Good afternoon. My name is Kristi Riedel. I would like to start by acknowledging the traditional custodians of the land upon which we meet today, the Jagera and the Turrbal People. I would like to pay my respects to their elders past, present and emerging.

Thank you so much for joining me this afternoon in relation to this seminar. I appreciate that you are already busy, particularly at this time of the year so I am really grateful that you have chosen to login or to join me this afternoon in this discussion about work health and safety prosecutions.

My plan for this afternoon is to do a few different things. I would like to start by giving you a bit of an overview of the legislative framework. I would then like to talk about some of the procedural matters to keep in mind if you are running one of these or defending one of these prosecutions. Then I would like to finish up with some discussions about cases because, let's face it, that is the most interesting bit often.

My involvement in these types of matters has been a result of a serendipitous series of events. I was involved in defending a prosecution for a commission of an offense against the *Electrical Safety Act* earlier this year. The way I became involved in it was not particularly unusual. I initially acted for an interested person in a coronial inquest that had been held a couple of years ago. My client, the interested person, was the owner of a commercial property here in Brisbane. He had a basement at the property which had a tendency to flood when it rained quite a lot. Unfortunately, a person was dead in that basement. To provide you with some context about this particular basement and the matter in general, what I have done, just to liven things up a little bit, is I have extracted some photographs that are on the public record and were included in the coroner's findings of decisions.

[Slide 3] The first one that I have got there is just to give you some context of the kind of location we were dealing with. This is a photograph of the basement and one would enter the basement by the descending a flight of stairs, it is very dimly lit. When you got to the bottom of the stairs you were met by all of this old equipment. As you can see in the photograph, there is a table there in foreground. On that table are a couple of pieces of equipment that are coloured blue. That particular contraption was of real interest during the inquest, it was an old compressor unit. Some time ago, the premises were used as a butchery. That compressor unit was used to power the refrigerators. As I mentioned earlier, the basement was subject to flooding and that was countered by the use of bilge-style pumps. This is a photo that is again taken from the coroner's findings of the decision of one of those pumps. They would come on automatically when the basement reached a certain level of water. On this particular occasion the pumps had stopped working and the water in the basement had risen quite high, I think it was about a meter or at least 30 centimetres in depth. My client had asked the deceased, who was related to my client by marriage, and was a handyman as well, to go

and have a look at the pumps and try and work out why they had stopped working. The deceased did so. He was later found dead beside the blue compressor pumps on the table that I showed you initially.

[Slide 4] This is a close up of that compressor unit. The general thought was, prior to this person dying in the basement, was that this blue compressor unit had been decommissioned so that there was no power connected to it. However, subsequent testing that was performed in the context of the investigation that followed the death found that this unit could become enlivened due to the presence of two or three phases of power still being connected to it. If one turned an isolator switch that was attached on the wall to this unit, if they turn that on, then this particular item would become live.

Another issue with it was the fact that the earthing to this particular unit was faulty, so it meant that if someone had turned on the isolator switch and that the unit had become energised, if you then touch the unit you could sustain an electric shock. The coroner found that the deceased had turned on this isolator switch, and turned it off as well. In the course of doing so, he came into contact with an exposed conductive part of the unit and he sustained an electric shock and that caused his demise.

The coroner's finding was delivered on 8 August 2019. On 8 April 2020, my client was served with a Complaint and Summons alleging that he breached s 38 of the *Electrical Safety Act*. The prosecution of that offense subsequently ensued. I will come back to that and talk about it a little bit later.

There are just a couple of things that I want to mention in passing. Firstly, I want to point out that the evidence that emerged in the coronial inquest formed the basis for the prosecution, certainly the findings were relevant as well. It is really important to keep in mind if you are acting for an interested person in a coronial inquest that there is that potential for a prosecution to perhaps emerge in the future. One should be mindful of the provisions of the *Coroner's Act* that relate to incriminating evidence.

It is also worth pointing out that sometimes a person who is being prosecuted might have a policy of insurance in place that offers them some level of cover. It is not going to provide cover for any fines that are ultimately imposed by a finding of guilt and a prosecution in which a penalty is imposed but it might provide some level of cover for defence costs and that can be quite valuable.

LEGISLATIVE FRAMEWORK - WORK HEALTH AND SAFETY PROSECUTIONS

[Slide 6] As I mentioned, the prosecution that I was involved in was in relation to the *Electrical Safety Act*. While I have titled this presentation 'Work Health and Safety Prosecutions', and I am going to focus on that primarily, I also want to have regard to the other sort of bundle of

acts such as the *Electrical Safety Act*, the *Coal Mining Safety and Health Act*, and the *Safety in Recreational Water Activities Act*. They are all part of an attempt, and particularly the *Work Health and Safety Act,* to harmonise work health and safety laws throughout Australia.

The acts are aimed at eliminating or reducing risks in the workplace. I have put them in the relevant sections setting out the purpose of the act, in relation to the *Coal Mining Act* the relevant provisions in s 6.

In terms of each of the acts, with regards to the *Electrical Safety Act*, it is directed at eliminating human costs to individuals, families and communities of death, injury and destruction that can be caused by electricity. It is really focused on preventing persons from being killed or injured, and property being destroyed or damaged.

The *Work Health and Safety Act*, it is part of, as I have mentioned, of a balanced and nationally consistent framework aimed at securing the health and safety of workers and workplaces by protecting workers and other persons against the risk of harm to their health, safety and welfare through the elimination or minimisation of risks associated with work or arising from particular substances or plant.

The *Coal Mining Act*, that is focused upon protecting the health and safety of persons at coal mines and persons who might be affected by coal mining operations.

The *Water Act,* that is focused on ensuring health and safety of persons to whom recreational water activities are provided. It is written looking again at minimising those risks. It operates in conjunction to the *Work Health and Safety Act* which regulates diving and snorkelling.

It is worth noting that there is a national model *Work Health and Safety Act*, it provides a foundation for the other work health and safety acts that are enacted across Australia.

There are many similarities between the states. One of the biggest changes in recent years has been the introduction of industrial manslaughter charges, those are not uniform across the states. Some states do not have those provisions yet within their legislative framework but there are a number of similarities with regards to the duties imposed and the type of penalty provisions for breaching those duties. Those other state pieces of legislation are quite useful when it comes to interpreting the acts. But when it comes to looking at the types of sentences imposed, that sort of area of law is state specific, it is not uniform and the cases provide limited guidance in that regard.

WHAT IS "DUTY OF CARE" IN TERMS OF THE *WORK HEALTH AND SAFETY ACT*?

[Slide 7] As I have just mentioned, the acts all impose a primary duty, that is a duty of care. If we take the *Work Health and Safety Act* for starters, that duty is imposed upon a person who is conducting a business or an undertaking, it also extends to workers that they have engaged or workers who are carrying out work that is influenced or directed by the person. That duty requires the person to ensure so far as is reasonably practicable that health and safety is not put at risk from the work that is carried out. They must ensure as far as reasonably practicable the provision of maintenance of a number of things such as a safe work environment that has no risk to health and safety, safe plants and structures, safe systems of work, safe use handling and storage of plant structures and substances, provision of adequate facilities for welfare of workers, information training, instruction and supervision, and the monitoring of help. Those duties are also expanded upon in s 20-26(a) of the *Work Health and Safety Act*. They are also extended to other people involved with the entity carrying on the undertaking. So, s 27 extends to officers, s 28 to workers, and s 29 to persons at the workplace.

WHAT IS "REASONABLY PRACTICABLE" IN TERMS OF THE *WORK HEALTH AND SAFETY ACT*?

[Slide 8] The primary duty imposed is qualified by reference to what is "reasonably practicable". That term is defined in s 18 of the *Work Health and Safety Act,* it is what I am going to focus upon. It talks about looking at what is or what was at the particular time reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up relevant matters, including likelihood of hazard or risk of concern occurring, the degree of harm that might result from the hazard, what the person concerned knows or ought to know about the hazard and the ways of eliminating or minimising it, the availability and suitability of ways to eliminate or minimise the risk and the cost of doing so.

The provisions in the *Electrical Safety Act* and the *Water Act* are similar.

The *Coal Mining Act* talks about an acceptable level of risk, so it is a little bit different. It indicates that operations must be carried out so that the level of risk is within acceptable limits and as low as reasonably achievable. To decide whether something is within acceptable limits, regard is had to the likelihood of illness, injury or the severity of same.

I would hope that you will appreciate when I have talked about the "reasonably practical" definition that there are a lot of parallels there between the calculus of negligence and what we talk about in terms of looking at whether or not someone has breached a duty of care in the negligence scope.

THE *WORK HEALTH AND SAFETY ACT* - CATEGORIES OF OFFENCE & PENALTIES

[Slide 9] Contravention of the duties can lead to the commission of an offence. The slide there contains the various provisions imposing the offenses under each of the acts. We will dive into a consideration of the offences under the *Work Health and Safety Act*.

[Slide 10] S 31 creates a category 1 offence, this is the most serious offence with the exception of industrial manslaughter. In terms of the other acts, we see similarities in s 40(b) of the *Electrical Safety Act*, s 21 of the *Water Act*, and s 34 of the *Coal Mining Act*.

[Slide 11] The key part of s 33 is that it is looking at persons who have a health and safety duty and who, without reasonable excuse, engage in conduct that exposes an individual to whom that duty is owed a risk of death or serious injury or illness. *And* that person is reckless as to the risk to an individual of death or serious injury or illness.

The things to note, this provision creates an offence which is a crime and it refers to the imposition of a penalty, there are different categories of the penalties. If you are dealing with an individual who is not conducting a business or undertaking or an officer, it is a penalty of 3000 penalty units or imprisonment of five years. If one is looking at the individual conducting the business or an officer, 6000 penalty units or the imposition of a five year period of imprisonment. If we are dealing with a body corporate, we are looking at 30,000 penalty units being imposed. Obviously, those are the statute maximums and there is a whole range of possibilities underneath it. When we talk about a penalty unit, the *Penalties and Sentences Act* is relevant, particularly s 5(1)(d), that is specific to the *Work Health and Safety Act*, the *Electrical Safety Act* and the *Water Act*, it indicates that a penalty that in this context is $100. In terms of the range of fines that can be imposed for a category 1 offence, we are looking at between $300,000-3 million.

[Slide 12] Turning to s 32, this gives rise to a category 2 offence. There are parallels in s 40(c) of the *Electrical Safety Act* and s 22 of the *Water Act*.

[Slide 13] The focus with this particular section is upon a person who has a health and safety duty, their failure to comply with that duty and the fact that that failure exposes an individual to a risk of death or serious injury or illness. For a category 2 offence we do not have any reference to their being no reasonable excuse and we do not have any reference to reckless conduct. A category 2 offence, however, it is still a crime and it imposes a fine of between $150,000 up to $1.5 million, depending upon whether you are dealing with an individual or body corporate. There is also no risk of imprisonment attached to a category 2 offense.

[Slide 14] S 33 creates a category 3 offence. This is the lesser of all three of the defences available. Parallels can be seen in s 40(d) of the *Electrical Safety Act* and s 23 of the *Water Act*.

[Slide 15] When we look at this particular category of offense, still a crime, but it is the least of serious of the three. The focus really is just on whether or not there has been a failure to comply with the health and safety duty. There is no reference to exposing individuals to a risk of death

or injury or serious illness. Contravention of this particular offense will see the imposition of a penalty of between $50,000-5100,000.

[Slide 16] It is useful to bear in mind the operation of s 33(a) in the *Work Health and Safety Act*. There are parallels in the other acts as well, but this particular section makes it clear that when we are dealing with a category 2 or 3 offense the *Work Health and Safety* duties prevail over the excuses provided by s 23 or s 24 of the criminal code. Those criminal code provisions, s 23(1) is dealing with intention and motive. It essentially provides that a person is not going to be criminally responsible for an act or omission that occurs independent of their exercise of their will, or an event that they do not intend or foresee. S 24 of the Criminal Code is dealing with mistakes of fact, so if one does not act under an honest and reasonable but mistaken belief in the existence of a state of things, they are not going to be criminally responsible.

The fact that category 2 and 3 offences are subject to the duty of care, prevailing over these particular offenses or excuses, was made clear by Judge Chowdhury in *Broederlow v Commissioner of Police*.

[Slide 17] Turning to s 34 of the *Work Health and Safety Act,* this is where things get a bit interesting. This particular provision looks at the implementation of an offence of industrial manslaughter. This particular provision commenced operations on the 23 October 2017. We see similar provisions in the other acts, s 48(n) of the *Electrical Safety Act*, s 25(c) of the *Water Act,* and s 48(c) of the Coal Mining Act. It is also worth noting that the *Mineral and Energy Resources and Other Legislation Amendment Act* of 2020, which is a bit of a mouthful to say, that talks about an industrial manslaughter offense being inserted into all resources laws and it provides for the implementation of a penalty of up to $13 million for organisations or twenty years imprisonment for personnel. That commenced operation on the 1 July 2020.

[Slide 18] When we look at s 34(c), we are really focused upon either the company, so conduct engaged by the company or the person conducting the business or the undertaking. It provides for penalties up to $10 million, or period of imprisonment up to twenty years. It is not going to be covered by your insurance as industrial manslaughter is a criminal offence.

It is also worth noting, as a bit of a side step, that in New South Wales there are some provisions in the New South Wales *Work Health and Safety Act*, particularly s 272(a) and s 272(b), which expressly prohibit contracts of insurance or indemnity arrangements being entered into which effectively provide someone coverage for any liability that they might have for a monetary penalty. S 272(b) makes it an offence for a company to enter into one of those types of arrangements. That has implications not only in relation to insurance policies, but if you have a deed of indemnity that is being offered by an executive of your organisation. So, the New South Wales provisions do not expressly prohibit insuring or indemnifying legal costs incurred in the course of defending one of these prosecutions or during an investigation, that is still

something that can be provided but they do provide to all contracts of insurance or indemnity arrangements regardless of when they were entered into. So there is somewhat of a retrospective operation there.

[Slide 19] In terms of the other offence, s 34(d), this imposes the offense of industrial manslaughter in relation to senior officials and we see similarities in the s 48(o) of the *Electrical Safety Act*, s 25(d) of the *Water Act,* and s 48(b) of the *Coal Safety Act*.

[Slide 20] As I mentioned, the focus here is on senior officers. S 34(a) of the *Work Health and Safety Act* defines what that term means. If we are dealing with a corporation, it means an executive officer of a corporation, an executive officer is defined also in that provision as a person who is concerned with or takes part in the corporation's management, whether or not the person is a Director or the person's position is given the name of the Executive Officer. Otherwise, the holder of an executive position is also considered to be a senior officer, it does not matter how that position was described, the focus is whether or not they are taking part in making decisions or a substantial part of the company's operations in the person's functions.

It is also worth noting that s 34(a) also defines cause and that is obviously a term that is used in in this legislation. When we are dealing with s 34(d), it is talking about conduct that causes death if it substantially contributes to the death. It is also worth pointing out again that s 34(d) it is a crime and there is a risk of twenty years imprisonment attached to its contravention.

QLD'S 1st INDUSTRIAL MANSLAUGHTER PROSECUTION SENTENCE AGAINST INDIVIDUAL

I draw your attention, you are probably already aware of it, there is a case currently under foot against Geoffrey Owen of Owen's Electric Motor Rewinds. This particular case has been the first instance where an individual has been charged with industrial manslaughter under the *Work Health and Safety Act.* It involves a situation where the worker at Owen's Electric Motor Rewinds, where he was fatally crushed by a portable generator that was being unloaded by a forklift. It is alleged that the forklift directly flipped as a result of Mr. Owen overloading it. It is still before the court. We do not have any determination yet, as far as I am aware, but it is one of the first instances where an individual has been charged under these provisions.

As I noted a little while ago, not all of the other states and territories have introduced industrial manslaughter laws specifically but it is worth noting that in August 2021 the ACT introduced legislation to move an existing industrial manslaughter offence from its *Criminal Act* into its work health and safety legislation. It also took the opportunity to increase the penalty associated with a contravention up to $16.5 million for a body corporate.

***R v BRISBANE AUTO RECYCLING PTY LTD* [2020] QDC 113 – QLD'S 1ST INDUSTRIAL MANSLAUGHTER SENTENCE**

[Slide 21] This is one of the cases that I would like to talk to you about. You are probably familiar with it by now, it is the first industrial manslaughter sentence that has been handed down in Queensland and I think it is a pretty interesting one.

The case involved the situation where there was a fatality at the auto wrecking business conducted by Brisbane Auto Recycling. A worker, his name was Mr. Willis, was struck by a forklift that was being reversed by another worker. Mr. Willis unfortunately died eight days later. Brisbane Auto Recycling, it was in the business of purchasing motor vehicles for resale, recycling and parts, it had two directors Mr. Hussaini and Mr Karimi. Unfortunately, in the wake of Mr. Willis being struck by the forklift and investigation into that conduct, Mr. Hussaini and Mr. Karimi attempted to fabricate a different version of the incident that included assertions that Mr. Willis had fallen off the back of a truck, or he had failed to winch a car body correctly and it fell on him. Strangely though, they did this in the context of the incident being captured by CCTV footage. Mr. Willis' family pressed both directors to provide them with a copy of that footage. Upon watching it, they notified police and the two men were charged.

Mr. Hussaini admitted to the Work Health and Safety investigator that they did not have any written safety policies or procedures in the workplace. He simply said that he told workers to be safe and to look after themselves. He said that they did not have a WorkCover policy because he did not know there was any requirement to have one. The investigation that was conducted by Work Health and Safety revealed that there was no traffic management plan in place on the worksite, the driver of the forklift lift that struck Mr. Willis did not have a license and there had not been any sufficient assessment of his competency undertaken by Brisbane Auto Recycling.

As I mentioned, charges were laid so Brisbane Auto Recycling was charged with industrial manslaughter. Mr. Hussaini and Mr. Karimi were charged with category 1 offences due to their reckless conduct. It is interesting to note that they were not charged with an industrial manslaughter offence as well.

On presentation of the indictment the defendants pleaded guilty. In terms of the sentencing that subsequently ensued, the judgment was quite useful in highlighting the kinds of factors that a court is going to take into account: the usual criminal type factors, when imposing a sentence; the fact that both Mr. Hussaini and Mr. Karimi were both aged in their early 20s was relevant; the fact that the maximum penalty for an offensive industrial manslaughter committed by a body corporate was a $10 million fine was also of note in terms of the maximum penalty for reckless conduct; and a category 1 type offence committed by an individual that led to a $600,000 fine or a five year term of imprisonment.

The case also talked about the need to have regard to s 9 of the *Penalties and Sentences Act* when sentencing one of these offences and it highlighted that imprisonment is a last resort. In terms of the factors, I have already mentioned a couple, but things like the maximum penalty; the nature of the offense; how serious the offence was, including whether there was any mental physical or emotional harm done to the victim; the extent to which the offender is to blame for the offence; the offender's age, character and intellectual capacity; the presence of any aggravating or mitigating factors concerning the offender; the prevalence of the offence; how much assistance the offender has given to law enforcement agencies in investigating the offense; and any other relevant circumstances. Obviously, if there is a plea of guilty that needs to be taken to account.

In this particular matter, factors that were specifically relevant and noted by the court were the fact that they Mr. Hussaini and Mr. Karimi were at risk of being deported and the impact that a custodial sentence would have on the defendants. With regard to general and specific deterrence, and that is often the whole purpose of one of these penalties being imposed, the courts that sentences impose should make it very clear to persons conducting a business or an undertaking, and officers, that a failure to comply with obligations under the *Work Health and Safety Act* leading to a workplace fatality will result in a severe penalty.

Ultimately, the court concluded that the gravity of the offending and the moral culpability of each defendant in this instance was high. Brisbane Auto Recycling had caused the death of Mr. Willis because it failed to control the interaction of mobile plant and the workers at the workplace. It failed to effectively separate pedestrian workers and mobile plant and it failed to effectively supervise operators of moving plant and workers.

With regard to Mr. Hussaini and Mr. Karimi, they were reckless as to the risk of workers and members of the public who have access the workplace. They failed to ensure that Brisbane Auto Recycling control the interaction of mobile plant and pedestrians. They failed to ensure the business effectively separated pedestrians and mobile plants and they failed to ensure that Brisbane Auto Recycling effectively supervised operators of moving plant.

Ultimately, a penalty was imposed upon Brisbane Auto Recycling of $3 million. It is notable that that is less than a third of the maximum penalty that can be imposed. With regard to Mr. Hussaini and Mr. Karimi, they had engaged in conduct that was designed to deflect responsibility for the incident. The court said that that conduct was disgraceful. They had, however, subsequently cooperated with investigators and they entered early pleas of guilty and they were remorseful. So, they were sentenced to ten months imprisonment and their sentences were wholly suspended and convictions were recorded.

PROCEDURAL POINTS FOR WORK HEALTH AND SAFETY PROSECUTIONS

[Slide 22] In terms of some of the procedural points to bear in mind, when dealing with a prosecution under these types of statutes it is important to keep in mind that it is not a civil trial so there are going to be a number of differences that you need to take into account.

In terms of where a prosecution is going to be conducted, it will be conducted in the Magistrates Court if it is a committal in relation to AN indictable offence, if it is a category 2 or 3 offence, if it is a contravention of an enforceable undertaking, or a contravention of a civil penalty provision, or another type of offence.

If, however, it is a category 1 offence or industrial manslaughter proceeding, that is going to take place in the District Court. There are limitation periods that apply so the prosecution needs to be commenced within two years after the offence first comes to the notice of the Work Health and Safety Prosecutor or within a year of the coronial report being made in a coronial inquest. If we are dealing with a breach of an undertaking, that needs to be commenced within six months of the contravention or the contravention being learned of. With regard to a category 1 offence, however, there is a possibility to pursue it after the limitation period has ended, if fresh evidence is discovered and the court is satisfied that that evidence could not reasonably have been discovered within the limitation period.

It is really important to bear in mind that these types of offences and the duties that are contained in these acts do not give rise to a civil right of action. I often see it in pleadings in civil matters where references is made to these acts as being a basis for a civil claim. While the duties and the definition of what is reasonably practicable are useful in terms of defining or substantiating the scope of a duty of care that is owed, as I said, they do not give rise to a civil cause of action.

RESPONDING TO A CHARGE

[Slide 23] If you are in a situation where your client has been charged with contravention of one of these acts, they have got a few different options that they can turn to. They can enter:

1. an early plea of guilty and proceed straight to sentencing, that is certainly the situation that arose in the matter involving Ardent Leisure;

2. ultimately, you can attempt to negotiate with the regulator or the Office of Prosecutions and try and see if they will accept some type of undertaking. Now that won't be accepted in relation to a category 1 offence or a category 2 offence if a death is involved, or if the offense involves industrial manslaughter. In terms of what an undertaking is, it is a high-level sanction for contravention of the act. Essentially, it is a written legally binding document, a commitment to implement effective health and safety initiatives that are designed to deliver tangible benefits for workers, industry and

community. It is an alternative to a court and post sanction and it may form part of the person's work health and safety record;

3. the other option, if you do not want to do either of those two things, is to enter a plea of not guilty and to proceed to a hearing.

[Slide 24] If you choose to follow that, as I said at the outset, it is not a civil trial, there are a number of things to keep in mind. The procedural requirements are largely contained in the *Justices Act*, or in the Criminal Code. The Criminal Code is particularly relevant in terms of the disclosure requirements. They are quite different to what we see in civil jurisdiction.

Usually, there will be a directions, or a couple of directions, hearings held to implement a timetable for the matter. The directions hearings can also be used to do another number of other things. You can use them to deal with any disclosure issues, expert evidence issues, in terms of joining complaints that can be done in that context, or if there is a need to make some arrangements as to how the evidence has to be provided, whether that be by phone or video.

It is really important to make sure that the complaint is properly particularised. It needs to contain a description of the person, the property. It needs to provide details of the offence that has been committed – I will talk about a case in a moment where this was really relevant.

Another thing that is often done in the context of these types of prosecutions is the parties will agree upon a number of facts, that relates to simple offenses or breach of duty, it is an admission of fact and it is sufficient proof without any other evidence. It is often a useful way of just willowing the issues in dispute and focusing the court's attention on the specific items.

PROPERLY PARTICULARISE THE COMPLAINT - *GUILFOYLE v NIEPE CONSTRUTIONS PTY LTD* [2021] QMC 1

[Slide 25] In terms of that case I just mentioned, *Guilfoyle v Niepe Constructions*, it really highlights the importance of making sure the complaint is properly particularised. When reviewing the complaint that your client has received, the comments in this decision should be borne in mind.

The decision relates to an application to strike out a complaint under the *Justices Act*. Niepe Constructions had been charged with two offences under the *Work Health and Safety Act*. It was argued that the complaint was a nullity because it did not plead any of the essential factual ingredients of the offences that had been charged. The complaint simply said that Niepe had failed to comply with the duty imposed by s 19 of the *Work Health and Safety Act*.

Contrary to s 32, the contravention had occurred in Toowoomba, at a specified location and the date that it occurred. It did not contain any factual details under a heading such as particulars and the court said the complaint went no way towards describing the act or omission said to constitute the relevant failure, the factual matters constituting the relevant risk, or the state of affairs the appellant was said to have failed to ensure. The name of the person or the persons who were exposed to the risk was not even identified. So there were no essential factual ingredients except for the place the date and the pleading merely repeated the words of the offense creating the provision and could hardly be more general giving no guidance at all as to what the contravention actually consisted of. It was not clear from the face of the complaint the true nature of the offense other than expressing the words of the statutory provisions and it could not be said that Niepe was in no doubt as to the nature of the complaint.

The court ultimately found that the complaint was a nullity and it stuck it out. That is a really important thing to keep in mind when having a look at that document.

***WORK HEALTH AND SAFETY PROSECUTOR v KOUZOUKAS* (UNREPORTED, MAGISTRATE NOLAN, 10 JUNE 2021)**

[Slide 26] I talked at the outset about a prosecution that I was involved in this year, I will take you through that. It involved Mr. Kouzoukas, he was my client. He was charged with an offence contrary to s 40(d) of the *Electrical Safety Act*. It was alleged that he breached the duty of care that he owed pursuant to s 38.

The elements of the offence were that he was in control of electrical equipment, he had an electrical safety duty, and that was a duty to ensure that the electrical equipment was electrically safe, he had failed to comply with the electrical safety duty. Mr. Kouzoukas pleaded not guilty. We proceeded to a hearing earlier this year. We defended the charge on two bases.

Firstly, we argued that the court could not be satisfied beyond reasonable doubt that the blue compressor unit, I showed you some photos of that at the outset, that it was not electrically safe. We spent a bit of time with the electrical expert, understanding the testing regimes and what was involved and we used that to attack the expert electrical evidence that was produced by the Prosecutor. We argued that all the testing of the electrical equipment that was conducted in the course of the investigation into the death was de-energised testing. The evidence of one expert witness was that that was not sufficient, you could not make a conclusive determination as to how the equipment would operate when it was energised when you conducted de-energised testing. The magistrate accepted that argument.

We also argued that the client had eliminated or minimised the risk that it posed so far as reasonably practicable. We delved into the definition of what was electrically safe. So, s 10 of

the *Electrical Safety Act* talks about something being electrically safe if it is free from electrical risk. That means that the electrical risk has been eliminated or minimised so far as is reasonably practicable. We placed reliance upon cases that had considered the phrase "reasonably practicable". I spoke earlier about how cases from other jurisdictions can be quite useful when looking at the interpretation of the legislation. And we looked at the factors that were set out in s 28 of the ESA, the likelihood of the hazard or the risk occurring, the degree of harm, the knowledge and the ways that were available to eliminate the risk.

In the final judgment, the magistrate noted that there had not been any other incidences where people had been electrocuted. In the basement, there was no evidence to that effect. Importantly, my client's evidence was that he believed that all the equipment in the basement had been decommissioned. He had received advice from an electrician about twenty years ago to that effect. Given that he had previously entered the basement while it was flooded to pump out the water himself, that was really telling of his belief that he thought everything in the basement was electrically safe.

Ultimately, we were successful in defending the charge. The court found that Mr. Kouzoukas was not guilty. The prosecution ultimately did not discharge the burden of proof that he bore in establishing the contravention.

TAKEAWAYS

In terms of just finishing up today, this is a really interesting area of law. It is certainly developing, with different things happening in different states, particularly in the space of industrial manslaughter offense. I think it is really important if you have clients who are subject to the duties imposed by the *Work Health and Safety* regime to make sure that they appreciate that those duties have a really wide ambit, they are very broad. It is important for workplaces to make sure they have rigorous health and safety protocols in place, and the procedures as well and that they are documented, and that they have a system in place to identify potential risks and strategies to minimise those risks because if there is a prosecution that emerges, having that documentation, that evidence will most likely set one's client in good stead in terms of demonstrating that they did all that was reasonably practicable in response to the risk.

I am very grateful for you joining me this afternoon and I hope that this has been of interest and useful tool. Thank you very much. Have a good afternoon.