IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M126 of 2011

BETWEEN

BAIADA POULTRY PTY LTD

Appellant

- and -

THE QUEEN

Respondent

RESPONDENT'S SUBMISSIONS

PART I – SUITABILITY FOR PUBLICATION

1.1 The respondent certifies that this submission is in a form suitable for publication on the internet.

PART II – CONCISE STATEMENT OF ISSUES PRESENTED BY THE APPEAL

2.1 The issues presented by the appeal are:

(a) Does the application of the proviso involve the exercise of a discretion?

(b) What regard, if any, can an appellate court pay to a jury's verdict in deciding whether there has been a substantial miscarriage of justice in circumstances where there has been an inadequate direction concerning one of an accused's two defences?

(c) Does a case involving inadequate directions to the jury about one of an accused's two defences fall into the category of cases described in *Weiss*

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v. The Queen[1] and *Wilde v. The Queen*[2] whereby the proviso cannot have application?

PART III – NOTICES UNDER SECTION 78B OF THE JUDICIARY ACT 1903

3.1 The respondent agrees that there does not appear to be a need for notices to be given under section 78B of the *Judiciary Act* 1903.

PART IV – STATEMENT OF ANY CONTESTED MATERIAL FACTS, NARRATIVE OF FACTS OR CHRONOLOGY

4.1 The respondent does not take issue with the applicant's factual narrative. The respondent accepts the summary of the evidence set out in the judgment of the Court of Appeal at [2] to [11] and [13] to [15].

PART V – STATEMENT OF APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

5.1 The relevant provisions are:

(a) Section 568(1) of the *Crimes Act* 1958 (Vic);

(b) Section 276 of the *Criminal Procedure Act* 2009 (Vic); and

(c) Sections 20 and 21 of the *Occupational Health and Safety Act* 2004 (Vic).[3]

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[1] *Weiss v. The Queen* (2005) 224 CLR 300.

[2] *Wilde v. The Queen* (1988) 164 CLR 365.

[3] Copy annexed.

PART VI – STATEMENT OF ARGUMENT

Introduction

6.1 The appellant was convicted at trial of one charge of failing, so far as is reasonably practicable, to provide and maintain for its employees plant and systems of work that were safe and without risks to health, in contravention of s. 21(1) and (2)(a) of the *Occupational Health and Safety Act* 2004 (Vic).

6.2 The Crown case against the appellant at trial was that the appellant failed to provide and maintain for its employees safe systems of work pertaining to forklift traffic management and the loading and unloading of trailers at the Houben Farm. The Crown alleged that the appellant had contractual power to direct DMP Poultech Pty Ltd and Azzopardi Haulage Pty Ltd regarding safety measures to be observed while loading and unloading trailers at the Houben Farm, and had the skill and capacity which made it reasonably practicable for the appellant to do so. The fact that it would have been reasonably practicable for the appellant to direct its subcontractors to observe proper safety measures was demonstrated, among other things, by safety directives issued by the appellant to DMP Poultech Pty Ltd after the fatal incident, which referred to the appellant's pre-existing policies regarding the safe loading and unloading of trucks.[4]

6.3 The Court of Appeal allowed the appellant's appeal in relation to ground 4, finding that the trial judge had failed to adequately direct the jury that they could not convict the appellant unless they were satisfied beyond reasonable doubt that the appellant's engagement of DMP Poultech Pty Ltd and Azzopardi Haulage Pty Ltd was insufficient to discharge the appellant's obligation to do what was reasonably practicable to provide and maintain a safe working environment in respect of the loading operations.[5]

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[4] *Baiada Poultry v. The Queen* (2011) 203 IR 396 at [21].

[5] Ibid. at [44].

6.4 A majority of the Court (Neave JA and Kyrou AJA) nonetheless dismissed the appeal, holding that the proviso to s. 568(1) of the *Crimes Act 1958.*

6.5 Nettle JA, dissenting, disagreed. Whilst he regarded the Crown case against the appellant as strong,[6] Nettle JA concluded that the proviso should not apply and that the appellant's appeal should be allowed.

The application of the proviso does not involve the exercise of a discretion in the strict sense of the term

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6.6 The respondent agrees that the application of the proviso does not involve the exercise of a discretion in the *House*[7] sense, in that the appellate court does not have a choice as to whether to apply the proviso or not.

6.7 However, it is submitted that the statutory task to be undertaken by an appellate court in applying the proviso does involve what might be described as a "discretion" in a broader sense, in that the decision as to whether a *substantial* miscarriage of justice has *actually* occurred involves a value judgment about which reasonable minds can differ.

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6.8 It has been recognised by this Court that discretion is a notion that "signifies a number of different concepts".[8] The various ways in which the word is used was recently described by Spigelman CJ in *Dao v. The Queen* as follows:

> The protean word "discretion" is often deployed loosely in legal discourse. It is sometimes used to extend beyond decisions in which a choice must be made between alternatives, so as to encompass any decision involving a value judgment on which reasonable minds may differ."[9]

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[6] *Baiada Poultry v. The Queen* (2011) 203 IR 396 at [49].

[7] *House v. The King* (1936) 55 CLR 499.

[8] *Coal and Allied Operations Pty Ltd v. Australian Industrial Relations Commission* (2000) 203 CLR 194 at [19], citing *Norbis v. Norbis* (1986) 161 CLR 513 at 518.

[9] *Dao v. The Queen* (2011) 278 ALR 765 at [47] and the authorities referred to therein.

6.9 Furthermore, in *Coal and Allied Operations Pty Ltd v. Australian Industrial Relations Commission*, Gleeson CJ, Gaudron and Hayne JJ recognised that the concept of discretion includes a decision where "the decision maker is required to make a particular decision if he or she forms a particular opinion or value judgment".[10]

6.10 In these circumstances, it is not surprising that courts have used the word "discretion" when describing the application of the proviso, including in the examples set out in the appellant's submissions.[11]

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6.11 In this case, it is submitted, that the use of the word "discretion" by the majority in the Court below cannot be assumed to refer to the concept of discretion in the narrow or *House* sense, as is contended for on behalf of the appellant.[12] Nor, is it submitted, indicative of error.

6.12 Furthermore, the critical question is not the language used by the majority in describing the application of the proviso, but whether the Court applied the correct process. As had been stated by this Court on numerous occasions, it is the language of the statute that is important, rather than secondary sources,

20 materials or labels, which may be apt to mislead.[13]

The majority of the Court of Appeal correctly applied the proviso

6.13 Upon analysis of the reasons of the majority of the Court below, it is submitted that no error is disclosed in the approach taken to the application of s. 568(1) of the *Crimes Act* 1958 (Vic).

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[10] *Coal and Allied Operations Pty Ltd v. AIRC* (2000) 203 CLR 194 at [20].

[11] *Appellant's submissions* at [6.11].

[12] *Appellant's submissions* at [6.3] and [6.8].

[13] *Weiss v. The Queen* (2005) 224 CLR 300 at [31]-[33]; see also *Dao v. The Queen* (2011) 278 ALR 765 at [51] and the authorities referred to therein.

6.14 Despite using the word "discretion" to describe the task being undertaken, it is submitted that the majority of the Court of Appeal correctly applied s. 568(1) in accordance with *Weiss v. The Queen*, and did not approach the application of the proviso as if it involved the exercise of a discretion in the *House* sense.

6.15 Neave JA and Kyrou AJA undertook an assessment of the evidence on the whole of the record and reached an independent conclusion that the evidence properly admitted at trial proved the appellant's guilt beyond reasonable doubt.[14]

10 6.16 The majority took into account the natural limitations that exist in the case of an appellate court proceeding wholly or substantially on the record, but considered that this was not a case where such limitations prevented the Court of Appeal from reaching the necessary degree of satisfaction about the appellant's guilt.[15]

6.17 Although Nettle JA formed the view that the inadequacy of the trial judge's directions were such that an error akin to a "significant denial of procedural fairness" had occurred,[16] it is submitted that this was not a conclusion that the majority of the Court was compelled to reach in the particular facts and circumstances of the case.

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6.18 It is submitted that no error can be demonstrated in the approach taken by the majority of the Court of Appeal in applying the proviso in this case.

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[14] *Baiada Poultry Pty Ltd v. The Queen* (2011) 203 IR 396 at [57], [60]-[64].

[15] Ibid. at [58].

[16] Ibid. at [51].

Relevance of the jury verdict of guilty

6.19 The majority of the Court of Appeal was correct, it is submitted, in regarding the jury's guilty verdict as a factor that may be taken into account in deciding whether a substantial miscarriage of justice has actually occurred. As stated by this Court in *Weiss v. The Queen*:

> [T]he appellate court's task must be undertaken on the *whole* of the record of the trial including the fact that the jury returned a guilty verdict..... The fact that the jury did return a guilty verdict cannot be discarded from the appellate court's assessment of the whole record of trial.[17]

6.20 While the jury's verdict of guilty is a relevant factor, the weight to be given to the verdict will vary according to the degree of irregularity in the conduct of the trial. For example, in *Cesan v. The Queen,*[18] Hayne, Crennan and Kiefel JJ considered that it was not possible to place any weight upon the jury's guilty verdicts in circumstances where the jury had been distracted from paying attention to the evidence at trial, and in particular, were distracted during the evidence given by one of the accused persons.[19]

6.21 Similarly, in *Evans v. The Queen,*[20] Gummow and Hayne JJ regarded the jury's guilty verdict as being of little assistance in assessing the record of the trial, given that the appellant had been required during his trial to dress as the robber had dressed (in a balaclava, overalls and sunglasses) and parade before the jury, hence undermining the appellant's denial of committing the robbery and having an unascertainable affect on the jury's assessment of the appellant as a witness.[21] Gummow and Hayne JJ contrasted this situation to that which arose in *Nudd v. The Queen*[22], where serious irregularities on the part of defence

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[17] *Weiss v. The Queen* (2005) 224 CLR 300 at [43].

[18] *Cesan v. The Queen* (2008) 236 CLR 358.

[19] Ibid. at [129].

[20] *Evans v. The Queen* (2007) 235 CLR 521.

[21] Ibid. at [46].

[22] *Nudd v. The Queen* (2006) 225 ALR 161.

counsel were satisfactorily repaired by the trial judge, therefore rendering the jury's verdict of guilty a matter that "could safety be taken to be both highly relevant and powerful".[23]

6.22 In the current matter, it is submitted that the Court of Appeal was entitled to have some regard to the jury verdict. The only question that arises is how much weight could be placed on the verdict given the inadequate direction that occurred. It is submitted there is no basis upon which it could be inferred that the majority placed any, yet alone undue, weight on the jury's verdict in their assessment of the record. While the majority's reasons state that the jury's verdict guilty is "a factor which *may* be taken into account in deciding whether a substantial miscarriage of justice has occurred", their reasons do not indicate that *any* weight was given to this factor.

6.23 Furthermore, it is submitted that the majority's reasons imply that their Honours formed their own view of the strength of the evidence quite separate to the jury's guilty verdict.[24]

6.24 Accordingly, it is submitted that no error can be demonstrated concerning the majority's treatment of the jury's verdict of guilty.

Cases where the proviso cannot apply

6.25 In *Weiss v. The Queen,* this Court observed that "no single universally applicable description of what constitutes 'no *substantial* miscarriage of justice' can be given" and that, "[l]ikewise no single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal".[25]

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[23] *Evans v. The Queen* (2007) 235 CLR 521 at [53].

[24] *Baiada Poultry Pty Ltd v. The Queen* (2011) 203 IR 396 at [60]. See also [63]-[64].

[25] *Weiss v. The Queen* (2005) 224 CLR 300 at [46].

6.26 However, this Court in *Weiss* described a category of cases in which the proviso should not be engaged:

> There may be cases where it would be proper to allow the appeal and order a new trial, even though the appellate court was persuaded to the requisite degree of the appellant's guilt. Cases where there has been a significant denial of procedural fairness at trial may provide examples of cases of that kind.[26]

6.27 The reasons of the Court in *Weiss* referred to the earlier decision of this Court in *Wilde v. The Queen*, in which Brennan, Dawson and Toohey JJ stated:

> The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and there has been a substantial miscarriage of justice. Errors of that kind may be so radical or fundamental that by their very nature they exclude the operation of the proviso.[27]

6.28 The category of cases in which the proviso cannot be engaged is necessarily ill defined and, it is submitted, should remain so.

6.29 Examples of the kinds of errors that have been found by this Court to fall within the category of cases in which the proviso is inapposite include the following:

(a) erroneously permitting the accused to demonstrate to the jury the wearing of a balaclava and overalls similar to those worn by the offender, together with the wrongful exclusion of alibi evidence;[28]

(b) the repeated distraction of the jury from attending to the evidence at various stages of the trial due to the judge falling asleep and therefore failing to exercise the necessary degree of control and supervision of the proceedings;[29]

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[26] *Weiss v. The Queen* (2005) 224 CLR 300 at [45].

[27] *Wilde v. The Queen* (1988) 164 CLR 365 at 373.

[28] *Evans v. The Queen* (2007) 235 CLR 521.

[29] *Cesan v. The Queen* (2008) 236 CLR 358.

(c) not directing the jury regarding the nature and conduct of a special hearing, as mandated by statute;[30]

(d) misdirecting the jury as to the accused's right to silence;[31]

(e) misdirecting the jury on the burden of proof;[32]

(f) failing to leave manslaughter as an alternative to murder;[33]

(g) failing to leave a defence of accident to the jury in circumstances where this was an alternate case open to the appellant on the evidence;[34]

(h) failing to direct the jury regarding the possibility of there being an unwilled act which caused the death of the deceased, in circumstances where such a defence was logically anterior to the issue of self defence;[35]

(i) failing to direct the jury at all as to an element of the offence, namely that the accused did an act of such a nature as to be likely to endanger human life;[36]

(j) misdirecting the jury as to an element of the offences and thereby reversing the onus of proof with respect to that element;[37]

(k) failing to direct the jury of their need for agreement as to the accused's having committed the same three acts constituting a charge of maintaining a sexual relationship;[38]

(l) erroneously directing the jury to ignore expert evidence called on behalf of the accused concerning mental disorders suffered by the complainant and impacting upon recollection and truthfulness;[39]

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[30] *Subramaniam v. The Queen* (2004) 79 ALJR 116.

[31] *Glennon v. The Queen* (1994) 179 CLR 1.

[32] *Murray v. The Queen* (2002) 211 CLR 193.

[33] *Gillard v. The Queen* (2003) 219 CLR 1; *Gibert v. The Queen* (2000) 201 CLR 414.

[34] *Stevens v. The Queen* (2005) 227 CLR 319.

[35] *Ugle v. The Queen* (2002) 211 CLR 171.

[36] *Quartermaine v. The Queen* (1980) 143 CLR 595.

[37] *Krakouer v. The Queen* (1998) 194 CLR 202.

[38] *KBT v. The Queen* (1997) 191 CLR 417.

[39] *Farrell v. The Queen* (1998) 194 CLR 286.

(m) not directing the jury to have regard to the accused's special sensitivity to sexual interference and history of sexual abuse in considering the issue of provocation;[40]

(n) refusing to discharge the jury following the introduction into evidence of inadmissible evidence of further sexual offences committed by the appellant;[41]

(o) failing to direct the jury as to the limited use that could be made of recent complaint evidence in a rape trial where the credibility of the complainant was the key issue;[42] and

(p) refusing to stay or adjourn the trial until arrangements were made for counsel to appear at public expense for the accused at the trial.[43]

6.30 The proviso may also be inapplicable where "the consequence of the failure of process is to deprive the appellate court of the capacity justly to assess the strength of the case against the appellant".[44] For instance, in *Evans v. The Queen* the fact that the appellant was not permitted to lead alibi evidence meant that the appellate court could not decide from the record that the appellant was proved guilty of the offences on which the jury returned its verdicts of guilty.[45]

6.31 In the appellant's trial, it is submitted that the error involved was dissimilar, both in gravity and effect, to the kinds of errors identified in the cases referred to above in which this Court has held that the proviso is inapposite. Accordingly, it is submitted that this case does not fall within the category of cases in which the proviso cannot apply.

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[40] *Green v. The Queen* (1997) 191 CLR 334.

[41] *Crofts v. The Queen* (1996) 186 CLR 427.

[42] *Jones v. The Queen* (1997) 143 ALR 52.

[43] *Dietrich v. The Queen* (1992) 177 CLR 292.

[44] *Nudd v. The Queen* (2006) 225 ALR 161 at [6] per Gleeson CJ.

[45] *Evans v. The Queen* (2007) 235 CLR 521.

6.32 The error in the appellant's trial comprised an inadequate direction to the jury concerning reasonable practicability. Reasonable practicability was both an element of the offence which the prosecution was required to prove to the requisite standard and was one of two defences relied upon by the appellant at trial, albeit, it is submitted, that it was a secondary defence (the primary defence being that the appellant did not have control over relevant matters at the Houben Farm).

6.33 While the trial judge's direction was found by the Court of Appeal to be inadequate, it is submitted that it is relevant, as the majority of the Court below found, that the element was not altogether ignored by the learned trial judge.[46] The trial judge redirected the jury at the request of the appellant's trial counsel along the lines sought by defence counsel, without further exception being taken to the redirection.

6.34 The appellant's submissions refer to *Krakouer v. The Queen*[47], which the appellant submits is "not dissimilar" to the appellant's case. The respondent submits that *Krakouer* is fundamentally different to the appellant's case in three important respects. Firstly and critically, the misdirection in *Krakouer* included a reversal of the onus of proof, which, it is submitted, makes it a far graver misdirection than that which occurred in the appellant's trial. Secondly, the misdirection in *Krakouer* was made without any evidentiary basis, it not being contended at trial that the appellant had been in possession of the drugs. Finally, the trial judge in *Krakouer* declined to redirect the jury on this matter, despite exception being taken to the misdirection by defence counsel supported by the prosecutor. Hence the jury were left to follow a wholly incorrect direction of law on an issue which was seen as being significant by both counsel engaged at the trial.

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[46] *Baiada Poultry Pty Ltd v. The Queen* (2011) 203 IR 396 at [59].

[47] *Krakouer* v. *The Queen* (1998) 194 CLR 202.

6.35 There are a number of available examples of cases where misdirections relevant to an accused's defence have been found by this court not to result in a substantial miscarriage of justice. For instance:

(a) *Fester v. The Queen*[48] concerned misdirections regarding identification evidence, being the central issue at trial. The errors were found not to result in a substantial miscarriage of justice, as the case against the accused was so strong that her conviction was regarded by the Court as inevitable.

(b) In *Darkan v. The Queen,*[49] the trial judge misdirected the jury regarding the meaning of "probable consequence", which was an element of the case advanced against the second appellant at trial. Notwithstanding this error, the proviso was applied.

(c) In *Holland v. The Queen,*[50] the trial judge had failed to fully direct the jury about the elements of the offences of attempt, which were left to the jury as alternative offences to those for which the appellant was convicted. A majority of the Court considered that a substantial miscarriage of justice had not occurred, in circumstances where the real issue on the trial was whether the appellant had intentionally effected digital penetration of the complainant's vagina.

6.36 While the category of cases in which the proviso is inapposite should not be regarded as closed, it is submitted that to oust the application of the proviso in this case would significantly broaden the scope of the residual category beyond those kinds of errors that have thus far been found by this Court to fall within the category of cases where the proviso cannot be engaged. To do so, it is submitted, would tend towards readopting the Exchequer rule, which it was the legislative object of the proviso to do away with.[51]

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[48] *Fester v. The Queen* (2001) 208 CLR 593.

[49] *Darkan v. The Queen* (2006) 227 CLR 373.

[50] *Holland v. The Queen* (1993) 117 ALR 193.

[51] *Weiss v. The Queen* (2005) 224 CLR 300 at [38].

No substantial miscarriage of justice in this case

6.37 It is submitted that in the circumstances of this case, including the conduct of the trial, it was appropriate for the Court of Appeal to apply the proviso, as the majority did.

6.38 The inadequate directions to the jury concerning reasonable practicability were not, it is submitted, an error of a kind that rendered the proviso inapposite. Nor was the Court of Appeal deprived, by reason of the inadequate directions given, of the capacity to assess the strength of the case against the appellant and determine that no substantial miscarriage of justice had actually occurred.

6.39 Most of the evidence led by the prosecution at the appellant's trial was uncontested, there were no relevant issues of credibility, and no alleged erroneous admission or rejection of evidence. Furthermore, much of the evidence led at trial was documentary, and was able to be reviewed by the appellate court as part of the record.[52]

6.40 The Court of Appeal was, it is submitted, able to apply the correct direction regarding reasonable practicability, within the context of s. 20(2) of the *Occupational Health and Safety Act* 2004 (Vic), which sets out matters that regard must be had to in determining what is reasonably practicable.[53]

6.41 Considering the whole of the record including the evidence relevant to those matters set out in s. 20(2) the majority correctly, it is submitted, found:

> Neither DMP nor Azzopardi Haulage had specialist expertise in relation to the loading or unloading of modules which the applicant lacked. The risk that a truck driver might be seriously injured or even killed while a forklift was being used to load or unload trucks and the need to take precautions to prevent forklift accidents were obvious. The measures necessary to do so were well known to the applicant and throughout the industry. They were common sense measures which did not require specialist skill or knowledge.... The only inference that was open on the evidence was that the costs of

[52] *Baiada Poultry Pty Ltd v. The Queen* (2011) 203 IR 396 at [58].

[53] Ibid. at [61]-[63].

issuing safety measures to contractors was minimal compared with the gravity of the risk of harm.[54]

6.42 Accordingly, the majority was entitled to conclude that it "would not have been open to the jury on the whole of the evidence to acquit the applicant on the basis that it took reasonably practicable steps to protect the health and safety of persons involved in loading the truck at Houben Farm" by relying on its independent contractors. The majority was therefore able to conclude that the appellant was proved beyond reasonable doubt guilty of the offence charged.[55]

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6.43 The appeal should be dismissed.

Dated: 19 October 2011

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[54] Ibid. at [63].

[55] Ibid. at [60] & [64].

ANNEXURE – Sections 20 and 21 of the *Occupational Health and Safety Act 2004* (Vic)

Version No. 010

Occupational Health and Safety Act 2004

No. 107 of 2004

Version incorporating amendments as at 23 February 2007

PART 3—GENERAL DUTIES RELATING TO HEALTH AND SAFETY

Division 1—The Concept of Ensuring Health and Safety

20. The concept of ensuring health and safety

(1) To avoid doubt, a duty imposed on a person by this Part or the regulations to ensure, so far as is reasonably practicable, health and safety requires the person—

(a) to eliminate risks to health and safety so far as is reasonably practicable; and

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

(2) To avoid doubt, for the purposes of this Part and the regulations, regard must be had to the following matters in determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety—

(a) the likelihood of the hazard or risk concerned eventuating;

(b) the degree of harm that would result if the hazard or risk eventuated;

(c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;

(d) the availability and suitability of ways to eliminate or reduce the hazard or risk;

(e) the cost of eliminating or reducing the hazard or risk.

Division 2—Main duties of employers

21. Duties of employers to employees

(1) An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.

Penalty: 1800 penalty units for a natural person;

9000 penalty units for a body corporate.

(2) Without limiting sub-section (1), an employer contravenes that sub-section if the employer fails to do any of the following—

(a) provide or maintain plant or systems of work that are, so far as is reasonably practicable, safe and without risks to health;

(b) make arrangements for ensuring, so far as is reasonably practicable, safety and the absence of risks to health in connection with the use, handling, storage or transport of plant or substances;

(c) maintain, so far as is reasonably practicable, each workplace under the employer's management and control in a condition that is safe and without risks to health;

(d) provide, so far as is reasonably practicable, adequate facilities for the welfare of employees at any workplace under the management and control of the employer;

(e) provide such information, instruction, training or supervision to employees of the employer as is necessary to enable those persons to perform their work in a way that is safe and without risks to health.

(3) For the purposes of sub-sections (1) and (2)—

(a) a reference to an employee includes a reference to an independent contractor engaged by an employer and any employees of the independent contractor; and

(b) the duties of an employer under those sub-sections extend to an independent contractor engaged by the employer, and any employees of the independent contractor, in relation to matters over which the employer has control or would have control if not for any agreement purporting to limit or remove that control.

(4) An offence against sub-section (1) is an indictable offence.

Note: However, the offence may be heard and determined summarily (see section 53 of, and Schedule 4 to, the **Magistrates' Court Act 1989**).