IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

No. M252 of 2015

BETWEEN

KATHRYN DEAL

Appellant

and

FATHER PIUS KODAKKATHANATH

Respondent

10

APPELLANT'S SUBMISSIONS

Part I: Certification for publication on the Internet.

1. The appellant certifies that these submissions, and the chronology, are in a form suitable for publication on the Internet.

Part II: The issue or issues that the appeal presents

2. Whether on the true construction of regulation 3.1.2, of the *Occupational Health and Safety Regulations* 2007 the words "associated with" in the phrase "a risk of a musculoskeletal disorder associated with a hazardous manual handling task affecting an employee" are limited so as to require a close connection between the relevant activity and the risk of

20 injury;

3. Whether on their true construction the manual handling regulations of the *Occupational Health and Safety Regulations* 2007 only apply to activities which require the application of force in the course of the particular activity and thus result in a risk of injury, that is to say, they apply only to risks of injury from the application of the force involved in the activity;
4. Whether in the circumstances alleged by the appellant, the risk of the injury which she had suffered was, or was arguably, one which engaged regulation 3.1.2 of the *Occupational Health and Safety Regulations* 2007.

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Part III: Certification re section 78B of the Judiciary Act 1903

5. The appellant considers that no notice is required to be given in compliance with s 78B of the *Judiciary Act* 1903

Part IV: Reports and citation

6. There is no authorised or other report of the reasons for judgment of either the primary or the intermediate court in the case. The Internet citation of the reasons of the Court of Appeal is [2015] VSCA 191.

Part V: Relevant facts

7. On 19 September 2007 the appellant suffered injury to her right knee in the course of her employment with the respondent. The circumstances in which the appellant suffered the injury were as follows:

8. From the reasons of the majority at [8]-[9]:

> On 19 September 2007, as part of her job, the appellant had to remove a number of large sheets to which were attached papier mache displays, from a pin board on a wall of a classroom. The appellant described the sheets as being 'stock card', which she said was thicker than 'copy paper'. Her counsel opened that the sheets were of two sizes, each of which was larger than A3 size, and which comprised a multiple of A3 sheets.[1] The appellant was only 156 cms in height. The pin board could not be accessed from ground level. The employer had provided a two step stepladder for use when performing this task – one which had to be done periodically, and not only in the particular classroom. The steps were an 'A' frame configuration. The top of the 'A' frame was 600 mms above floor level. The second - that is, top - step was at 450 mms. In a practical sense, the steps had to be set at right angles to the pin-board. The appellant had to ascend the steps, unpin the displays, and whilst carrying one or more of them, descend the steps backwards. On the particular occasion, the appellant was carrying more than one display.[2] As she was descending, she held the displays by putting both hands underneath them. She thus had no hand free to steady herself. Because of their size, she also had an impaired view of the steps which she was descending. In the event, she missed her footing and fell, and, in

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1 The appellant, however, did not give very definite evidence about their size. [However, the same sized sheets were exhibited]

2 In her evidence, she spoke, variously, of carrying 'a couple on top of each other'; and 'three to four probably'.

doing so, suffered injury. In performing this task, the appellant worked alone. She thus had no option of, for instance, unpinning the displays and handing them to a co-worker before descending the steps. By contrast, when she was putting the displays up, the children would hand them to her whilst she was on the steps.

9. From Digby AJA at [206]-[210], [215]-[219]:

The appellant gave evidence that when the stepladder was in use it was necessary to step up forwards and step down backwards; she did not want to damage the displays that had been attached to the pin board so she stacked them on top of each other and held them in front of her body whilst she stepped back down the ladder; the cardboard buckled a little bit in the middle; because they were in front of her she 'couldn't literally see down past them', and 'just went cautiously and tried to feel for the ladder, the step as I went. Each time, I didn't go fast, I was always going slow enough to feel for it, but this time I missed'.

In answers to interrogatories the respondent identified two Manual Handling Risk Assessments for hanging artwork and paper and cardboard displays, one of which included the following:

MANUAL HANDLING RISK ASSESSMENT (17)				
Location: Classrooms & hallways			Job/Task: Hanging paper & cardboard displays	
	Task/process steps	Repetitive or sustained awkward posture	Repetitive or sustained movement	Handling loads that are unstable, unbalanced or difficult to move
A	Climbing ladders to hang light displays	✓	✓	✓
Risk Assessment				
		Yes/No	Briefly explain each finding	
5	Rate task as high, medium or low risk.	Medium		
Risk Control Recommendations				
List in order based on hierarchy of controls (see below)				
1. Install a pulley system.				

2.	Mark maximum height that posters etc can be placed on walls.	
3.	Design mechanical aids to place art work — eg coat hanger on pole to reach hooks or wires.	
4.	Advise staff to use suitable ladder, not chairs/tables etc.	
5.	Provide documented SWP instructions on how to use pulley system.	
6.	Provide information, instruction and supervision to enforce above.	
Control hierarchy-	1.	Alter workplace or environment. 2. Alter system of work. 3. Change the objects used. 4. Use mechanical aids. 5. Provide information, instruction & training (If 1-4 not practicable).

The Risk Assessment did not include, in the Risk Control Recommendations, any recommendation to ensure that if the manual handling task concerned required both hands to stabilise the load being handled then an assistant should be available to enable the load to be passed to that assistant, while the person handling the load was standing securely on the platform; further, there was no evidence at trial of any hazard identification process under the Regulations, or otherwise, identifying the need for, or recommending, the system of work summarised in the last preceding paragraph.

10. The respondent's Risk Assessment or Risk Control Recommendations, set out above, did not identify, as a separate or relevant task, that of removing displays from a wall on which they had been hung. They did, however, show that the task of hanging displays had been identified as a hazardous manual handling task.

11. By Amended Writ filed 20 September 2013 the appellant sought to recover damages for her injury from the respondent for negligence and breach of statutory duty, constituted by a breach of the *Occupational Health & Safety Regulations* 2007, in particular regulations 3.1.1, 3.1.2 and 3.1.3. The particulars of negligence included breach of the regulations.

12. The matter came on for hearing in the County Court on 25 August 2014 before a judge and a jury. After the conclusion of the evidence of the appellant, the trial judge proposed that he "determine the first issue, that is, whether the regulations themselves are applicable" [45] and [55] and after argument, the trial Judge ruled that although there was manual handling, it was not hazardous manual handling, that the regulations did not apply to the circumstances of the appellant's injury, and that her case in reliance on them could not be put to the jury, see at [69]-[72]. The trial judge was asked to review his ruling after the evidence had been given, but he refused to do so, see at [88]-[94].

13. The matter then proceeded as a case of negligence only. On 2 September 2014 the jury delivered a verdict that there was no negligence of the respondent which was a cause of injury, loss or damage to the appellant. In accordance with the jury verdict the trial Judge entered judgment for the respondent and ordered the appellant to pay the respondent's costs on County Court scale.

Part VI: Argument

Errors alleged:

14. The majority wrongly held that although the injury which the appellant had suffered was a musculoskeletal disorder as defined, that is, an injury that arose in whole or in part from manual handling in the workplace, and that "there was evidence fit to go to the jury that the load being carried by the appellant was unstable or unbalanced (or, possibly, difficult to grasp or hold)" (majority at [133], see also Digby AJA at [353] (thus making the task in which she was engaged was a hazardous manual handling task) the risk of the injury was not "a risk of a musculoskeletal disorder associated with a hazardous manual handling task affecting an employee", within the meaning of regulation 3.1.2, because the words "associated with" in that regulation required a close connection between the activity and the anticipated risk of harm: [143];
15. The majority wrongly held that the manual handling regulations are directed towards activities which require the application of force in the course of the particular activity and thus result in a risk of injury, that is, that they apply only to risks of injury from the application of the force involved in the activity: [147]-[148] ;
16. The majority wrongly held that in the present case the risk of harm from the activity only assumed that character because the appellant sustained injury, and that it was sustained only in a manner tenuously connected with a workplace activity: [143];
17. Although the majority considered at [146] that on the evidence the carrying of the displays had a causative relationship with the appellant's fall, either because the displays obscured her vision of the steps, for which reason she missed her footing, or because using both hands to handle the displays she could not steady herself, most particularly when she lost her footing, it wrongly held that such a connection could not satisfy the relationship between risk and activity which is required by regulations 3.1.2. or 3.1.3: [146]
18. The majority wrongly held that in the circumstances alleged by the appellant, the risk of the injury which she had suffered was not one which engaged regulation 3.1.2 of the *Occupational Health and Safety Regulations* 2007.

Submissions

19. Beginning first with the relevant parts of the *Occupational Health and Safety Regulations* 2007, regulation 3.1.2 is as follows:

> **Control of risk**
>
> (1) An employer must ensure that the risk of a musculoskeletal disorder associated with a hazardous manual handling task affecting an employee is eliminated so far as is reasonably practicable.
>
> (2) If it is not reasonably practicable to eliminate the risk of a musculoskeletal disorder associated with a hazardous manual handling task affecting an employee, an employer must reduce that risk so far as is reasonably practicable by— (a number of relevant matters are set out).

20. Combining the relevant definitions in regulation 1.1.5, a **musculoskeletal disorder** is an injury, illness or disease that arose in whole or in part from an activity requiring the use of force exerted by a person to lift, lower, push, pull, carry or otherwise move, hold or restrain any object (**manual handling),** and that such activity is **hazardous manual handling** if (inter alia) it has the characteristic of manual handling of unstable or unbalanced loads or loads which are difficult to grasp.

21. Applying these definitions to the facts of the present case and the findings, the appellant's injury is a musculoskeletal disorder, as it arose from an activity found to be manual handling. This was not the subject of any dispute. This activity was also hazardous manual handling because it was within one of the descriptions in the definitions, see at [116]-[118] and [340]. Regulation 3.1.2 requires that if a task is a hazardous manual handling task, then the risk of injury, illness or disease associated with the task must be eliminated so far as reasonably practicable. By the use of the definite article the regulation proceeds on the basis that the activities identified as hazardous and requiring control of risk will have a risk (of some sort) associated with them. A risk of injury illness or disease will exist where there is a possibility of such occurring. See *Orbit Drilling Pty Ltd v The Queen* [2012] VSCA 82 at [73]:

> "More fundamentally, an employer's duty under the Act is to ensure that employees are not exposed to risks, rather than to prevent a particular accident. As Harper J said in *Holmes v R E Spence & Co Pty Ltd*:
>
> [T]he question in cases such as the present is not whether the detail of what happened was foreseeable, but whether accidents of some class or other might

conceivably happen, and whether there is a practicable means of avoiding injury as a result. Here, such a practicable means of avoidance was available.

This is a matter of fact. Whether that risk is associated with some matter is again a matter of fact. The occurrence of an injury, illness or disease may expose the risk, even if not previously perceived: See *DPP v Coates Hire Operations Pty Ltd* [2012] VSCA 131 at [73]:

> "With OHS offences of the conventional risk-based kind, the consequences of the company's safety breach are generally viewed as of little relevance to the assessment of objective seriousness. When an accident occurs, it is not the accident itself which constitutes the offence but, rather, the failure of the employer to ensure (so far as reasonably practicable) that its employees were not exposed to risk. It is the extent of that failure which determines the gravity of the offence. The occurrence of an accident, and the sustaining of injuries by an employee, may nevertheless provide relevant evidence of the existence of the risk to health and safety, and of the seriousness of that risk."

See also *Cahill v State of New South Wales (Department of Community Services) (No 3)* [2008] 182 IR 124 at [295].

22. All members of the Court of Appeal considered that there was evidence that the applicant was or was arguably engaged in manual handling (majority at [109] – [111]) and also in a hazardous manual handling task (majority at [116]-[118] and Digby AJA at [340]). At [126] the majority considered that the applicant was engaged in manual handling essentially for the reasons given by the judge, identified at [109] as being "that the term manual handling should be construed to embrace the entire activity in which the applicant was engaged proximately to the time at which she suffered injury. That is, the activity involved, inter alia, lifting and carrying the displays down the steps, such activity involving 'use of force' sufficient to satisfy the definition of the term manual handling. His Honour so concluded although, as he put it, '[t]here is no doubt, on the evidence, that the work being performed by [the applicant] is characterised as particularly light'." The task was one of hazardous manual handling, because "assuming that what the applicant was then doing involved manual handling, there was evidence that it involved handling an unstable load and, possibly, one that was difficult to hold. In that connection, it was immaterial that the load was unquestionably light."
23. At [133] the majority stated that "If one were to stop there, upon the conclusion which we have reached that there was evidence fit to go to the jury that the load being carried by the

appellant was unstable or unbalanced (or, possibly, difficult to grasp or hold), it could be said that Regulation 3.1.1 was potentially engaged." The majority then stated that "the question which then arises is what is comprehended, in Regulation 3.1.2, by 'the risk of a musculoskeletal injury *associated with* a hazardous manual handling task'?"

24. The answer to this question appears to have been given at [143] where the majority stated that "We have kept to the forefront in our considerations the fact that the Act and the Regulations are concerned with workplace safety, and in that connection with the identification and elimination or alleviation of risks to health arising from workplace activities. But it is in our opinion consistent with that purpose that the Regulations should be construed to require a close connection between the activity and the anticipated risk of harm. Were it otherwise, taking the present case as an example, an employer would potentially face the prospect of both civil and criminal liability for failing to identify and act upon a risk which only assumed that character because an employee sustained injury in a manner tenuously connected with a workplace activity".

25. As to [143], the following submissions are made:

    a) the meaning (or application) given by the majority was not the plain and ordinary meaning of "associated with", but one which was more limited. The plain and ordinary meaning includes "accompanying" or "connected with" or "together with", see *Macquarie Dictionary* and *The Shorter Oxford English Dictionary*. There is no valid reason for holding that any lesser meaning or application should be given to the words. To the extent that the words involve matters of degree, the beneficial nature of the legislation requires that a wider, rather than a lesser, meaning or application be given, as workplace safety is a matter which requires the remedial approach to statutory construction referred to by Digby AJA at [281], [282], [284, and at [288]. The remedial nature of occupational health and safety legislation requires that it be construed "so as to give the fullest relief which the fair meaning of its language will allow", per Isaacs J in *Bull v. Attorney-General for New South Wales* (1913) 17 CLR 370 at 384. See also *R v ACR Roofing Pty Ltd R v ACR Roofing Pty Ltd* (2004) 11 VR 187 at 203, *R v Irvine; DPP v Dynamic Industries Pty Ltd; DPP v Irvine* [2009] VSCA 239 at [90];

    b) the limited meaning given by the majority is not required by the legislative text, as there is no context which would limit the meaning to something less than the ordinary meaning. The limited meaning given is not consistent with the objects of the Act and of the regulations, and is indeed contrary to them, as it leaves a possibly large area of risk of injury free of regulation, not only in respect of manual handling, but also in the

other regulations which contain the words "associated with", such as Chapter 4, concerning hazardous substances and materials.

c) Further, the construction decided on by the majority appears to be influenced by a view of what the majority considered as the appropriate scope of the legislation, contrary to the principles referred to in the *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] 248 CLR 378 at [23]-[30], and in any event is difficult to apply, because what risks are "closely associated" with an activity, and which are not?

d) the view of the majority that a close connection is "consistent with" the purposes of the Act and regulations is not supported by any reasoning. The purposes of the Act and of the regulations, set out at sections 2 and 4 of the Act and regulation 1.1.1 of the regulations are so widely expressed as to be incompatible with the limited meaning adopted;

e) The decision that the "associated with" requires a "close" connection means that the majority considered that any lesser association than "close" is insufficient. One basis of the reasoning of the majority here appears to be that because a tenuous association is too strict a requirement to have been intended, the opposite (close association) was the intended meaning. It is submitted that this is not a logical conclusion. Also, there are authorities in New South Wales in the occupational health and safety context which would exclude remote or speculative risks, see the discussion in *Cahill v State of New South Wales (Department of Community Services) (No 3)* (2008) 182 IR 124 at [223] and following. Whether or not it is correct that such risks are excluded, either view is inconsistent with a close connection being required between risk and activity;

f) Another basis of the reasoning of the majority was that a limited meaning should be given to the words "associated with" because of the potential prospect of civil and criminal liability of an employer. It is submitted that the objects of the Act and of the regulations are incompatible with, or do not allow, a construction being given to the words "associated with" limited because of the potential prospect of civil or criminal liability of an employer. The criminal liability of an employer is provided for in order to ensure that an employee receives the protections which the legislation provides for. This view has been stated in many sentencing cases, in the context of deterrence. See, for example, *Capral Aluminium Ltd v Workcover Authority of New South Wales* (2000) 49 NSWLR 610 at 643 [73]:

"Although general deterrence and specific deterrence have differing purposes or

aims, the varying aims of deterrence are particularly relevant in occupational health and safety prosecutions in light of the objects and terms of the Act. As Hungerford J in *Fisher v Samaras Industries Pty Ltd* (1996) 82 IR 384 at 388 said:"... the fundamental duty of the Court in this important area of public concern ...[is] to ensure a level of penalty for a breach as will compel attention to occupational health and safety issues so that persons are not exposed to risks to their health and safety at the workplace.""

and *DPP (Vic) v Coates Hire Operations Pty Ltd* [2012] VSCA 131 at [79]:

"For offending of this kind, general deterrence is also a consideration of great importance. In *Orbit Drilling*, this Court endorsed the view of the Industrial Commission of New South Wales in Court Session, that the fundamental duty of the Court in this important area of public concern ... [is] to ensure a level of penalty for a breach as will compel attention to occupational health and safety issues so that persons are not exposed to risks to their health and safety at the workplace."

On the basis of the matters mentioned above, the potential criminal liability of an employer cannot have a lessening effect on the meaning of the words of the regulations;

g) Further, modern authority allows the consideration of potential criminal liability to have no, or little, effect, in the construction of legislation of the present sort, see *The Queen v ACR Roofing Pty Ltd* (ante) at [43] (per Nettle JA):

"Reference was made in the course of argument to the penal nature of s.21 and it was submitted on behalf of A.C.R. that if there be any ambiguity about the meaning of the section, the ambiguity is to be resolved in favour of the subject. In a sense that goes without saying. That rule may have lost much of its importance in modern times, but it remains that if the meaning of a statute is truly ambiguous or doubtful the ambiguity or doubt must be resolved in favour of the offender. It is, however, also a recognised principle of statutory construction that legislation which is concerned with furthering industrial safety is to be construed "so as to give the fullest relief which the fair meaning of its language will allow", and the High Court has said that where the rule requiring strict construction of penal statutes collides with the need to construe industrial safety legislation effectually, the latter tends to prevail. As it was expressed by the majority in *Waugh v Kippen*[3]:

[3] (1986) 160 C.L.R. 156 at pp.164-5

"[Where] the two principles of interpretation ...come into conflict...the court must proceed with its primary task of extracting the intention of the legislature from the fair meaning of words by which it has expressed that intention, remembering that it is a remedial measure passed for the protection of the worker. It should not be construed so strictly as to deprive the worker of the protection which Parliament intended that he should have...In such a context the strict construction rule is indeed one of last resort. Furthermore, the process of construction must yield for all purposes a definitive statement of the incidence of an obligation imposed on the employer.

The legislature cannot speak with a forked tongue. Although the standard of proof applicable to criminal proceedings for a breach of the obligation will differ from that applicable to civil proceedings and the law may provide specific defences by way of answer to a prosecution which have no relevance to civil proceedings (as in *Sovar v. Henry Lane Pty. Ltd.* (1967) 116 C.L.R. 397), the elements that make up the obligation will be the same in each case. For example, in the present case one could not conclude in favour of an objective criterion of the likelihood of a risk of injury in the context of a criminal proceeding and a subjective criterion for the purposes of a civil action."

h) Parliament clearly intended that an employee have the fullest protection that the fair meaning of the words "associated with" allows, and in particular did not intend that that protection be limited by any unexpressed qualification to the meaning that those words would ordinarily have;

26. As to the "use of force" issue, at [147]- [149] the majority approved of the following sentences from from the reasons for judgment of J Forrest J in *Lindsay-Field v Three Chimneys Farm Pty Ltd* 2010 [VSC] 436 at [104]:

> "In any event, I do not accept that this activity is of the type intended to be covered by the Regulations. The objective of the Regulations, I think, is directed towards activities (and, particularly repetitive actions) which require the application of force in the course of the particular activity (be it lifting, pushing, pulling or holding) and thus result in a risk of injury."

27. As to [147]-[149], the following submissions are made:

a) What the reasons of the majority do is to hold that the manual handling regulations apply only to risks of injury from the application of force involved in the particular

hazardous manual handling task. The effect of this conclusion is to read regulation 3.1.2 as meaning: "An employer must ensure that the risk of a musculoskeletal disorder associated with the application of force in a hazardous manual handling task affecting an employee is eliminated so far as is reasonably practicable". This is not what the regulation provides. The regulation requires only that the risk be associated with the task. A risk of injury from the application of force in a task is only one way in which a risk may be associated with a task. The underlined words are not in the regulation, and the decision of the majority has added words to the regulation which its purpose does not require.

b) The only relevance of the application of force is that it is a matter which the regulations requires to identify a task as being one of manual handling. Once a task has been identified as being manual handling, then regulation 3.1.2 applies if there is a risk of a musculoskeletal disorder (i.e. an injury illness or disease arising from that task) and the risk is associated with a hazardous manual handling task. The inclusion of risks of illness or disease supports this submission, as they are expansive of the scope of the protection given by the regulations. The requirement of the application of force does not define, or limit, the meaning of "associated with". The majority was wrong in holding that it did.

c) The majority has in effect changed the phrase "the risk associated with the task" (which is what the regulation provides) to "the risk resulting from the application of force in performing the task". It is submitted that this is an unwarranted limitation on the natural meaning of the words of the regulation.

28. On the evidence given or on the facts of the appellant's case as alleged, the activity engaged in by the appellant in the task of removal was detaching intact displays from their vertical plane on a classroom wall whilst standing on the top step of a stepladder, moving the intact displays to a horizontal plane, supporting them with both hands underneath, then descending the stepladder backwards, whilst still supporting the displays horizontally with both hands underneath. The displays flexed or sagged in the middle, being made of thin card material, and their holding and support required attention by the appellant. Whilst descending the steps the displays impeded the appellant's vision of the steps, and left her with no free hand with which to support herself. The appellant's impeded vision and /or her lack of support in the course of descending with the display caused her to miss her step and fall, injuring her knee. The risk of an injury clearly was associated with the appellant's hazardous manual handling task. Indeed, if necessary, such risk was also closely connected

with the task. On any reasonable view, there was a risk that a person performing that task could misstep and suffer an injury. Moving backwards, being unsighted and being unsteady whilst engaged in tasks are clearly matters which in may result in injury. No great analysis is required to consider that risk of injury is "associated with" these circumstances, simply as a matter of fact.

Notice of Contention

29. The respondent has served a Notice of Contention giving notice that it wishes to contend that the decision of the Court below should be confirmed on the ground that the Court below erroneously decided or failed to decide that regulations 3.1.1, 3.1.2 or 3.1.3 did not confer a private right of action on the appellant. The respondent did not make any such submission, or raise any such issue, in the County Court or in the Court of Appeal, and must be taken to have decided not to do so. The appellant will make any necessary submissions on the issue in her Reply.

Part VII: Legislation

30. *Occupational Health and Safety Act* 2004, sections 2 and 4.

Occupational Health and Safety Regulations 2007, regulations 1.1.1, 1.1.5, 3.1.1, 3.1.2, 3.1.3 and 4.1.25.

The above provisions are attached as an annexure. They are as they existed at the relevant time, and are still in that form at the date of the making of these submissions.

Part VIII: Orders Sought

31. The appellant seeks the following orders:

    1. the appeal be allowed;
    2. the orders of the Court of Appeal be set aside and that in lieu thereof it be ordered that the appeal to the Court of Appeal be allowed, and that the matter be returned to the Court of Appeal to be dealt with it in accordance with decision of this Court.
    3. An order that the respondent pay the appellant's costs of the appeal to this Court, and of the appeal to the Court of Appeal.
    4. Such further or other order or relief as this Court deems appropriate.

Part IX: Time

32. It is estimated that 1.5 hours will be required for the presentation of the appellant's oral argument on her appeal, and 2.25 hours in all if the Notice of Contention is pursued.

Dated: 29 January 2016

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LEGISLATION ANNEXURE TO APPELLANT'S SUBMISSIONS

OCCUPATIONAL HEALTH AND SAFETY ACT 2004

2.Objects

(1) The objects of this Act are—

(a) to secure the health, safety and welfare of employees and other persons at work; and

(b) to eliminate, at the source, risks to the health, safety or welfare of employees and other persons at work; and

(c) to ensure that the health and safety of members of the public is not placed at risk by the conduct of undertakings by employers and self-employed persons; and

(d) to provide for the involvement of employees, employers, and organisations representing those persons, in the formulation and implementation of health, safety and welfare standards—

having regard to the principles of health and safety protection set out in section 4.

(2) It is the intention of the Parliament that in the administration of this Act regard should be had to the principles of health and safety protection set out in section 4.

4. The principles of health and safety protection

(1) The importance of health and safety requires that employees, other persons at work and members of the public be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances.

(2) Persons who control or manage matters that give rise or may give rise to risks to health or safety are responsible for eliminating or reducing those risks so far as is reasonably practicable.

(3) Employers and self-employed persons should be proactive, and take all reasonably practicable measures, to ensure health and safety at workplaces and in the conduct of undertakings.

(4) Employers and employees should exchange information and ideas about risks to health and safety and measures that can be taken to eliminate or reduce those risks.

(5) Employees are entitled, and should be encouraged, to be represented in relation to health and safety issues.

PART 3—GENERAL DUTIES RELATING TO HEALTH AND SAFETY

Division 1—The Concept of Ensuring Health and Safety

s. 20

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.

OCCUPATIONAL HEALTH AND SAFETY REGULATIONS 2007

1.1.1 Objectives

The objectives of these Regulations are—

(a) to further the objects of the **Occupational Health and Safety Act 2004** by—

(i) providing for health and safety in relation to workplaces and hazards, activities and things at workplaces; and

1.1.5 Definitions

In these Regulations—

hazardous manual handling means—

(a) manual handling having any of the following characteristics—

(i) repetitive or sustained application of force;

(ii) repetitive or sustained awkward posture;

(iii) repetitive or sustained movement;

(iv) application of high force being an activity involving a single or repetitive use of force that it would be reasonable to expect that a person in the workforce may have difficulty undertaking;

Example

The force required to lift or otherwise handle heavy weights, to push or pull objects that are hard to move, to operate tools that require the use of 2 hands to exert sufficient force but that are designed for one hand or to operate tools that require squeezing of grips that are wide apart.

r. 3.1.3

(v) exposure to sustained vibration;

(b) manual handling of live persons or animals;

(c) manual handling of unstable or unbalanced loads or loads that are difficult to grasp or hold;

manual handling means any activity requiring the use of force exerted by a person to lift, lower, push, pull, carry or otherwise move, hold or restrain any object;

CHAPTER 3—PHYSICAL HAZARDS

PART 3.1—MANUAL HANDLING

3.1.1 Hazard identification

(1) An employer must, so far as is reasonably practicable, identify any task undertaken, or to be undertaken, by an employee involving hazardous manual handling.

Notes

1 Act compliance—section 21 (see regulation 1.1.7).

2 Hazardous manual handling is defined in regulation 1.1.5).

(2) An employer may carry out a hazard identification under subregulation (1) for a class of tasks rather than for individual tasks if—

(a) all the tasks in the class are similar; and

(b) the identification carried out for the class of tasks does not result in any person being subject to any greater, additional or different risk to health and safety than if the identification were carried out for each individual task.

3.1.2 Control of risk

(1) An employer must ensure that the risk of a musculoskeletal disorder associated with a hazardous manual handling task affecting an employee is eliminated so far as is reasonably practicable.

Note

Act compliance—section 21 (see regulation 1.1.7).

(2) If it is not reasonably practicable to eliminate the risk of a musculoskeletal disorder associated with a hazardous manual handling task affecting an employee, an employer must reduce that risk so far as is reasonably practicable by—

(a) altering—

(i) the workplace layout; or

(ii) the workplace environment, including heat, cold and vibration, where the task involving manual handling is undertaken; or

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(iii) the systems of work used to undertake the task; or

(b) changing the objects used in the task involving manual handling; or

(c) using mechanical aids; or

(d) any combination of paragraphs (a) to (c).

Notes

1 Act compliance—section 21 (see regulation 1.1.7).

2 Under sections 27 to 30 of the Act, designers of plant, buildings or structures (or parts of buildings or structures) and manufacturers and suppliers of plant or substances must ensure, so far as is reasonably practicable, that the plant, substance, building or structure (or part) is designed, manufactured or supplied (as the case may be) to be safe and without risks to health, including the risk of musculoskeletal disorder.

(3) If it is not reasonably practicable for an employer to reduce the risk of a musculoskeletal disorder associated with a hazardous manual handling task in accordance with subregulation (2), the employer may control that risk by the use of information, instruction or training.

Notes

1 Act compliance—section 21 (see regulation 1.1.7).

2 An employer may only rely solely or primarily on the use of information, instruction or training to control a risk if none of the measures set out in subregulation (2) is reasonably practicable.

(4) Without affecting the generality of subregulations (1), (2) and (3), an employer, when determining any measure to control any risk of musculoskeletal disorder, must address the following factors—

(a) postures; and

(b) movements; and

(c) forces; and

(d) duration and frequency of the task; and

(e) environmental conditions including heat, cold and vibration that act directly on a person undertaking the task.

Notes

1 Act compliance—section 21 (see regulation 1.1.7).

2 Sections 35 and 36 of the Act set out the duty of the employer to consult with employees, including involving the health and safety representative (if any). (See also regulation 2.1.5).

3.1.3 Review of risk control measures

(1) An employer must ensure that any measures implemented to control risks in relation to musculoskeletal disorders are reviewed and, if necessary, revised—

(a) before any alteration is made to objects used in a workplace or to systems of work that include a task involving hazardous manual handling, including a change in the place where that task is undertaken; or

(b) before an object is used for another purpose than that for which it was designed if that other purpose may result in an employee carrying out hazardous manual handling; or

(c) if new or additional information about hazardous manual handling being associated with a task becomes available to the employer; or

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(d) if an occurrence of a musculoskeletal disorder in a workplace is reported by or on behalf of an employee; or

(e) after any incident occurs to which Part 5 of the Act applies that involves hazardous manual handling; or

(f) if, for any other reason, the risk control measures do not adequately control the risks; or

(g) after receiving a request from a health and safety representative.

Note

Act compliance—section 21 (see regulation 1.1.7).

CHAPTER 4—HAZARDOUS SUBSTANCES AND MATERIALS

PART 4.1—HAZARDOUS SUBSTANCES

4.1.24 Control of risk

(1) An employer must eliminate so far as is reasonably practicable any risk associated with hazardous substances at the employer's workplace.

Note

Act compliance—sections 21 and 23 (see regulation 1.1.7).

(2) If it is not reasonably practicable to eliminate a risk associated with hazardous substances at the employer's workplace, the employer must reduce that risk, so far as is reasonably practicable, by—

(a) substituting the substance with—

(i) a substance that is less hazardous; or

(ii) a less hazardous form of the substance; or

(b) isolating employees from the source of exposure to the hazardous substance; or

(c) using engineering controls; or

(d) combining any of the risk control measures in paragraphs (a), (b) and (c).

Note

Act compliance—sections 21 and 23 (see regulation 1.1.7).

(3) If an employer has complied with subregulations (1) and (2) so far as is reasonably practicable and a risk associated with a hazardous substance at the workplace remains, the employer must use administrative controls to reduce the risk, so far as is reasonably practicable.

Note

Act compliance—sections 21 and 23 (see regulation 1.1.7).

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(4) If an employer has complied with subregulations (1), (2) and (3) so far as is reasonably practicable and a risk associated with a hazardous substance at the workplace remains, the employer must control the risk by providing appropriate personal protective equipment to employees at risk.

Note

Act compliance—section 21 (see regulation 1.1.7).

4.1.25 Review of risk control measures

(1) An employer must ensure that any measures implemented to control risks in relation to hazardous substances in the workplace are reviewed and, if necessary, revised—

(a) before any alteration is made to systems of work that is likely to result in changes to risks associated with hazardous substances in the workplace; or

(b) if the employer receives advice from a registered medical practitioner under regulation 4.1.30(3)(c)(i) that adverse health effects have been identified by the health surveillance; or

(c) after any incident occurs to which Part 5 of the Act applies that involves a hazardous substance in the workplace; or

(d) if, for any other reason, the risk control measures do not adequately control the risks; or

(e) after receiving a request from a health and safety representative.

Note

Act compliance—sections 21 and 23 (see regulation 1.1.7).