for the person charged to establish a defence under s 53, to prove that he or she did not have sufficient residual control to eliminate the risk, that the risk was not foreseeable, not possibly and practicably preventable, or that a reasonable employer in the circumstances of the case would not have taken the precautions suggested. The same amending Act which obviated the allocation of onus in *Collins* also deleted the provision for the institution of proceedings before the Supreme Court in its summary jurisdiction

95 By the *Occupational Health and Safety (Workers’ Compensation) Act 1987* (NSW).

and substituted provision for their institution before the Industrial Commission, now the Industrial Court.

VII. THE SIGNIFICANCE OF MENS REA TO OFFENCES UNDER THE ACTS

It is not only in relation to what amounts to due diligence in supervision and maintenance of safe practices that *Tesco Supermarkets* was an inappropriate case for use as authority in *Collins*. *Tesco Supermarkets* was also inappropriate because a substantial proportion of the various judgments was directed to the question whether it was necessary to the liability of the employer for acts of his or her servants or agents to prove *mens rea* on the part of the employer; to what extent was the state of mind, the knowledge and the intention of the servants or agents performing the employer's duty on behalf of the employer to be taken as the state of mind, knowledge and intention of the employer? It is at least arguable that Street CJ's finding that the SRA had exercised all due diligence and that the failures leading to the electrocution were "casual negligence" of employees, may have been influenced by the issues of *mens rea* and imputation of state of mind etc discussed in *Tesco Supermarkets*. That influence would seem to be recognisable in the penultimate paragraph of His Honour's judgment:

...both of these matters as particularised come back to casual failures on behalf of employees of the Authority. In the first instance, that is the isolation, the failures were in observing the practice of isolating the foundry before work was done in the vicinity of the mains; and in the second instance the failure was that of an employee of the Authority in omitting to tape over the Crosby clamps. In neither instance is it established that the Authority itself is guilty of having failed to take such measures as it is reasonable for a person in the position of the Authority to take to ensure that the premises were safe...⁹⁶

However, issues of *mens rea* and the imputation of state of mind, knowledge and intention are effectively irrelevant to the duties imposed by these Acts. Since the duties of care imposed by the Acts are in large measure, if not in entirety, the duties established by the common law to take care for the safety of persons at work,⁹⁷ what the Acts require is that the duty-bearers *not be negligent*. Negligence is not a matter of intention to harm; it involves a failure to advert to and respond to the risk of harm.

Admittedly, the statutory incorporation of duties drawn from the law of negligence introduces difficulties and anomalies into these Acts. In jurisdictions where the issue of reasonable practicability is an element of the offence, and for the

⁹⁶ Note 21 *supra* at 216.

⁹⁷ See for example, *Chugg v Pacific Dunlop Ltd* [1988] VR 411 at 415.

prosecution to establish,⁹⁸ the magistrate or judge must be satisfied of three elements: first, that the risk was foreseeable, *beyond a reasonable doubt*;⁹⁹ secondly, that there were *practicable* precautions available, that is precautions which do not involve inordinate cost in comparison to the process in question, inordinate interference with the process in question, or separate risks of equal or greater severity of injury; and thirdly, that the *reasonable and prudent employer* in the circumstances of the particular case would have taken those precautions. These matters are fundamentally affected by the civil standard of proof on the balance of probabilities, and it is difficult to envisage how they can then be established beyond reasonable doubt. That difficulty is avoided under the New South Wales Act, where the effect of s 53 is that they are for the defence to rebut, and where it has been held (as pointed out above) that the standard of proof for s 53 is the civil standard. The same finding as to the standard of proof would be open as regards s 40 of the British Act. But whatever the difficulties posed by a statutory duty not to be negligent, it is clear that if that *is* the duty, *mens rea* and related concepts cannot genuinely play a part.

Despite the apparent obviousness of that contention, in *TTS Pty Ltd v Griffiths*,¹⁰⁰ an appeal against a conviction under the Northern Territory equivalent of s 2(1)¹⁰¹ was based, *inter alia*, on the absence of proof of criminal intent. Counsel for the employer argued that, since the offence created by s 29 was a simple offence, it was covered by the *Northern Territory Criminal Code*, Part II - Criminal Responsibility, which was intended to codify the law pertaining to criminal responsibility. Section 31 of the Code provides that a person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him [or her], as a possible consequence of their conduct.

The case did not necessitate any substantial discussion whether the intent of the employee, whose faulty performance of his or her work had created the risk on which the charge against the employer was based, could be imputed to the employer (the issue examined at length in *Tesco Supermarkets*) because s 180(2) of the *Work Health Act* provides that:

When in proceedings under this Act it is necessary to establish the intention of a body corporate, it is sufficient to show that a servant or agent of the body corporate had that intention.

Thus, the intent of Raymond, the negligent employee, was the intent to be considered pursuant to s 31 of the Code, but what *was* the intent of Raymond that had to be shown to fix the company with liability for a breach of s 29 of the *Work Health Act*? How could the Act be applied *subject to the Code* without totally subverting the intention of the legislature?

Counsel for the employer submitted that the relevant intent was the intent to do

98 As seen above - Commonwealth, South Australia, Tasmania, Victoria, Western Australia, the Northern Territory and the Australian Capital Territory (and possibly Queensland).

99 See note 41 *supra*, for the rule in Australia as to foreseeability of risk.

100 Unreported, Supreme Court of the Northern Territory, Asche CJ, No 11 of 1991, 20 December, 1991.

101 *Work Health Act* 1986 (NT), s 29.

the act (allegedly constituting a risk) knowing it to be unsafe or knowing it to be prohibited. Counsel for the prosecution submitted that:

...all that need be shown is the intent to do the prohibited act, or that the lack of safety must have been foreseen...it was not for the prosecution to prove that the company actively intended to set up an unsafe system of work. The prosecution need only prove that the company intended to and did set up a system of work which was unsafe, and lack of safety was a foreseeable consequence of the position established.¹⁰²

Chief Justice Asche accepted the prosecution argument, thus circumventing the threat of stultification of the Act. He stated:

All that is required is the intent to do what was in fact done, that is to carry out the work in a particular way. If the particular method intentionally employed is not safe "so far as practicable", then the defendant "fails" to "provide and maintain plant and systems of work that or, so far as is practicable, safe and without risk to health". That is not to say that s 31 of the Code has no application. It still excludes those cases where the act was not intended in the sense that what was done was not what the actor intended to do. Hence if an employer carefully instructs his employees in a particular and safe system of work, and one of the employees (*without any laxity on the employer's part*) disobeys those instructions and creates an unsafe system, it would not seem to me that the employer could be successfully prosecuted; for the unsafe system of work has not been created by the intentional act of the employer [emphasis added].¹⁰³

That passage might seem, at first glance, to support Street CJ's argument in *Collins*, quoted above.¹⁰⁴ However, it does not in fact do so, because of the effect of the passage italicised. A safe system involves, as seen, not merely the devising and promulgating of a safe practice, but the supervision and enforcement of that practice. Where the 'system' contains only the promulgation of the practice but no provision for enforcement, it is not a safe system, and a failure of an employee to follow the practice is not casual negligence, or 'casual' disobedience of the employee, but rather a failure by the employer to fully *establish* a safe system. The establishment of the system which is unsafe, because of the absence of supervision, is what the employer intends to do; the unsafe system has been created by the intentional act of the employer. This is, the proper interpretation of Asche CJ's remarks, as indicated by the passage italicised. It might have been even more obvious had His Honour stated, "...if an employer carefully instructs his employees in a particular and safe system of work *and supervises compliance with that system...*", although, since as argued above a 'safe system' involves a composite of a safe *practice* and a proper procedure for supervision and enforcement of the practice, the addition of those words was strictly unnecessary.

His Honour's next point was less compelling. He said:

If it be argued that this example is flawed by the provisions of s 180(2) if the

102 Note 100 *supra* at 31-2.

103 *Ibid* at 33.

104 Note 21 *supra* at 217.

employer is a corporation, so that the intention of the insubordinate employee becomes the intent of the employer, the answer is that the expression used in s 180(2) is that “it is sufficient to show that a servant or agent of the body corporate had that intention”. The word “sufficient” does not mean “conclusive”. *Re Duce and Boots Cash Chemists (Southern) Ltd’s Contract* (1937) Ch 642 at 649-50 (per Bennett J). It would be open to the employer to rebut the prima facie presumption.
105

My quibble here is not so much that “sufficient” does mean “conclusive”, even though, in the context of s 180(2), such an interpretation is open. Rather, it could be argued that the answer to the possible imputation of an intentional departure from a safe system, which involves the practice and the procedures for supervision and enforcement, is that the *act* which the insubordinate employee performs will not be an *act* which could be performed by the employer in the circumstances, but one that is prohibited to the employer; it is not part of the establishment of a system of work; it is something quite distinct which can be categorised separately.¹⁰⁶

VIII. THE EFFECT OF PARTICULARISATION

Section 2(2) of the British Act particularises matters which will constitute a failure to comply with s 2(1). Section 2(2) provides:

Without prejudice to the generality of an employer’s duty under the preceding subsection, the matters to which that duty extends include in particular....

All of the Australian Acts, except that of Tasmania, also particularise the employer’s duty. There has, however, been some confusion as to the effect of the particularisation.

On the wording of s 2(2), it would seem obvious that conduct falling within any of the lettered paragraphs would be a breach of s 2(1), and that s 2(2) does not itself *create* offences. Section 2(2) refers to “an employer’s *duty under the preceding subsection*”, and the matters which “*that duty*” includes. The Commonwealth, New South Wales, Victorian, Northern Territory and ACT Acts are of similar effect, although the wording producing that effect is slightly different:

Without limiting the generality of subsection (1), an employer contravenes *that subsection* if [he/the employer] fails [to]...

The Queensland Act states that:

Without in any way limiting the generality of subsection (1), any one or more of the following shall represent particulars of *the* offence created *by that* subsection...

105 Note 100 *supra* at 33-4.

106 In this respect, we should note the ease with which courts can categorise the type of act which is performed to suit the desired result; for example, in relation to the need to prove that the injury which has occurred is of the type which was foreseeable, as in *Smith v Leech Brain & Co Ltd* [1952] 2 QB 405; or in relation to the distinction between prohibited acts and prohibited modes of performing authorised acts, for the purposes of establishing that an employee was within the course of employment.

All of these formulae clearly indicate that it is subsection (1) that creates the offence, but that an offence against subsection (1) may be established, inter alia, by the matters set out in subsection (2). This approach is, in keeping with the early formulations of the employer's common law duty in *Wilsons & Clyde Coal Co v English*¹⁰⁷ and *Wilson v Tyneside Window Cleaning*,¹⁰⁸ whereby the employer's overriding duty is one to take reasonable care to avoid exposing the employees to unnecessary risk of injury, and the provision of safe plant, safe system of work and competent staff were manifestations of that duty. The particularisations of the subsection (1) duty in the various subsection (2) are an extended list of those old heads or manifestations of the common law duty.

The South Australian and Western Australian Acts however adopt a different formulation. The South Australian Act in s 19(1) states:

An employer shall, in respect of each employee...ensure so far as reasonably practicable that the employee is, while at work, safe from injury and risks to health, and, in particular-

- (a) shall provide and maintain so far as is reasonably practicable -
 - (i) a safe working environment;
 - (ii) safe systems of work;
 - (iii) plant and substances in a safe condition;
- (b) shall provide adequate facilities...for welfare...
- (c) shall provide such information, instruction, training and instruction as are reasonably necessary...

Section 19(1) of the Western Australian Act states that:

An employer shall, so far as is practicable, provide and maintain a working environment in which his employees are not exposed to hazards and in particular, but without limiting the generality of the foregoing, an employer shall -

- (a) provide and maintain workplaces...
- (b) provide such information, instruction...
- (c) consult and co-operate with health and safety representatives...

Even under this formula, where the particulars are identified separately as things the employer *shall* do, it can be argued that the phrasing indicates that the things the employer *shall* do *in particular* are merely elaborations of the duty to "ensure so far as reasonably practicable that the employee, while at work, is safe from injury and risks to health" or to "so far as is practicable, provide and maintain a working environment in which his employees are not exposed to hazards".

It has been implied, however, and strangely in connection with the much clearer formula of the Victorian Act, that the subsection (2) particularisation creates as many separate, and potentially concurrent, offences as it has paragraphs. That implication arises from the decision of Fullagar J in *Chugg v Pacific Dunlop*

107 Note 79 *supra*.

108 Note 15 *supra*.

*Ltd.*¹⁰⁹ The case involved the return of an order nisi to review the decision of a magistrate hearing an information laid for commission of an offence created by s 47 of the *Occupational Health and Safety Act 1985* (Vic).¹¹⁰ The magistrate had held that the information was bad for duplicity. To appreciate the argument put, it is helpful to examine the information:

Nature of Information: Fail to provide and maintain a safe working environment.

The information of Peter Richard Chugg...an Inspector appointed pursuant to the *Occupational Health and Safety Act 1985*, who says that the defendant on the second day of November 1985...was pursuant to s 47 of the *Occupational Health and Safety Act* guilty of an offence against that Act in that being an employer it did fail to provide and maintain as far as was practicable for employees a working environment that was safe and without risks to health when it did fail to provide and maintain plant and systems of work that were so far as was practicable safe and without risks to health, and when it did fail to provide such information, instruction and supervision to employees as was necessary to enable the employees to perform their work in a manner that was safe and without risks to health, in contravention of the provisions of s 21 of the *Occupational Health and Safety Act*.

Particulars of failure to provide and maintain safe plant and systems of work:-...

Particulars of failure to provide information, instruction and supervision:-...¹¹¹

Counsel for the prosecution argued that the information did not exhibit duplicity. He contended that s 21, read with s 47, discloses only one criminal offence - failing to provide and maintain a working environment that is so far as practicable, safe and without risks to health. Counsel argued that the effect of s 21(2) was that an employer who fails to do any of the things set out in the lettered paragraphs thereby contravenes s 21(1), and that the only offence with which the employer can be charged is failure to comply with s 21(1).¹¹² Justice Fullagar accepted that the paragraphs of subsection (2) did not of themselves create offences independent of subsection (1). Nevertheless His Honour held that the information was bad for duplicity, stating that:

...the major issue is whether sub-sections (1) and (2) of s 21, in combination with s 47(1) create on the one hand one continuing offence of allowing to subsist a particular proscribed environment, or create on the other hand a large number of offences each consisting of some identifiable act or omission, which, in all the circumstances, constitutes a failure to comply with a general duty of care laid down by s 21(1). I have come to the conclusion that the latter alternative is correct.¹¹³

It was further stated that the duty created by s 21 was essentially the same in scope and character, as the employer's duty of care to the employee in tort, and the words of the court in *Byrne v Baker*¹¹⁴ were adapted:

This concept of negligence has reference to identifiable acts or omissions, not to

109 Note 97 *supra*.

110 Section 47 states that:

Any person who contravenes or fails to comply with any provision of this Act or the regulations shall be guilty of an offence against this Act.

111 Note 97 *supra* at 413-14.

112 *Ibid* at 414.

113 *Ibid* at 415.

114 [1964] VR 443 at 453.

any general characterisation of the conduct of [an employer] over a selected period.

His Honour continued by arguing that:

...the offences created by subsections (1) and (2) of s 21 in combination with s 47 consist of identifiable acts or omissions which constitute in all the circumstances a breach of the duty stated by s 21(1). If in all the circumstances they constitute a failure falling within one or more of the paragraphs of s 21(2), one need look no further because *ipso facto* they constitute a breach of the duty owed by s 21(1).¹¹⁵

His Honour went on to point out that the acts and omissions covered by the set of particulars of failure to provide and maintain safe plant and systems of work, were different from the acts and omissions covered by the particulars of failure to provide information, instruction and supervision, and concluded that:

...[t]his being so, it is in my opinion clear that at least two offences, and probably more have been included in the information...¹¹⁶

and that, since this had been done in a manner which did not comply with the *Magistrates (Summary Proceedings) Act 1975* (Vic), s 6(3),¹¹⁷ the information was bad for duplicity.¹¹⁸

There is no doubt that, on the wording of s 21, conduct of an employer which falls *merely* within s 21(2)(a), the safe plant and systems paragraph, will constitute a breach of s 21(1), and that conduct of an employer which falls *merely* within s 21(2)(e),¹¹⁹ the information and instruction paragraph, will also constitute a breach of s 21(1). In that sense, it can be said that the two paragraphs create separate offences. It would therefore clearly be possible for an employer to be

115 Note 97 *supra* at 416.

116 *Ibid.*

117 Section 6 of the *Magistrates (Summary Proceedings) Act 1975* (Vic) states:

- (1) Charges for indictable offences, whether for felonies or misdemeanours or for both felonies and misdemeanours, may be joined in the same information if the charges are founded on the same facts or form or are part of a series of offences of the same or a similar character but any charge so joined may be dealt with separately.
- (2) Charges for offences punishable on summary conviction may be joined in the same information but any charge so joined shall, if the defendant so requests, be dealt with separately.
- (3) Where two or more offences are charged in an information pursuant to subsection (1) or subsection (2) the charge with respect to each offence shall be set out in a separate numbered paragraph.

By s 47(3) of *Occupational Health and Safety Act 1985* (VIC):

An offence against this Act (not being a contravention of or failure to comply with a provision of the regulations) shall be an indictable offence.

118 In the case of *TIS Pty Ltd v Griffiths*, note 100 *supra* at 5, Asche CJ alluded to the issue of duplicity, stating that the particulars in the complaint sufficiently identified the offence alleged, and that the charge was not duplicitous. He compared *Chugg*, where, he said, "the particulars relied upon related to different subsections of the Victorian Act and the information was held duplicitous". As seen, the particulars related to different paragraphs of the *one* subsection, paragraphs which Fullagar J held to create separate offences when separately read with subsection (1).

119 It is, of course, possible to argue that the requirement of provision of a safe *system of work* is as wide in its scope as the requirement of provision and maintenance of a safe and healthy working environment, and that paragraphs (b) to (e) of subsection (2) of the Victorian Act are just as much elements of paragraph (a) as they are of subsection(1).

concurrently guilty of two separate offences, where two distinct situations of risk are created by the two distinct failures to comply with the paragraphs of subsection (2). However, even though Fullagar J described the two sets of particulars in the information before him as constituted by different acts and omissions, there was in fact only *one* situation of risk created by the simultaneous acts and omissions set out in the particulars and thus by the simultaneous failure to comply with paragraphs (a) and (e). In other words, the failure to comply with paragraph (a)¹²⁰ would not, in the circumstances, have resulted in an unsafe working environment had there not been a simultaneous failure to comply with paragraph (e), and vice versa.

This is substantiated by comparing the particulars referred to by Fullagar J with the facts of the incident which precipitated the charge. The facts are not set out by Fullagar J, but can be seen from the High Court decision on subsequent informations relating to the same incident.¹²¹ The factual background is set out in the judgment of Dawson, Toohey and Gaudron JJ:

The defendant is the occupier of a factory...in which there was...a machine known as a Banbury Mill. 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 2 November 1985, the machine was not being used for production and the conveyor belt had been pushed aside, leaving the hopper door unguarded. On that day a fourth year apprentice, Robert Mark Everest, was employed 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 at or on a control panel near the machine. It did not require work at, in, or upon the machine itself. Mr Everest apparently had occasion to go to the machine for he was fatally injured when the hopper door closed, trapping the upper part of his body inside.¹²²

The particulars of failure to provide and maintain safe plant and systems of work, in the information considered by Fullagar J, were:

Robert Mark Everest was able to gain access to the trapping space created by the power driven hopper door and frame of a Banbury mill on which he was carrying out maintenance.

No system of work was in place to ensure that the interaction of the electrical and hydraulic systems of activating a Banbury mill did not result in danger to employees.¹²³

The particulars of failure to provide information, instruction and supervision were:

Robert Mark Everest was not provided with up-to-date circuit drawings relating to a Banbury mill on which he had been instructed to carry out maintenance.

Robert Mark Everest was not informed of modifications that had been made to a Banbury mill particularly to the closing function of the hopper door in its manual

120 Interpreting paragraph (a) narrowly so that it is not co-extensive with subsection (1).

121 Note 51 *supra*.

122 *Ibid* at 485.

123 Note 97 *supra* at 414.

mode.

Robert Mark Everest, an apprentice, was allowed to work with inadequate supervision.¹²⁴

Had the employer not failed to provide Everest with information, instruction and supervision, the ability to gain access to the trapping space and the interaction of the electrical and hydraulic systems would not have caused a risk, because Everest would not have gone to the machine. Had the employer not failed to bar access to the trapping space and to ensure that the electrical and hydraulic systems did not result in the hopper door closing, the lack of information, instruction and supervision would not have caused risk, because Everest would not have been able to get into the area of the danger.

However, if we accept Fullagar J's argument, a failure to comply with s 21(2)(a) constitutes a breach of s 21(1), and a failure to comply with s 21(2)(b) also creates a breach of s 21(1), and on that interpretation, the information as worded did allege two offences, and therefore was duplicitous on its face.¹²⁵ It is obvious, however, that in many, if not most situations where an employer has failed to provide a safe and healthy working environment, because the working environment poses a risk to the health and safety of an employee, the risk will result from the interaction of more than one of the failures particularised in s 21(2). The same will be true in relation to the British, Commonwealth, New South Wales, Queensland, Northern Territory and ACT Acts. In such circumstances, if Fullagar J's interpretation is accepted, an information similar to that framed in *Chugg*, as quoted above, will be objectionable. There would seem to be two alternative methods of proceeding. The information could allege:

...that being an employer [the defendant] did fail to provide and maintain as far as was practicable for employees a working environment that was safe and without risks to health...¹²⁶

Then it could give the particulars of the acts and omissions constituting that failure, whereby if any of those acts or omissions amounted to any of the failures in the paragraphs of subsection (2), and those acts or omissions are proved to have occurred, the prosecution case would be made out.¹²⁷ That method would seem, however, to be open to the same objection made by Fullagar J, that the *particulars*, if fully stating the relevant acts and omissions of the defendant, would disclose

124 *Ibid.*

125 See also *Stevenson v Broken Hill Associated Smelters Proprietary Limited* (1991) 42 IR 130, where a single information alleging four counts of failure to comply with s 19(1) of the South Australian Act, each individually particularised by reference to the various paragraphs of s 19(2), was held duplicitous.

126 Or "did fail to ensure, so far as reasonably practicable, the health, safety and welfare of employees...", or whatever phrasing is required by the relevant subsection (1).

127 Where "reasonable practicability" is for the defence to rebut, a prima facie case will be made out when the failure to ensure safety is established by proof of the acts or omissions in the particulars, but that prima facie case will be subject to rebuttal by the defence if it can be proved that it was not reasonably practicable to ensure safety.

failure to comply with more than one paragraph of subsection (2), and therefore, more than one offence, so that an information in this form would also be duplicitous. Alternatively, the prosecution could lay a number of informations, each alleging a failure to comply with *one* of the paragraphs of subsection (2), and each supported by particulars of the acts and omissions constituting the failure to comply with the particular paragraph referred to in the specific information.

The prosecuting authority in Victoria subsequently adopted this second option in relation to the incident involving Everest. They laid six informations relating to breach of s 21, and one relating to breach of the Occupational Health and Safety (Machinery) Regulations. However, the prosecution did not give evidence as to the reasonable practicability of compliance with the provisions of the Act. The charges of breach of the Act were dismissed. Again the prosecution appealed, ultimately to the High Court, which held that, under s 21, as a matter of statutory construction, it was for the prosecution to establish the reasonable practicability of compliance and that the prosecution had not discharged its onus. However, from examination of the facts, had the prosecution realised the need to lead evidence of practicability, it would have been sufficiently able to establish the various charges. Since the prosecution in this case was instituted by a branch of the same Department from which the drafting instructions for the 1985 Act had come, it is fair to assume that the Department intended the onus as to reasonable practicability to lie with the defence, as with the British Act. However, the High Court decision amounts to a finding that what the Department had intended and what, through Parliamentary Counsel, they had effected were two different things.

Whether or not a reversal of onus is desirable, (and it is argued that it *is*), it is not appropriate that the second option discussed above should be available. That is, it is not appropriate that the creation of *one* situation of risk should expose a defendant to conviction of more than one offence, particularly where, as was the case in *Chugg*, the risk depended on the simultaneous failure to comply with the subsection (2) paragraphs constituting each offence. To avoid such a result, if, *in actuality*, the paragraphs of the various subsections (2) create separate and potentially concurrent offences, a provision is required to prevent double jeopardy. The New South Wales Act, in s 34, states that:

Where an act or omission constitutes an offence -

(a) under this Act or the regulations; and

(b) under the associated occupational health and safety legislation

the offender shall not be liable to be punished twice in respect of the offence.

By ss 35, 37, 39, 41 and 43, the expression “associated occupational health and safety legislation”, refers to the existing Factories, Construction Safety, Mining and Dangerous Goods legislation¹²⁸ and their regulations. Thus, for example, where an employer fails to securely fence a dangerous part of the machinery of a factory, contrary to s 27 of the *Factories, Shops and Industries Act 1962* (NSW),

128 *Factories, Shops and Industries Act 1962* (NSW); *Construction Safety Act 1912* (NSW) *Mines Inspection Act 1901* (NSW); *Mines Rescue Act 1925* (NSW); *Coal Mines Regulation Act 1982* (NSW); *Dangerous Goods Act 1975* (NSW); and also *Rural Workers Accommodation Act 1969* (NSW).

and this constitutes a failure to ensure the safety of employees, the employer may be prosecuted, and convicted, both for breach of s 27 of the *Factories, Shops and Industries Act* and for breach of s 15(1) of the *Occupational Health and Safety Act*, but a penalty may be imposed for one only of those breaches. There seems no logical reason why the same protection against double jeopardy cannot be afforded where the one act or omission constitutes more than one offence against the *Occupational Health and Safety Act*, or where the one act or omission constitutes an offence against s 15 and also a breach of the Occupational Health and Safety Regulations. Furthermore, only a minor amendment to s 34 is required to achieve that result. Thus, if the *Chugg* interpretation is correct, it is desirable to amend the British Act, and the other Australian Acts containing particularising provisions equivalent to s 2(2) of the British Act, along the lines of an expanded s 34 of the New South Wales Act.

Whilst such amendment would prevent the injustice of the possibility of more than one conviction for offences arising out of the one situation of risk, it does not altogether eliminate the problems created by the interaction of the particularising subsections of the occupational health and safety legislation, with the rules as to the presentation of charges. If the Acts are aimed at the prevention of *situations of risk*, through the deterrent effect of prosecution if necessary, it is surely desirable that prosecutions for the failure to prevent such situations should be able to present the full facts of each situation. In other words, it is desirable to allow an information worded in accordance with the first suggested option above. If again *Chugg* is correct, this would require, in addition to amendments preventing double jeopardy in occupational health and safety situations, amendments to the legislation governing procedure, to absolve informations from the taint of duplicity.

An even simpler solution to the problems exemplified by *Chugg* is the solution adopted by the New South Wales Industrial Commission in *State Rail Authority of New South Wales v Dawson*.¹²⁹ The Commission stated there:

It is clear, however, from *Shannon v Comalco Aluminium Limited* (1986) 19 IR 358 at 359, that s 15(1) establishes a far-reaching obligation upon an employer and imposes a duty in absolute (or strict) terms with s 15(2) spelling out the heads or particulars of that absolute duty but without in any way cutting down its rigour. Thus an offence against s 15 is created under subs (1) thereof *notwithstanding that* an employer, in the particular case, may fail to carry out *more than one of the duties referred to in subs (2); only one offence is committed by the employer, and that is pursuant to subs (1)* [emphasis added].¹³⁰

This is the most preferred interpretation of the effect of the various subsections (2) on the various subsections (1) establishing the employer's duty, and most closely accords with the reality of workplace risk, so often the result of concurrent

129 (1990) 37 IR 110.

130 *Ibid* at 113. The references to an absolute or strict duty are, of course, relevant only to the New South Wales Act, but - leaving that aside - the interpretation in the passage is generally applicable.

failures to provide safe plant, proper instruction and so on.¹³¹

The confusion which has resulted from the particularising subsection raises questions as to the need for inclusion in the Acts. It is surely obvious that taking reasonable care for the health and safety of employees will involve providing safe plant and premises, providing adequate instruction, making arrangements for the safe handling, storage and transport of plant and substances. However, little is gained merely by such statutory statements, as there are difficulties associated with a statutory obligation in such vague terms as the taking of reasonable care. It is important that those on whom the various general duties are placed should be guided and educated as to what reasonable care involves in the circumstances of their particular workplace. Furthermore, this guidance and education is surely needed in more esoteric aspects of safety and health rather than in the obvious matters mentioned in the particularising paragraphs, and should be provided by Regulations or Codes of Practice as appropriate.

IX. CONCLUSION

Aspects of the Robens-style legislation discussed suggest that the problems are inherent in legislation of this type, given the appearance of similar difficulties in different jurisdictions. The major problem lies in the attempt to give statutory force to an obligation derived from the possibilities, probabilities, and dependence on particular circumstances that characterise the common law duty of care. Allied to this is the fact that the common law duty is compatible with multiple causes, and concurrent liabilities, and that, if the statutory standard of reasonable care is to make a real contribution to the improvement of occupational health and safety, the net of overlapping and concurrent obligations, derived and incorporated from the common law, must be given full effect. Many of the judgments of the superior courts appear to adopt an overly rigid approach to the allocation of responsibility, derived from the earlier specifications-standard style of legislation, which is incompatible with the realities of the workplace and of the application within the workplace of a "performance" standard of "reasonable care". Furthermore, there is a greater sensitivity to those realities and to the practical content of "reasonable care" at the level of the Industrial Magistrates, who deal daily with situations of workplace risk, injury and disease. Thus, those judgments, which will constitute authoritative interpretations of the meaning and scope of the Acts, must also be characterised by a similar sensitivity.

131 See also *Inspector McGill v Boral Gas (New South Wales) Pty Ltd*, (unreported, Industrial Relations Court, August, Marks J, August 1993). His Honour confirmed that s 15 created only one offence, and dismissed Boral's preliminary objection that the information was bad for duplicity. Boral subsequently sought prerogative relief from the New South Wales Court of Appeal. That Court dismissed the summons as premature, the avenue of appeal to the Full Industrial Court not having been exhausted.

BRITISH SECTION NUMBERS AND AUSTRALIAN EQUIVALENTS

UK	CTH	NSW NT	QLD ACT	SA	TAS	VIC	WA
2	16	15 29	9 27	19	32	21	19
3	17	16 29	10 28, 31	22	32	22	21
4	-	17 30	11 29	23	35	23	22
6	18	18 -	12 32	24	-	24	23
7	21	19 31	13 30	21	33	25	20