[20,060] Principles that apply to duties

13 This Subdivision sets out the principles that apply to all duties that persons have under this Act.

Note The principles will apply to duties under this Part and other Parts of this Act such as duties relating to incident notification and consultation.

Editor's note: For variations to the Model legislation for each jurisdiction refer to the entries as set out below.
QLD — s 13 of the QLD WHS legislation.
ACT — s 13 of the ACT WHS legislation.

COMMENTARY TO SECTION 13

Principles that apply ..... [20,060.5]

[20,060.5] Principles that apply The principles set out in ss 14–16 of the Act apply to all duties imposed by the Act and the regulations (see definition of "this Act" in s 4). The principles apply to duties imposed by Pt 2 ("health and safety duties") as well as duties imposed by other Parts (eg the duty to notify incidents imposed by s 38).

[20,065] Duties not transferrable

14 A duty cannot be transferred to another person.

COMMENTARY TO SECTION 14

Non-delegability ..... [20,065.5]

[20,065.5] Non-delegability At common law and under existing Occupational Health and Safety laws, it is accepted that an employer's duties to its employees are non-delegable: see *Kondis v State Transport Authority* (1984) 154 CLR 672 at 688–9; 55 ALR 225; 58 ALJR 531; BC8400477 and *Kirk v IRC (NSW)* (2010) 239 CLR 531; 262 ALR 569; [2010] HCA 1; BC201000230 at [10] and [18]. A similar approach has been taken in New Zealand (*Linework Ltd v Department of Labour* [2001] 2 NZLR 639) and the United Kingdom (*R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78; [1997] Crim LR 512; *R v Associated Octel Co Ltd* [1996] 4 All ER 846; [1996] 1 WLR 1543; [1997] Crim LR 355).

As Mason J explained in *Kondis*, the non-delegable nature of an employer's duty to its employees results from the special relationship between the two under which "the employer has the exclusive responsibility for the safety of the appliances, the premises and the system of work to which he subjects his employee and the employee has no choice but to accept and rely on the employer's provision and judgment in relation to these matters": see *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687–8; 55 ALR 225; 58 ALJR 531; BC8400477.

The First Report of the National Review into Model Occupational Health and Safety Laws (see: R Stewart-Crompton, S Mayman and B Sherrif, *National Review into Model Occupational Health and Safety Laws, First Report, October 2008*, http://www.nationalohsreview.gov.au/), at 6.88 recommended that this approach be extended to all duties under the model laws:

> . . .Our recommended approach to the duty of care would not permit any delegation of the duty of care. Each duty holder would retain the non-delegable duty of care at all times. Arranging for another person to undertake activities necessary for compliance with the duty of care owed by

Job: specialist/nohs/allvols/serv_0/mwhsa_277876
Page: **29** Date: **25/1/2012** Time: **12:19:7**
bwpageid:: 20241::
bwservice::0::

the duty holder would not be sufficient to meet the duty so far as is reasonably practicable, unless the duty holder took steps necessary to confirm the relevant matters were appropriately attended to, and the required health and safety standards were maintained.

The recommendation finds expression in s 14. It is supported by s 272 which prohibits "contracting out" of legal obligations. The principle of "non-transferability" is likely to be interpreted consistently with the case law concerning "non-delegability".

[20,070] Person may have more than 1 duty

15 A person can have more than 1 duty by virtue of being in more than 1 class of duty holder.

COMMENTARY TO SECTION 15

More than 1 duty ..... [20,070.5]

[20,070.5] More than 1 duty An example of the application of s 15 is a circumstance where a Person Conducting a Business or Undertaking (PCBU) has a duty under ss 19 and 20 simultaneously. The s 19 duty arises by virtue of the PCBU engaging workers; the s 20 duty arises by virtue of the control of a workplace. The PCBU must comply with both duties but the steps that are required for compliance may well be the same.

[20,075] More than 1 person can have a duty

16 (1) More than 1 person can concurrently have the same duty.

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

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

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

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

Editor's note: For variations to the Model legislation for each jurisdiction refer to the entries as set out below.
ACT — s 16 of the ACT WHS legislation.

COMMENTARY TO SECTION 16

More than one person can have a duty ..... [20,075.5]
A duty for the same matter ..... [20,075.10]
Capacity to influence and control ..... [20,075.15]
Duty holders must consult with each other ..... [20,075.20]

[20,075.5] More than one person can have a duty The First Report of the National Review into Model Occupational Health and Safety Laws (see: R Stewart-Crompton, S Mayman and B Sherrif, *National Review into Model Occupational Health and Safety Laws, First Report, October 2008*, http://www.nationalohsreview.gov.au/), recommended at 4.7 that the:

> . . .model Act must make clear that all duty holders must at all times accept their responsibility for health or safety and ensure that the duties are met. The provisions of the model Act should not permit or encourage, directly or indirectly, any duty holders to avoid their health and safety responsibilities.

Section 16 gives effect to this recommendation by requiring each duty holder to comply with its duty "even if another duty holder has the same duty".

Job: specialist/nohs/allvols/serv_0/mwhsa_277876
Page: **30** Date: **25/1/2012** Time: **12:19:7**
bwpageid:: 20242::
bwservice::0::

An example of the application of s 16(1) is a circumstance where a labour hire employer places one of its employees to work with a host employer. The labour hire employer and the host employer will each owe a duty to the employee pursuant to s 19(1)(a) of the Act because the employee will be a "worker" engaged by each of them. Each must comply with its duty: s 16(2). What will be "reasonably practicable" for them to do in the circumstances will be "a question of fact and degree": see *Baiada Poultry Pty Ltd v R* (2011) 203 IR 396; [2011] VSCA 23; BC201100511 at [19].

[20,075.10] A duty for the same matter The term "matter" is well known in Occupational Health and Safety law. For example, in construing "matter" in s 21(3)(a) of the former Occupational Health and Safety Act 1985 (Vic), the Supreme Court of Victoria (Byrne J) held that it is "wide enough to cover any activity or thing in the working environment which might involve risk to the health and safety of a worker": see *Stratton v Van Driel Ltd* (1998) 87 IR 151; [1998] VSC 75; BC9805001 at [16].

[20,075.15] Capacity to influence and control Section 16(3)(b) provides that in circumstances where more than one person has a duty, each must discharge the duty "to the extent to which the person has the capacity to influence or control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity". The Explanatory Memorandum (EM) makes clear that the Act is concerned with "both 'actual' or 'practical' control" at [66]. This is consistent with existing case law: *Reilly v Devcon Australia Pty Ltd* (2008) 36 WAR 492; 173 IR 307; [2008] WASCA 84; BC200802582 at [34]–[35], *R v ACR Roofing Pty Ltd* (2004) 11 VR 187; 142 IR 157; [2004] VSCA 215; BC200408208 at [68]; *Baiada Poultry Pty Ltd v The Queen* (2011) 203 IR 396; [2011] VSCA 23; BC201100511 at [17]–[19] and *McMillan Britton & Kell Pty Ltd v Inspector Blake* (1999) 89 IR 464 at 480–1.

[20,075.20] Duty holders must consult with each other Where more than one person has a duty in respect of the same matter, s 46 requires them to "consult, co-operate and co-ordinate activities" with each other "so far as is reasonably practicable.

[20,080] Management of risks

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

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

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

COMMENTARY TO SECTION 17

A duty to ensure health and safety ..... [20,080.5]
Management of risks ..... [20,080.10]

[20,080.5] A duty to ensure health and safety Section 17 applies to each of the duties imposed by ss 19–26. Each is expressed as a duty to "ensure health and safety". Under existing case law such a duty has been interpreted to require that the duty holder guarantee, secure or make certain: see *R v Commercial Industrial Construction Group Pty Ltd* (2006) 14 VR 321; [2006] VSCA 181; BC200607021 at [25]; *McMillan Britton & Kell Pty Ltd v Inspector Blake* (1999) 89 IR 464 at 480 and *Hardy v St Vincent's Hospital Toowoomba* [2000] 2 Qd R 19; [1998] QCA 086; BC9801870.

[20,080.10] Management of risks Section 17 requires the elimination of risks so far as is reasonably practicable. It is only where a risk cannot be eliminated to this standard, that minimisation is permissible.

Subdivision 2 — What is reasonably practicable

[20,085] What is reasonably practicable in ensuring health and safety

18 In this Act, **reasonably practicable**, in relation to a duty to ensure health and

Job: specialist/nohs/allvols/serv_0/mwhsa_277876
Page: **31** Date: **25/1/2012** Time: **12:19:7**
bwpageid:: 20243::
bwservice::0::

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

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

COMMENTARY TO SECTION 18

What is "reasonably practicable"? ..... [20,085.5]
Taking into account and weighing all relevant matters ..... [20,085.10]
The likelihood of the relevant hazard or risk occurring ..... [20,085.15]
The degree of harm that might result ..... [20,085.20]
Knowledge ..... [20,085.25]
Availability and suitability ..... [20,085.30]
Cost ..... [20,085.35]

[20,085.5] What is "reasonably practicable"? Under existing Occupational Health and Safety (OHS) law both in Australia and overseas, duties are commonly qualified by "reasonably practicable". The drafters of the model Bill seek to build on the existing law: see Explanatory Memorandum at [70].

Gaudron J observed in *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304; 177 ALR 585; [2001] HCA 6; BC200100264 at [53] that:

> The words "reasonably practicable" have, somewhat surprisingly, been the subject of much judicial consideration. It is surprising because the words "reasonably practicable" are ordinary words bearing their ordinary meaning. And the question whether a measure is or is not reasonably practicable is one which requires no more than the making of a value judgment in the light of all the facts. Nevertheless, three general propositions are to be discerned from the decided cases:
>
> - The phrase "reasonably practicable" means something narrower than "physically possible" or "feasible";
> - What is "reasonably practicable" is to be judged on the basis of what was known at the relevant time;
> - To determine what is "reasonably practicable" it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to avert that risk (footnotes omitted).

[20,085.10] Taking into account and weighing all relevant matters These general observations must of course be read in light of s 18. As Ormiston J cautioned in relation to the definition of "practicable" in s 4 of the Occupational Health and Safety Act 1985 (Vic), the starting point must be the statutory definition and not cases decided in respect of other Acts: see *Chugg v Pacific Dunlop Pty Ltd (No 2)* [1999] 3 VR 934; BC8900691 at [132]–[133].

A consideration of whether a given measure was "reasonably practicable" under the Act requires "all relevant matters" to be taken into account and weighed up. The "relevant matters" must in all cases include the five matters identified in s 18. These are examined in turn.

[20,085.15] The likelihood of the relevant hazard or risk occurring The greater the likelihood, the more will be expected of a duty holder to eliminate or minimise the hazard or risk.

Job: specialist/nohs/allvols/serv_0/mwhsa_277876
Page: **32** Date: **25/1/2012** Time: **12:19:7**
bwpageid:: 20244::
bwservice::0::

[20,085.20] The degree of harm that might result Even if a hazard or risk is unlikely to occur (eg a leak of toxic chemicals from a road tanker), if the degree of harm that might result is very high (multiple deaths), the more will be expected to eliminate or minimise the hazard or risk.

[20,085.25] Knowledge Section 18(c) is concerned with what a given duty holder knows of the identified matters and what the duty holder "ought reasonably to know". This is clearly an objective standard that emphasises the positive nature of the duty: see *Morrison v De Bono* (2005) 147 IR 454 at [22]. It requires a duty holder to keep abreast of industry knowledge in regulations, codes, standards and articles in trade journals: see *Chugg v Pacific Dunlop Pty Ltd (2)* [1999] 3 VR 934; BC8900691 at [134] and *Morrison v Kiwi Electrix Pty Ltd* (1998) 19 WAR 482; 103 A Crim R 312 at 324; BC9803763.

[20,085.30] Availability and suitability A range of sources may be considered including regulations, codes, standards and articles in trade journals. In *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 260; 95 ALR 481; 64 ALJR 599; BC9002934, a majority of the High Court (Dawson, Toohey and Gaudron JJ) held that:

> The questions of safety and practicability, in many cases, raise issues of common sense rather than special knowledge.
>
> . . .
>
> In some cases the mere identification of the cause of a perceptible risk may, as a matter of common sense, also constitute identification of a means of removing that risk. . .

See also *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; 190 IR 437; [2010] HCA 1; BC201000230 at [18] where the High Court noted that, in the absence of a definition of "reasonably practicable" in the Occupational Health and Safety Act 1983 (NSW), its application to a given set of facts "may often involve a common sense assessment".

[20,085.35] Cost Once the first four matters have been assessed, it is necessary to consider the "cost associated with available ways of eliminating or minimising the risk including whether the cost is grossly disproportionate to the risk". Under existing law, cost is a factor but there is no reference to "gross disproportion": see, for example, s 5(c) of the definition of "reasonably practicable" in the Workplace Health and Safety Act 2007 (NT). The Victorian Occupational Health and Safety Act Review (2004) conducted by Chris Maxwell (see: C Maxwell, *Occupational Health and Safety Act Review, March 2004*, http://www.dtf.vic.gov.au) recommended the inclusion of a "gross disproportion" test in Victoria (at 563). However, the recommendation was not accepted. Maxwell referred to a line of English cases that had explained the "gross disproportion" test: see *Coltness Iron Company Ltd v Sharp* [1938] AC 90 at 93–4; *Edwards v National Coal Board* [1949] 1 KB 704 at 712; [1949] 1 All ER 743; *Marshall v Gotham Co Ltd* [1954] AC 360 at 370 and 373; [1954] 1 All ER 937; [1954] 2 WLR 812; *Austin Rover Ltd v Inspector of Factories* [1990] 1 AC 619 at 625–6 and 636; [1989] 2 All ER 1087; [1989] 3 WLR 520; [1990] ICR 133. See also *Holmes v RE Spence & Co Ltd* (1992) 5 VIR 119 at 124. It is to be expected that these cases will be taken into account in the application of s 18(e) of the Act.

DIVISION 2 — PRIMARY DUTY OF CARE

[20,090] Primary duty of care

19 (1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:

(a) workers engaged, or caused to be engaged by the person; and

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

while the workers are at work in the business or undertaking.

Job: specialist/nohs/allvols/serv_0/mwhsa_277876
Page: **33** Date: **25/1/2012** Time: **12:19:7**
bwpageid:: 20245::
bwservice::0::

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

(3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:

(a) the provision and maintenance of a work environment without risks to health and safety; and
(b) the provision and maintenance of safe plant and structures; and
(c) the provision and maintenance of safe systems of work; and
(d) the safe use, handling and storage of plant, structures and substances; and
(e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and
(f) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and
(g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

(4) If:

(a) a worker occupies accommodation that is owned by or under the management or control of the person conducting the business or undertaking; and
(b) the occupancy is necessary for the purposes of the worker's engagement because other accommodation is not reasonably available,

the person conducting the business or undertaking must, so far as is reasonably practicable, maintain the premises so that the worker occupying the premises is not exposed to risks to health and safety.

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

Note A self-employed person is also a person conducting a business or undertaking for the purposes of this section.

COMMENTARY TO SECTION 19

Primary duty of care ..... [20,090.5]
The duty is an onerous one ..... [20,090.10]
Workers engaged, or caused to be engaged, by the person: ..... [20,090.15]
At work in the business or undertaking ..... [20,090.20]
Other persons ..... [20,090.25]
Specific aspects of the duty ..... [20,090.30]
Safe systems of work ..... [20,090.35]
Accommodation ..... [20,090.40]
Duty of self-employed person ..... [20,090.45]

[20,090.5] Primary duty of care The "primary" duty imposed by s 19 is to be contrasted with the "further duties" imposed by ss 20–26. The duty imposed by s 19 is the equivalent of the duty imposed under current law on an "employer" for the benefit of its "employees". However, the duty is imposed on a "person conducting a business or undertaking" for the benefit of identified classes of "workers" and "other persons". In this regard, the Act departs radically from the existing law. As noted in the annotations above concerning ss 6 and 7, the rationale for these changes to the existing law is that the current law is too complex and does not adequately reflect the changing and dynamic nature of modern work arrangements. Whether the new approach meets those challenges remains to be seen.

Job: specialist/nohs/allvols/serv_0/mwhsa_277876
Page: **34** Date: **25/1/2012** Time: **12:19:7**
bwpageid:: 20246::
bwservice::0::

[20,090.10] The duty is an onerous one Under existing Occupational Health and Safety law, the employer's duty has been described as requiring a pro-active approach. In *Workcover Authority (NSW) v Atco Controls Pty Ltd* (1998) 82 IR 80 at 85, Hill J observed:

> This case is yet another illustration of the need for employers to exercise abundant caution, maintain constant vigilance and take all practicable precautions to ensure safety in the workplace. It is essential that the approach be a pro-active and not re-active one; employers should be on the offensive to search for, detect and eliminate, so far as is reasonably practicable, any possible areas of risk to safety, health and welfare which may exist or occur from time to time in the workplace.

Courts in Victoria have made similar observations: see *Holmes v RE Spence & Co Pty Ltd* (1990) 5 VIR 119 at 123; *R v Commercial Industrial Construction Group Pty Ltd* (2006) 14 VR 321; [2006] VSCA 181; BC200607021 at [48]–[49].

It is to be expected that the duty of a person conducting a business or undertaking under s 19 will be construed in a similar way.

[20,090.15] Workers engaged, or caused to be engaged, by the person: Under s 19(1)(a), a Person Conducting a Business or Undertaking (PCBU) has a duty to ensure so far as is reasonably practicable, the health and safety of a worker engaged, or caused to be engaged, by the person. "Worker" is defined in s 7 as a person who "carries out" work for a PCBU. However, under s 19, the PCBU only owes a duty to a worker it "engages" or "causes to be engaged". These terms are not defined in the Act.

In *R v ACR Roofing Pty Ltd* (2004) 11 VR 187; 142 IR 157; [2004] VSCA 215; BC200408208, the Victorian Court of Appeal was required to construe the words "an independent contractor engaged by an employer" in s 21(3) of the Occupational Health and Safety Act 1985 (Vic). Nettle JA, with whom Ormiston and Vincent JJA agreed, held that the meaning of the words in context was a question of law (at [42]). Nettle JA held that engagement was not limited to circumstances where there were contractual relations between the parties (at [54]). Ormiston JA considered that the section applies to any person brought onto premises for the purposes of the employer's enterprise so long as the employer has some control over what the person does: at [1].

While *ACR Roofing* is a persuasive authority about the meaning of "engaged" in the context of an occupational health and safety statute, it may be distinguished on the grounds that such a broad approach to "engagement" may leave little work for s 19(1)(b) to do. Section 19(1)(b) provides protection to workers "whose activities in carrying out work are influenced or directed" by a PCBU. In such circumstances the PCBU will owe the workers concerned a s 19(1) duty. An example would be a courier delivering a parcel to premises occupied by a PCBU. Her "activities" will be influenced by a direction from the PCBU to leave the parcel at the front office. The PCBU must ensure, so far as is reasonably practicable, her health and safety by, for example, informing her of a malfunctioning door to the office.

[20,090.20] At work in the business or undertaking Whether a given worker falls under para (a) or (b), the Person Conducting a Business or Undertaking (PCBU) only owes a s 19(1) duty to them while the worker is "at work in the business or undertaking". The use of the definite article in this phrase means that the duty under s 19(1) only arises where the worker is working "in" the business or undertaking of the PCBU. According to the explanatory memorandum (at [79]), the duty "is tied to the work activities wherever they occur and is not limited to the confines of a physical workplace".

[20,090.25] Other persons A person conducting a business or undertaking also owes a duty to "other persons" under s 19(2). The duty differs from that imposed by s 19(1). It does not require the PCBU to ensure the health and safety of the "other persons"; it only requires that the PCBU ensure that the health and safety of those persons is not "put at risk" from work carried out as part of the "conduct of the business or undertaking": see [20,020.5] above in the annotations to s 5 for a discussion of case law in regards to this phrase. As the explanatory memorandum explains (at [81]), the s 19(2) duty is not a "positive duty" in contrast to that imposed by s 19(1).

The limitations on the duty imposed by s 19(2) need to be understood. It is not intended to protect

Job: specialist/nohs/allvols/serv_0/mwhsa_277876
Page: **35** Date: **25/1/2012** Time: **12:19:7**
bwpageid:: 20247::
bwservice::0::

a consumer from a defective product. The relevant risk to health and safety must arise from "work" carried out by the PCBU. As the explanatory memorandum explains at [61]:

> The duties under the Bill are intended to operate in a work context and will apply where work is performed, processes or things are used for work or in relation to workplaces. It is not intended to have operation in relation to public health and safety more broadly, without the necessary connection to work.

[20,090.30] Specific aspects of the duty Section 19(3) identifies certain specific matters that must be addressed by a PCBU in seeking to comply with the duties imposed by ss 19(1) and (2). The drafters have employed the passive voice: a PCBU must "ensure . . . the provision and maintenance of a work environment. . .". This may be contrasted with existing statutory provisions, such as s 21(2)(a) of the Occupational Health and Safety Act 2004 (Vic) which requires an employer to provide and maintain a safe system of work. The grammatical difference is deliberate. As the explanatory memorandum explains, a PCBU can comply with the duty by actively verifying that "someone else" has undertaken the necessary compliance activities (at [84]). This is consistent with the non-delegable nature of the duties-the performance of the duty may be delegated but not the responsibility.

[20,090.35] Safe systems of work An important aspect of the s 19 duty is the provision and maintenance of safe "systems of work". This is a requirement under both existing statutes and the common law and has been the subject of much judicial consideration. In *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424; 206 ALR 387; [2004] HCA 28; BC200403490 at [55], the High Court held that "a system of working normally consists of a series of similar or somewhat similar operations". At common law, an employer must take into account in the design of its systems that employees may perform tasks repetitively, in difficult conditions and in circumstances where they are prone to lapses in concentration as a result of "inadvertence, inattention and mis-judgement": see *Czatyrko v Edith Cowan University* (2005) 214 ALR 349; 79 ALJR 839; [2005] HCA 14; BC200501748 at [15]; *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 310; 65 ALR 1; 60 ALJR 362; BC8601420. These principles have been accepted as part of the employer's duty under occupational health and safety statutes: see *Tenix Defence Pty Ltd v Maccarron* [2003] WASCA 165; BC200304137 at [45] and *R v Australian Char Pty Ltd* [1999] 3 VR 834; (1995) 79 A Crim R 427; 64 IR 387; BC9503362 at [63]. A safe system of work must not only be provided; it must be maintained, even against employee disobedience: see *McLean v Tedman* (1984) 155 CLR 306 at 312; 56 ALR 359; 58 ALJR 541; BC8400457. In *R v Commercial Industrial Construction Group Pty Ltd* (2006) 14 VR 321; [2006] VSCA 181; BC200607021 at [48], the Victorian Court of Appeal said the following about the employers' duty under the Occupational Health and Safety Act 1985 (Vic):

> As this case illustrates, the formal adoption of a satisfactory safety management system will not have the beneficial effects intended unless it is accompanied by the employer's active implementation of the system in the workplace. The employer's duty will not be discharged simply by creating a safe system of work. The obligation requires the employer to ensure 'that procedures and instructions [are] actively and positively complied with by employees'. Not only must employees be properly trained but there must be ongoing supervision and compliance audits, to ensure that the system is being applied in practice. Employee compliance with the safe system must be constantly monitored by the employer. (footnotes omitted).

[20,090.40] Accommodation Where a worker occupies accommodation that is owned by or is under the management or control of the person conducting the business or undertaking and the occupation is "necessary for the purposes of the worker's engagement because other accommodation is not reasonably available", the Person Conducting a Business or Undertaking (PCBU) has a duty to maintain the premises to the standard specified. An example is accommodation provided at a remote mine-site.

[20,090.45] Duty of self-employed person In addition to being a person who conducts a business or undertaking and has the duties imposed by the remainder of s 19, a "self employed

Job: specialist/nohs/allvols/serv_0/mwhsa_277876
Page: **36** Date: **25/1/2012** Time: **12:19:7**
bwpageid:: 20248::
bwservice::0::

person" also has a duty under s 19(5) to ensure, so far as is reasonably practicable, his or her own health and safety while at work. The phrase "self-employed person" is not defined. In *Reilly v Tobiassen* (2008) 170 IR 294; [2008] WASC 6; BC200800098 at [76], Heenan J observed that a self employed person is generally a person working for reward other than under a contract of employment. By virtue of s 7(3) of the Act, it appears that a self-employed person will be both a Person Conducting a Business or Undertaking (PCBU) and a "worker".

DIVISION 3 — FURTHER DUTIES OF PERSONS CONDUCTING BUSINESSES OR UNDERTAKINGS

[20,095] Duty of persons conducting businesses or undertakings involving management or control of workplaces

20 (1) In this section, **person with management or control of a workplace** means a person conducting a business or undertaking to the extent that the business or undertaking involves the management or control, in whole or in part, of the workplace but does not include:

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

(b) a prescribed person.

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

COMMENTARY TO SECTION 20

Person with management or control of a workplace ..... [20,095.5]
Person conducting a business or undertaking ..... [20,095.10]
Ensure so far as is reasonably practicable ..... [20,095.15]
Management or control ..... [20,095.20]
Workplace ..... [20,095.25]
The means of entering and exiting the workplace ..... [20,095.30]
Anything arising from the workplace ..... [20,095.35]

[20,095.5] Person with management or control of a workplace The duty imposed by s 20 applies to a person "with management or control of a workplace". Section 20(1) provides that this means "a person conducting a business or undertaking to the extent that the business or undertaking involves the management or control, in whole or in part, of the workplace". However, the section does not apply to either:

- the occupier of a residence, unless the residence is occupied for the purposes, or as part of, the conduct of a business or undertaking (see *Westminster City Council v Select Management Ltd* [1985] 1 WLR 576 — common areas of residential block of flats not occupied solely as a private dwelling); or
- a prescribed person.

[20,095.10] Person conducting a business or undertaking See the annotations to s 5 at [20,020.5] above.

[20,095.15] Ensure so far as is reasonably practicable This phrase appears in each of ss 19–26. The meaning of this expression is discussed in the annotations to ss 17, 18 and 19 above.

[20,095.20] Management or control Existing Occupational Health and Safety laws impose similar duties: s 22 of the Occupational Safety and Health Act 1984 (WA); s 10 of the Occupational Health and Safety Act 2000 (NSW). In *Morrison v De Bono* (2005) 147 IR 454; [2005] WASC 271;

Job: specialist/nohs/allvols/serv_0/mwhsa_277876
Page: **37** Date: **25/1/2012** Time: **12:19:7**
bwpageid:: 20249::
bwservice::0::

BC200510588, an owner/builder of a two storey house was charged with contravening s 22 of the Occupational Safety and Health Act 1984 (WA). He had engaged a builder to install some plaster walls in the house. The house had an unguarded 2m x 2m square void between the ground floor and first floor where the staircase was to be located. An employee of the builder fell through the void and was seriously injured. The Supreme Court of Western Australia (Le Miere J) held that the owner/builder was a person in control of the workplace. The court rejected the owner/builder's argument that he had relinquished control to the builder. The court held that a person may have "a sufficient degree of control over premises that he is able to make the premises safe for workers working on the premises, notwithstanding that they are not his employees and he has no control over their method of work": at [14]. In the absence of an agreement granting the builder exclusive possession, the owner "had the right and ability to access the site at any time he wished": at [16]. See also *Workcover Authority (NSW) v McDonald's Australia Ltd* (1999) 95 IR 383 (franchisor was in control of one of its outlets).

[20,095.25] Workplace "Workplace" is defined in s 8 which is annotated at [20,035.5] above.

[20,095.30] The means of entering and exiting the workplace The explanatory memorandum (at [93]) distinguishes between the duties of a person that owns and controls a workplace (such as an office building) and a person that occupies and manages a workplace (such as a tenant who manages an office within the building). The former will be required to ensure that people can enter and exit the building; the latter's responsibilities will be limited to entry to and exit from the premises it controls.

[20,095.35] Anything arising from the workplace This curious expression is not defined. The explanatory memorandum gives as an example the safe maintenance of kitchen appliances: at [93].

[20,100] Duty of persons conducting businesses or undertakings involving management or control of fixtures, fittings or plant at workplaces

21 (1) In this section, **person with management or control of fixtures, fittings or plant at a workplace** means a person conducting a business or undertaking to the extent that the business or undertaking involves the management or control of fixtures, fittings or plant, in whole or in part, at a workplace, but does not include:

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

(b) a prescribed person.

(2) The person with management or control of fixtures, fittings or plant at a workplace must ensure, so far as is reasonably practicable, that the fixtures, fittings and plant are without risks to the health and safety of any person.

COMMENTARY TO SECTION 21

Person with management or control of a workplace ..... [20,100.5]
Person conducting a business or undertaking ..... [20,100.10]
Management or control ..... [20,100.15]
Ensure so far as is reasonably practicable ..... [20,100.20]
Workplace ..... [20,100.25]
Plant ..... [20,100.30]

[20,100.5] Person with management or control of a workplace The duty imposed by s 21 applies to a person "with management or control of fixtures, fittings or plant at workplaces". Section 21(1) provides that this means "a person conducting a business or undertaking to the extent that the business or undertaking involves the management or control of fixtures, fittings or plant, in whole or in part, at a workplace". However, the section does not apply to either:

Job: specialist/nohs/allvols/serv_0/mwhsa_277876
Page: **38** Date: **25/1/2012** Time: **12:19:8**
bwpageid:: 20250::
bwservice::0::