SENTENCES

Goondiwindi Court File No. 532/17
[redacted] *(1 x breach s 32)*

Goondiwindi File No. 533/17
[redacted] *(1 x breach s 33)*

Goondiwindi Court File No. 531/17
[redacted] *(1 x breach s 46)*

Goondiwindi Court File No. 529/17
[redacted] *(1 x breach s 46)*

I. INTRODUCTION

At the outset of proceedings, the complaint against [redacted] *(s 33)* was amended by consent, by removing number 9 of the Particulars which had previously stated:

> "9. The risk was death or serious injury to workers, including the risk of crush injuries from falling off or under the path of moving plant towed by a tractor namely the trailer"

A plea of guilty was then entered on behalf of the following defendants for a number of breaches of the *Work Health and Safety Act* 2011 ("WHSA"), in the Magistrates Court at Goondiwindi on 7 September, 2018. After lengthy submissions the matters were adjourned to today for sentence.

1. [redacted] *- (1 x breach s 32)* G'windi Court File No. 532/17
2. [redacted] *- (1 x breach s 33)* G'windi Court File No. 533/17
3. [redacted] *- (1 x breach s 46)* G'windi Court File No. 531/17
4. [redacted] *- (1 x breach s 46)* G'windi Court File No. 529/17

A "*Statement of Agreed Facts*" was tendered (Exhibit 1) at the outset, together with a bundle of documents including photographs (Exhibit 2). I was also provided with *written submissions* which each party expanded upon in their oral submissions. During the adjournment I have had the opportunity to peruse the transcript, fully consider the comprehensive submissions, the numerous cases referred, the relevant Codes of Practice, the photographs, and all other documents tendered.

It is accepted that the defendants: *were co-operative throughout the investigation; had no prior convictions for any WHSA breach; and entered timely pleas of guilty.* In relation to each offence the prosecution seeks a penalty at the middle to upper level of the appropriate range with a conviction being recorded. Counsel for the defendants submitted that the penalty for each be towards the lower end with a conviction not being recorded. In relation to costs for each offence, the parties reached an agreement being professional costs of $1000 and $92.55 court costs.

During the proceedings, and with the agreement of both legal representatives, [redacted] (mother of the deceased child) read an emotional statement to the court outlining the ongoing devastating impact of this tragic event on their family. Mr. [redacted] also addressed the court at the end of proceedings expressing his remorse.

As part of his submissions, the prosecutor referred me to numerous authorities including the Queensland cases of *Williamson v VH & MG Imports Pty Ltd* [2017] QDC 56 and *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd* [2018] QDC 20. He also referred me to a number of comparable cases in other jurisdictions. Defence counsel distinguished those cases particularly those from other states where the sentencing procedures in each of those jurisdictions differed from Queensland. In this regard, I am cognizant of the use to be made of comparable sentences, including those relevant decisions in *"harmonized"* interstate jurisdictions.[1] Whilst I have been referred to a numerous comparative sentences, particularly those in the magistrates' court, without the full transcript and sentencing remarks they were of limited assistance to me in my arrival at an appropriate penalty for each offence.

Also, I am also cognizant of the appropriate approach to sentencing in cases such as the present, which is to consider the relevant factors with respect to each defendant for the offence charged rather than imposing one global fine.[2]

During submissions each party referred me to the relevant provisions of the *"Sentencing Guidelines"* in s 9 of the *Penalty and Sentences Act* 1992 (Qld) ("PASA") which I will address accordingly.

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[1] *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd* [2018] QDC 20, per Fantin DCJ (at [113]) citing Fraser JA in *R v Goodwin; Exparte Attorney-General (Qld)* [2014] QCA 345 (at [5]); *Williamson v VH & MG Imports Pty Ltd* [2017] QDC 56, Deardon DCJ (at para [68] – [73])
[2] *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd* [2018] QDC 20, Fantin DCJ (at [103])

Further, both parties have submitted, and I accept, that each defendant *entered a timely plea of guilty (s 13 PASA) and co-operated fully with the investigation (s 9(2) (i) PASA).* Each defendant has no prior relevant history and I accept that each are well known in the community and the rural industry as good corporate citizens. I also accept that [redacted] is otherwise a person of good character *(s 11; 9(2) (f) PASA).*

Upon consideration of all of the material before me, the submissions, and the relevant authorities, I accept the prosecution submissions that penalties for each offence in the "middle to upper level" appropriate range are applicable. I will now give my reasons.

A. THE FACTS

The lengthy "*Statement of Agreed Facts*" (Ex 1) consists of 83 paragraphs in 8 pages. I do not intent to regurgitate those facts in my sentencing reasons but I have attached a copy (Annexure "A") and I find accordingly.

B. THE LAW

i) The *Workplace Health and Safety Act* 2011 (Qld) ("WHSA")

The objective of the WHSA is to provide a nationally consistent framework to secure the health and safety of workers and workplaces[3]. ***S 3(1)*** details a number of means to how this object is to be achieved, most relevantly by *"...(1)(a) protecting workers and other persons against harm to their health and safety and welfare through the elimination or minimization of risks arising from work or from specified types of substances or plant".* ***S 3(2)*** of the Act is an extension of the objectives provided in ***s 3(1) (a),*** applying the overriding principal that *"regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of substances or plant as is reasonably practicable."*[4] This statutory scheme, consistently with the statutory purposes specified in s 3, imposes onerous duties upon a wide class of persons, including employers, those conducting businesses or undertakings of various kinds, and officers, workers and other persons at workplaces, to ensure health and safety.[5]

What is to occur in circumstances where more than one person has a duty in relation to the same matter is captured in ***s 16*** of the Act. What is required from a duty holder *"to ensure health and safety"* is set out in ***s 17*** of the Act.

A person *"conducting a business or undertaking"* owes a duty of care under ***s.21(2)*** of the Act to *".....ensure, so far as is reasonably practicable, that the fixtures, fittings and plant are without risks to the health and safety of any person".* What is *"reasonably practicable"* in relation to *a duty to ensure health and safety* imposed by the WHS Act, is defined in ***s 18.*** In this regard I note ***clause 18*** of the *Explanatory Notes* in the Bill.[6]

The primary duty of care imposed on persons conducting businesses or undertakings for workers engaged in the business and others is specified in ***s 19(2)*** as: *"(2...)..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."* That obligation is explained in ***s 19(3):***

There are further duties imposed on those who conduct businesses or undertakings in Division 3 of Part 2. Of relevance here, ***s 25(2)*** imposes a duty on a person who conducts a business or undertaking that supplies plant that is to be used at a workplace to ensure, so far as is reasonably practicable, that *the plant is without risks to the health and safety of persons who use it.*

"due diligence"

Section 27 of the Act *"casts a positive duty on officers (as defined in the dictionary) of a PCBU to exercise 'due diligence' to ensure that the PCBU[7] complies with any duty or obligation under the Act".*[8] Section 27(5) contains a non-exhaustive list of *"due diligence"*

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[3] s 3(1) *Work Health and Safety Act 2011*

[4] s 3(2) *Work Health and Safety Act 2011* & cl. 3 Explanatory Notes, Work Health and Safety Bill 2011.

[5] *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd* [2018] QDC 20, per Fantin DCJ (at [35]-[36])

[6] *Work Health and Safety Bill* 2011 (at pp 25-26)

[7] Clause 5, *Work Health and Safety Bill* 2011, Explanatory Notes, provides that the principal duty holder under the Bill is a *'person conducting a business or undertaking'* (PCBU).

[8] Clause 27, *Work Health and Safety Bill* 2011, Explanatory Notes

steps an officer must take to discharge their duties under this provision. In this regard I note clause 27 of the *Explanatory Notes* in the Bill.[9]

I am cognizant of the following passage in *WorkCover Authority (New South Wales) (Inspector Mansell) v. Daly Smith Corporation (Aust) Pty Ltd and Smith* [2004] NSWIR Comm 349 where Staunton J stated at [131], that *due diligence*:

> *"is not done by merely hoping others would or could do what they were told, but also ensuring they have the skills to execute the job they are required to do and then ensuring compliance with that in accordance with the safe standards established. Compliance requires a process of review and auditing, both formal and random, in order to ensure that the safe standards established are in fact being adhered to and under ongoing review".*

In relation to an individual, the requirement to exercise *"due diligence"* pursuant to section 27 only arises if that individual was as *"officer"* of the relevant corporation.[10]

A person conducting a business or undertaking owes a duty of care under *s.46* WHSA. The section provides that if more than 1 person has a duty under the WHSA, *"each person with the duty must, so far as is reasonably practicable, consult, cooperate and coordinate activities with all other persons who have a duty in relation to the same matter".* The phrase *'so far as is reasonably practicable'* is not defined so its ordinary meaning will apply.[11]

As evidence of whether or not a person has complied with their duty, *s 275* WHSA permits a court to have regard to approved *codes of practice* to determine what reasonably practicable steps the defendant could have taken to ensure health and safety.

"reasonably practicable" / "so far as reasonably practicable"
I note Gaudron J in the High Court case of *Slivak v Lurgi (Australia) Pty Ltd*[12] in discussing the statutory duty imposed by *s 24(2a)(a)* of the *Occupational Health, Safety and Welfare Act* 1986 (SA), referring to the relevant cases, stated:

> [53] The words ***"reasonably practicable"*** have, somewhat surprisingly, been the subject of much judicial consideration[26]. 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.

Further, I note the phrase ***"so far as is reasonably practicable"*** was considered by the High Court in *Baiada Poultry Pty Ltd v The Queen.*[13]

Part 2, Div 5 of the WHS Act specifies three categories of offences which may be committed by a person who has breached a health and safety duty, and the maximum penalties for each[14].

> ***Category 1*** *- is the most serious offence. It requires that the offender engage in conduct which, without reasonable excuse, exposes a person to a risk of death or serious injury or illness, as to which risk, the offender is reckless: (s 31).*
> ***Category 2*** *- requires that the failure to comply with a health and safety duty exposes an individual to a risk of death or serious injury or illness: (s 32).*
> ***Category 3*** *- requires that a person who has a health and safety duty fails to comply with that duty: (s 33).*

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[9] *Work Health and Safety Bill* 2011
[10] See *McKie v Al-Hasani and Kenoss Contractors Pty Ltd (in liq)* [2015] ACTIC where the court held that the prosecution had not established that the defendant did not have control or was responsible for the business or undertakings of the company and therefore was not an *"officer"*
[11] Clause 46, *Work Health and Safety Bill* 2011, Explanatory Notes
[12] (2001) 205 CLR 304
[13] [2012] HCA 14 (at para [14-[15])
[14] By virtue of section 5(1) (d) of the *Penalties and Sentences Act* 1992 (Qld), the value of a penalty unit for offences under the Act is fixed at $100 to ensure consistency with penalties imposed in other jurisdictions.

ii) Harmonized Work Health Safety Legislation and Impact on Penalty

The law under the current WHSA legislation was concisely set by Deardon DCJ in *Williamson v VH & MG Imports Pty Ltd*[15], stating that a sentencing court should look to relevant decisions in harmonized interstate jurisdictions for "*guidance*" on the appropriate penalty to be imposed in respect of each offence:[16]

> [73] It follows that in exercising the sentencing discretion afresh, this court should look to relevant decisions in harmonized interstate jurisdictions for guidance on the appropriate penalty. It is accepted, of course, that there is no single "correct" sentence in any given matter, but it is fundamental to a fair system of justice, that sentencing be undertaken with as much consistency as possible.[17]

iii) The *Penalty and Sentences Act* 1992 (Qld) ("PASA") Sentencing Guidelines (s 9)

In sentencing a court must take into account the Governing principles set out in Part 2 of the PASA. I will only refer to the relevant sections that pertain to these proceedings. In this case, ***deterrence***[18] (both general and specific) and ***denunciation***[19] are relevant considerations. Ultimately, it is the duty of the court to balance often incommensurable factors and to arrive at a sentence that is *"just in all of the circumstances"* which a matter of "instinctive synthesis" is being the approach to sentencing in Queensland.[20] In his submissions defence counsel referred me to the relevant passages of *R v Patel; ex parte Attorney-General* [2011] QCA 91 and *R v Conquest* [1995] QCA 567. I am cognizant of those cases.

Deterrence

A reading of the authorities reinforces my view that general deterrence plays a significant role in sentencing for breaches of the WHSA. In *Attorney General of New South Wales v Tho Services Limited (in liquidation) (ACN 000 263 678)* [2016] NSWCCA 221 Harrison J (with whom Hoeben CJ at CL and Campbell J agreed) stated:

> 62 If ever there were a case in which the need for **general deterrence** was obvious and critical, this is such a case. His Honour dealt with deterrence at [24]-[25] of his judgment in the following terms:
>
> > "[24] In the present circumstances I do not find it necessary to denounce the conduct of the offender. I am satisfied from all of the material that the offender took all reasonable institutional measures to ensure compliance with the Act.
> >
> > [25] The site of the offender's operation has been closed down and it no longer accepts work experience students. I see no need for individual deterrence, nor do I see any need for general deterrence. The defendant, at the time, was engaged in a public service providing work experience to students. It would be inappropriate use of punishment to further deter any enterprises from providing work experience to students for fear of suffering a substantial fine because of the casual act of negligence of one of their employees. The defendant at the time employed something like 1,000 employees, and it is impossible to guarantee that no employee would fail to be attentive to his duty."
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> 63 With respect to his Honour, those remarks fundamentally fail to engage either with the concept of **general deterrence** in the first place or its importance in an industrial setting such as those presently being considered in the second place.
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> 64 There is in my view an irreconcilable tension between his Honour's finding that the respondent took all reasonable institutional measures to ensure compliance with the Act on the one hand and the fact that notwithstanding those measures a work experience student was severely injured on the other hand. With respect to his Honour, he has approached the matter somewhat mechanistically, eliding the respondent's perfunctory performance of its statutory obligations with the absence of responsibility for what occurred. It is clear that at some point during the day in question, Mr Thomas was welding in full view of the respondent's employees without a protective visor in place. A more obvious failure of safety protocols is difficult to imagine. It therefore lies ill in the mouth of the respondent in those circumstances to say that the necessary induction process had been carried out or that the respondent's supervising employees had been properly

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[15] [2017] QDC 56 per Deardon DCJ (at [68])
[16] [2017] QDC 56 (at paras [70]-[73])
[17] *Wong v The Queen* (2001) 207 CLR 584; *Hili v The Queen* (2010) 242 CLR 520.
[18] section 9(1)(c)
[19] section 9(1)(f); (I also note comments *re: denunciation*, by Kirby J in *Ryan v The Queen* [2001] HCA 21 (at [118])
[20] *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 Kiefel CJ, Bell and Keane JJ at para [4] – [7]; *R v Karlsson* [2015] QCA 158

> trained. Such an approach would unacceptably see the elevation of form over substance to the possible detriment of practical safety implementation and would in effect authorise or excuse the less than optimal discharge of the obligation to take reasonable and proper care for the safety of employees and, in the present case, work experience students.

65 I accept that the need for **special deterrence** is affected by the fact that the respondent no longer trades. The need for general deterrence does not fade in the same way. The fact that the respondent was engaged in the provision of a public service providing work experience to students does not lower the need to be careful for their safety but on the contrary heightens it. His Honour's reasoning appears to trade off the avoidable consequences of an employee's negligence against the fact that the respondent or others like it in the community should not be discouraged from taking and assisting work experience students when possible. Arguably implicit in that approach is the notion that it is acceptable to provide the opportunity for work experience in an unsafe industrial setting if the alternative is no work experience opportunities at all. In my opinion that approach is entirely unacceptable. In my view it would be an entirely appropriate use of punishment to fine an enterprise like the respondent if the result was the potentially greater emphasis upon safety in such circumstances.

66 Moreover, the issue does not appear to me to revolve around the respondent's ability *"to guarantee that no employee would fail to be attentive to his duty"*. The question is directed at a failure to comply with a statutory obligation to take reasonable care, not a failure to guarantee safety. The fact that Mr Thomas was apparently exposed to the relevant risk throughout a large portion of the day suggests a fairly significant failure to comply with that obligation. It would not seem to me to be unreasonable or unusual for the respondent to have been sentenced in a way that informed the wider industrial community of the need to take an ever-vigilant and practical approach to safety in similar circumstances. That is particularly so when one has regard to the terms of s 3 of the *Work Health and Safety Act*.....(my emphasis)

"the maximum and any minimum penalty prescribed for the offence" - (s 9 (2) (b))

It is long established that sentences at the maximum statutory penalty should be reserved for cases that fall into the worst category of offending.[21] The maximum penalty fixed by the Parliament for an offence demonstrates the Parliament's view of the gravity of the offence and must be taken into account in determining, in a particular case, the appropriate sentence. It provides an indication of the relative seriousness of the offence and must be taken into account in determining the appropriate sentence. In *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 Kiefel CJ, Bell and Keane JJ stated:

> [10] It is also important to note the consideration referred to in s 5(2) (a) -- the *"maximum penalty* prescribed for the offence". In this regard, in *Markarian*,[22] the plurality said:
>
> > [C]areful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.

An increase in the maximum penalty is an indication that sentences for the offence in question should be increased.[23] The maximum penalties have substantially increased with the enactment of the current WHS Act. I accept the prosecutor's submission that the increase is the legislature responding to society's expectation that the highest level of protection should be provided to workers and others by persons conducting a business or undertaking, and if there is a failure, substantial penalties may be imposed. However, it does not necessary *"follow from the fact of an increase in the maximum penalty that all such offences committed after the amendment came into effect should attract a higher penalty than they previously would have."*[24]

Short v Lockshire (ibid) was the first appeal in Queensland after the maximum fine in the presence of the aggravating factor of death, had been increased to $300,000 in the case of the corporation.

"the nature of the offence and how serious the offence" – (s 9(2) (c))

The High Court, in *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120, stated, at [27]:

> The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.

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[21] *Veen v The Queen [No 2]*,[21] (1988) 164 CLR 465 at 478, per Mason CJ, Brennan, Dawson and Toohey JJ

[22] (2005) 228 CLR 357at 372[31].

[23] See *Muldrock v The Queen* [2011] HCA 39; (2011) 244 CLR 120 [31] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel & Bell JJ).

[24] In *R v Murray* [2014] QCA 250 Fraser JA (with whom Gotterson and Morrison JJA agreed) at [16]-[17]

In *assessing the objective seriousness of an offence* under the WHSA, the risk to be assessed is not the risk of the consequence, to the extent that a worker is in fact injured, but the potential risk arising from the failure to take reasonably practicable steps to avoid the injury occurring.

Judge Fantin in *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd*[25] adopted and followed the courts approach to sentence for an offence under the (harmonized) *Work Health and Safety Act* 2011 (NSW) in the decision *Nash v Silver City Drilling (NSW) Pty Ltd; Attorney General for New South Wales v Silver City Drilling (NSW) Pty Ltd.*[26] It provides useful jurisprudence with regard to sentencing under the Act. In his regard I note the following passages in *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd*[27] where Fantin DCJ stated:[28]

> [68] In assessing the objective seriousness of an offence under the equivalent New South Wales legislation, Basten JA (with whom Hoeben CJ and Walton J agreed) stated:
>
> > [34] The sentencing judge commenced his consideration with the proposition that *"[g]reater culpability attaches to the failure to guard against an event the occurrence of which is probable rather than an event the occurrence of which is extremely unlikely."* [Footnote omitted] However, the truth of that proposition depends upon other considerations, including *(a) the potential consequences of the risk, which may be mild or catastrophic, (b) the availability of steps to lessen, minimise or remove the risk and (c) whether such steps are complex and burdensome or only mildly inconvenient. Relative culpability depends upon an assessment of all those factors.*
> >
> > ...
> >
> > [41] Broadly speaking, the degree of culpability of the respondent may properly be assessed by reference to the risk against which steps falling within the definition of what is *"reasonably practicable"* are to be taken [fn: *Work Safety Act* s 18]. ...
> >
> > [42] The culpability of the respondent is not necessarily to be determined by the remoteness of the risk occurring, nor by a step-by-step assessment of the various elements. Culpability will turn upon an overall evaluation of various factors, which may pull in different directions. Culpability in this case is reasonably high because, even if the pressure event of the force which occurred might not be expected to occur often, the seriousness of the foreseeable resultant harm is extreme and the steps to be taken to avoid it, which were not even assessed, were straightforward and involved only minor inconvenience and little, if any, cost. That assessment will involve both objective considerations and a consideration of what the respondent's responsible officers knew or ought to have known.
> >
> > ...
> >
> > [45] Further, **the question of objective seriousness must be assessed within the gradation of category 1, category 2 and category 3 offences.**
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> > ...
> >
> > [53] The legitimate purposes of intervention in the present case are twofold. The first purpose is to identify the proper approach to considering the objective seriousness of offences under the Work Safety Act. **It is important to note that the risk to be assessed is not the risk of the consequence, to the extent that a worker is in fact injured, but is the risk arising from the failure to take reasonably practicable steps to avoid the injury occurring.** To discount the seriousness of the risk by reference to the unlikelihood of injury resulting is apt to lead to error. The conduct in question is the failure to respond to a risk of injury, conduct which will be more serious, the more serious the potential injuries, whether or not they are likely to materialise. **The objective seriousness of the conduct will also be affected by the case with which mitigating steps could have been taken.**
> >
> > [54] Secondly, it is important to emphasise that **the proportionality of the sentence should depend upon an assessment of the particular offence in the context of the penalties imposed by the Act.** As noted above, the Act provides a gradation rising from category 3 through to category 1, in order of seriousness. In addressing a category 2 offence, attention must be paid to the nature of the conduct which could have led to the employer being charged with a category 1 offence (namely reckless disregard as to the risk to the individual of death or serious injury), combined with a lack of reasonable excuse for engaging in such conduct. Serious derelictions of duty, which do not reach that standard, will constitute the high end of objective seriousness for category 2 offences. That factor is to be considered in the context of a category 2 offence which must, to qualify as such, involve conduct which exposes the individual to a risk of death or at least serious injury or illness.

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[25] [2017] QDC 20
[26] [2017] NSWCCA 96 – decision date 16 May 2017.
[27] [2018] QDC 20
[28] Applying *Nash v Silver City Drilling (NSW) Pty Ltd;; Attorney General for New South Wales v Silver City Drilling (NSW) Pty Ltd* [2017] NSWCCA 96

> [55] By contrast, a category 3 offence may involve a dereliction of duty, varying from the casual to the deliberate, but in circumstances where no individual is exposed to a risk of serious injury or illness.
>
> [56] Once the nature of the gradation is borne in mind, the relevance of the maximum penalties may be appreciated. [emphasis added]

> [69] An intermediate appellate court should not depart from an interpretation placed on uniform national legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong. The principles enunciated in *Nash* are applicable here.
>
> [70] The approach taken by the learned Magistrate on this issue is contrary to the principles enunciated in *Nash*, that the risk to be assessed is not the risk of the consequence, to the extent that a worker is in fact injured, but the potential risk arising from the failure to take reasonably practicable steps to avoid the injury occurring. To that extent, the worker's conduct and the injuries sustained by him were irrelevant considerations.
>
> [71] By asking herself the wrong question, and by allowing these erroneous or irrelevant matters to guide her, the learned Magistrate erred in law. This ground of appeal is made out. (my emphasis)

Similarly, the extent of a worker's knowledge or appreciation of the risk is irrelevant. In this regard I note the following passages in *Attorney General of New South Wales v Tho Services Limited (in liquidation) (ACN 000 263 678)* [2016] NSWCCA 221 where Harrison J (with whom Hoeben CJ at CL and Campbell J agreed) stated:

> [69] Once again with great respect to his Honour, the extent of Mr Thomas' knowledge or appreciation of the risk is entirely beside the point in the course of assessing the respondent's liability for an allegedly criminal act or omission. It may on one very narrow view be relevant to the question of contributory negligence in civil proceedings. That has nothing to do with this case.
>
> [70] As far as I can determine, the failures contended for were not only causally related to the risk but were effectively the fundamental facts and circumstances that created it. What his Honour's reasoning appears to overlook is the fact that the obligation to advise or inform Mr Thomas that his manual welding helmet should be worn with the visor in the flipped down position to protect his eyes was a ***continuing*** **obligation.** It was not an obligation that could either be discharged by a single compliance at an induction or avoided entirely because he was understood otherwise to know what to do when welding.
> (my emphasis)

"any damage, injury or loss caused by the offender" – (s 9(2) (e))

Any damage, injury or loss caused by the offender must be taken into account in sentencing. The authorities state generally the more serious the injury caused the higher the penalty.[29]

"the extent to which the offender is to blame for the offence" - (s 9(2) (d))

In *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd* [2018] QDC 20 Fantin DCJ in considering a breach of *s 33* of WHSA stated that *the risk to be assessed* is not the risk of the consequence, to the extent that a worker is in fact injured, but the potential risk arising from the failure to take reasonably practicable steps to avoid the injury occurring:

> [64] In support of that submission, it relied upon *Short v Lockshire Pty Ltd* 165 QGIG 521 (20 November 2000) where the President, in considering the predecessor legislation, said:
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> > "His Worship was wrong to take into account the contribution made by Mr. Humphreys to his own misfortune. It is a purpose of the Act to ensure that employers protect employees against their own folly. The folly of the employee cannot be relevant to penalty. With respect, His Worship erred also in giving undue weight to Mr. Cosgrove's remorse, distress at the incident, cooperation with the officers of Workplace Health and Safety and improved safety measures. Too much may not be made of mitigating factors less the objective gravity of the offence is diminished and the purpose of the Act restated."

I am cognizant of *Lockshire* as I was the magistrate who conducted the hearing and imposed the sentence. *Short v Lockshire* was referred to in *Richard Otto AND Boxgrove Pastoral Co Pty Ltd* (2002) 170 QGIG 143 where again I was the Magistrate who conducted the hearing at first instance and imposed the sentence. *Boxgrove* involved the death of a 18 year old worker on a rural property who died as a result of using a post hole digger to dig a post hole when his clothing became entangled in a

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[29] *R v Tufuga & Kepu; ex parte A-G (Qld) [2003] QCA 171* Williams JA (with whom McMurdo P and Holmes J agreed) (at [20]); *R v Henderson; Ex parte Attorney-General (Qld)* [2013] QCA 63 Margaret Wilson J (with whom Muir JA and Douglas J agreed) (at [55])

bolt. He was asphyxiated. He was not instructed to perform this task on the day in question. On appeal President Hall held that the penalty imposed although below the lower end of the tariff was appropriate stating:

> "Blameworthiness is always a consideration. Consistently with the decision in *Neilands v Darryl O'Neil* (2001) 168 QGIG 134, I consider the unexpected nature of the event causing the death required the Acting Industrial Magistrate to impose the fine below the lower end of the scale. And that is what His Worship did."

In *Peter Vincent Twigg AND Hughes and Hessey Pty Ltd* (C/2005/66) President Hall stated:

> Blameworthiness is always a material consideration. However caution must be exercised to ensure *that blameworthiness is not taken into account in assessing the objective gravity of the offence and weighed again in mitigation*. Additionally, consideration of blameworthiness in sentencing should be permitted to reintroduce at that level defences at ss 23 and 24 of the Criminal Code which are excluded by s 24 of the Act.

It would appear from the relevant authorities under the previous Act that *"blameworthiness"* is that of the employer, not the worker. In this regard there was an attempt to apply *Boxgrove* in *Brian Marfleet AND Lindsay Meyers Pty Ltd* (C/2006/42) which was rejected, President Hall stating:

> Importantly, the blameworthiness with which one is concerned is the blameworthiness of the Defendant. I do not accept that the decision of this Court in *Richard Otto AND Boxgrove Pastoral Co Pty Ltd* (2002) 170 QGIG 143 is authority to the contrary. The comments about the conduct of a (deceased) worker who had disobeyed instruction were not aimed at the worker but at evaluating how unexpected that worker's misconduct had been.....The circumstances of this case are entirely different. The Respondent was perfectly well aware that Mr. Palmer was to work with the machine which, I should add, was inherently hazardous.

In *Paul Bradley Waltham AND Cairns Synergy Electrical Pty Ltd* (C/2006/52) President Hall stated:

> Workers are to be protected whether they are fit or fatigued, careful or careless, experienced or inexperienced, overconfident of their skills or simply foolish. The obligation is not discharged by engaging experienced staff and trusting them to care for themselves. And given that the purpose of sentencing is to underpin rather than to undermine the Act, an employer is not entitled to seize the great mitigating advantage of an early plea of guilty coupled with the co-operation with authority, and then to explain away the objective gravity of the failure to discharge the obligation by attributing blame to the hapless employee. I accept that blameworthiness is always a factor. But the blameworthiness with which one is concerned is the blameworthiness of the (defendant) employer.

In P*aul Bradley Waltham AND Transfield Services (Australia) Pty Ltd (C/2006/62)* President Hall stated:

> That is not to deny that blameworthiness is a relevant consideration. Those who fall short of discharging the statutory obligation *e.g. the obligation at s 28(3),* will include at one end of the spectrum cautious and earnest persons whose best endeavors have failed and at the other end, persons whose conduct has vacillated between the cavalier and the callous. Considerations of deterrence and denunciation...will propel a sentencing Industrial Magistrate to imposition of quite different fines where blameworthiness differs. But considerations of *"reasonableness", "foreseeability"* or (with respect to Counsel of the Respondent) *sufficient of steps taken*, must not be given such weight that at the sentencing stage the absolute burdens cast by the Act are substituted by the values of the common law. The sentencing process must underpin the Act and not undermine it.

"offender's character, age and intellectual capacity" - (s 9(2) (f))
An *"offender's character, age and intellectual capacity"* are relevant considerations.

In relation to *intellectual capacity* it is well established that an offender's mental disorder, short of insanity, may lessen moral culpability and so lessen the claims of general or personal deterrence upon the sentencing discretion[30]. The Victorian Court of Appeal in *R v Tsiaras*,[31] set out the (5) propositions which were adopted by the Qld Court of Appeal in *R v Yarwood*,[32] and in other decisions.[33] However, I note that these propositions are not restricted to cases of *"serious psychiatric illness"*. In *Holden v QPS* [2018] QDC 217 Fantin DCJ stated

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[30] *R v Sutton* [2018] QCA 318 (at [26]); *R v Goodger* [2009] QCA 377 at [21] and *R v Neumann; ex parte A-G* [2007] 1 Qd R 53
[31] [1996] 1 VR 398 at 400
[32] (2011) 220 A Crim R 497
[33] See *R v Clark* [2017] QCA 318

> [36] The sentencing considerations identified in *R v Tsiaras* are not, and were not intended to be, applicable only to cases of *'serious psychiatric illness'*. One or more of those considerations may be applicable in any case where the offender is shown to have been suffering at the time of the offence (and/or to be suffering at the time of sentencing) from a mental disorder or abnormality or an impairment of mental function, whether or not the condition in question would properly be described as a (serious) mental illness[34].

Notwithstanding, there must be evidence before the sentencing court mitigating the offence *"as opposed to giving them some context".*[35] In *R v Gaerlan* [2014] QCA 145 Gotterson JA (with whom Margaret McMurdo P and Henry J agreed) stated:

> The learned sentencing judge did not have evidence before him of the applicant's stress disorder at the time of the offending or how it contributed to the offending. These are significantly relevant matters. By revealing the link between the applicant's psychological state and the offending, the evidence has an impact upon the criminality of the latter. It has frequently been observed, including recently in this Court in *R v Huff* [2012] QCA 138 that, where present, such a link can have a modifying influence in fulfilling the sentencing purposes of deterrence, punishment and denunciation in the case at hand.

"the presence of any aggravating or mitigating factor concerning the offender"- (s 9(2) (g))
A sentencing court must take into account *"the presence of any aggravating or mitigating factor concerning the offender"* although the Act does not specifically list such factors unlike in other jurisdictions.[36]

"the prevalence of the offence" - (s 9(2) (h))
The *"the prevalence of the offence"* is a relevant consideration when sentencing an offender.[37] In this regard a heavier sentence than usual may be imposed provided the offender is not made a scapegoat for others who have escaped apprehension for the commission of similar offences. [38] If it is to be relied upon by the sentencing Court as a major factor in the sentencing disposition, and neither the prosecution or defence have raised the issue at sentence, the parties must be given an opportunity to be heard.[39] However, prevalence is not a relevant factor in this case.

"how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences" – (s 9(2) (i))
It is accepted that each defendant co-operated fully in the investigation of the offences.

"any other relevant circumstance" – (s 9(2) (r))
Where a matter does not fall under any of the other categories, s 9 (2) (r) states that a sentencing court must also have regard to *"any other relevant circumstance"*. In this regard I note the following:

(i) remorse
There is no doubt that the defendants by their conduct have demonstrated *"genuine remorse"* including [redacted] emotional statement to the court. I note the following passage by Kirby J in *Cameron v R* (2002) 209 CLR 339 in relation to how remorse should be take into account, differentiating between "remorse" and "genuine remorse" in relation to entitlement to a discount for a plea of guilty stating:

> (4) The discount for a *plea of guilty* to the charge brought against the accused is to be distinguished from a discount for a spontaneous and immediate expression of remorse conducive to reform and for immediate cooperation with investigating police. The latter has always been treated as deserving of such recognition in the sentencing of an accused.....
>
> (5)..... The true foundation for the discount for a plea of guilty is not a reward for remorse or its anticipated consequences but acceptance that it is in the public interest to provide the discount. Nevertheless, where genuine remorse is established to the satisfaction of the sentencing judge, it may be in the public interest to mitigate punishment further as a reinforcement for the prisoner's resolve to avoid repetition of such conduct in the future and as an example to others. However, "remorse" is not, as such, a precondition for the provision of a discount for a plea of guilty. There are other features of the public interest that need to be given weight.

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[34] *Verdins* at [5], cited in *Yarwood* at [25]
[35] *Doig v Commissioner of Police* [2016] QDC 320 Deveareaux SC DCJ (at [16])
[36] E.g. see s 21A Crimes (Sentencing Procedure) Act 1999 (NSW).
[37] *R v Johnstone* [1923] St R 278 at 282.
[38] *R v Ryan: Ex parte A-G* [1989] 1 Qd R 188.
[39] *R v Lui* [2009] QCA 366] Fraser JA (with whom McMurdo P and Fryberg J agreed) (at para [14] – [16])

Although it would appear from a reading of the cases that *remorse* should be given little weight in the sentencing process in relation to offences under the WHSA, those cases did not distinguish *"genuine"* remorse.

(ii) **measures put in place by the defendants / factors occurring, after the offences**

Also *making significant changes to work practices post-incident* in order to comply with the WHSA is a relevant circumstance that must be considered. However, the authorities clearly state that such matters should not be given much weight in mitigation when arriving at an appropriate penalty. The position was clearly reiterated in *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd* [2018] QDC 20 where Fantin DCJ stated:

> [92] Care must be taken in giving the respondents credit for doing something which should have been done in any event. The legislation is not directed at *ex post facto* measures. It requires positive preventative steps to be taken to ensure workers are afforded safe working environments.
>
> [93] As the President of the Industrial Court said in *Lang v Amalgamated Food and Poultry Pty Ltd* 167 QGIG 245:
>
> > "Too much, however, may not be made of mitigation lest the purpose of the Act be frustrated. Given the objective gravity of the offence, *ex post facto* measures and excellent systems which failed because of inadequate policing, are no justification for taking the challenged sentence outside the range otherwise thought to be appropriate to an offence of this objective nature."
>
> [94] It was appropriate to take into account those steps taken by the respondents after the incident to remedy the breach and implement better systems. However, I consider these factors post-incident were given excessive weight by the learned Magistrate in the sentencing process, which led to error.

(iii) **Effect on the family**

As the attitude of the community is relevant, so is the effect on the family. It is a relevant circumstance in sentencing.[40] However, it is only one part of the complex sentencing process. In this regard defence counsel referred me to a passage in *R v Conquest*[41] and I am cognizant of that case.

In the present case the prosecutor did not produce a written victim impact statement[42] but [redacted] read into the record a prepared statement. Section 15(1) of the PASA states that *"in imposing a sentence on an offender, a court may receive any information, ... , that it considers appropriate to enable it to impose the proper sentence"*. Also, I note the approach that a sentencing court must take in relation to a *Victim Impact Statement*.[43]

Character (s 11)

S. 11 PASA states the matters the sentencing court may consider in determining offender's character including: *(a) the number, seriousness, date, relevance and nature of any previous convictions of the offender; and (b) any significant contributions made to the community by the offender; and (c) such other matters as the court considers are relevant.*

conviction / no conviction recorded (s 12)

In considering whether to record to not to record a conviction, a court must have regard to all circumstances of the case including: *(a) the nature of the offence; and (b) the offender's character and age; and (c) the impact that recording a conviction will have on the offender's— (i) economic or social wellbeing; or (ii) chances of finding employment.* In *R v Tobin* [2008] QCA 54 Fraser JA (with whom Keane and Muir JA agreed) stated:

> [31] That provision requires reference to all the circumstances, expressly including the nature of the offence, the offender's character and age, and the impact that recording a conviction will have on the offender's economic or social wellbeing or chances of finding employment. All of these features must be considered with no bias in favour of any of them, although the particular circumstances might lead to one or other in fact having greater weight:[44]

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[40] *R v H* (QCA, No 406 of 1998, 4 February 1999, unreported, BC9900907)
[41] [1995] QCA 567 PER Thomas and White JJ
[42] As defined in section 15 *Victims of Crime Assistance Act* 2009 (Qld)
[43] *R v Singh* [2006] QCA 71; *R v Evans; R v Pearce* [2011] QCA 135
[44] Citing *R v Brown; ex parte Attorney-General* [1994] 2 Qd R 182 at 185; [1993] QCA 271, *R v Briese; ex parte Attorney-General* [1998] 1 Qd R 487 at 493; [1997] QCA 010, *R v Cay, Gersch and Schell; ex parte A-G (Qld)* [2005] QCA 467 at [40].

I note that it was the position under the previous *Workplace Health and Safety Act 1995* that a conviction being recorded was rare for a first offender:

> "I notice that both in the case of Lollo Pipelines Pty Ltd and Lollo Plumbing Pty Ltd, the Industrial Magistrate recorded a conviction. As I understand it (see above), the Respondent is a first offender. It is rare for a conviction to be recorded on a first offence under the *Workplace Health and Safety Act 1995*. Nothing adverse is said about the Respondent's industrial character. It seems to me that having regard to s. 12 of the *Penalties and Sentences Act 1992*, I should refrain from entering a conviction."[45]

"guilty plea to be taken into account" (s 13)

Section 13 provides that in imposing a sentence on an offender who has pleaded guilty to an offence, a court must take the guilty plea into account and may reduce the sentence that it would have imposed had the offender not pleaded guilty. However, it must be stated in open court its reasons for not doing so, if it does not reduce the sentence. In *R v Safi* [2015] QCA 13 Fraser JA (with whom Holmes and Morrison JJA agreed) stated:

> [16] The question in this application is not whether there was such a non-compliance but what were the consequences of that non-compliance. I accept that the obligation imposed by s 13(3) is important. Where leniency is afforded on account of a plea of guilty, a statement to that effect serves the particularly important purpose of informing offenders of that fact. The publicity given to such statements encourages guilty offenders to plead guilty, thereby saving victims and witnesses of offences the trauma, disruption, and expense which may be involved in giving evidence and it saves the State the expense of prosecuting offences. Where it is evident that the guilty plea was in fact taken into account, however, those considerations will not necessarily justify the Court in reviewing a sentence merely because the sentencing judge did not clearly state that the plea was taken into account

In *R v Woods* [2004] QCA 204 in a joint judgment the Court of Appeal stated:[46]

> **Effect of plea of guilty**
>
> [7] Sub-section 13(3) of the *Penalties and Sentences Act* provides that when imposing the sentence, the court must state in open court that it took account of the guilty plea in determining the sentence imposed. If the court does not reduce the sentence imposed upon an offender who has pleaded guilty, then the sentencing judge must, pursuant to sub-section 13(4), state in open court that fact and his or her reasons for not reducing the sentence. Sub-section 13(5) provides that a sentence is not invalid merely because of the failure of a court to make the statement mentioned in sub-section (4), but its failure to do so may be considered by an appeal court if an appeal against sentence is made. This is an application for such an appeal.
>
> [8] Section 13 of the *Penalties and Sentences Act* is a statutory expression of the common law principle which has most recently been referred to by the High Court in *Cameron v The Queen*[1] where Gaudron, Gummow and Callinan JJ observed at 343 [11]:
>
> > "It is well established that the fact that an accused person has pleaded guilty is a matter properly to be taken into account in mitigation of his or her sentence. In *Siganto v The Queen*[2] it was said:
> >
> > > 'A plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case.'
> >
> > It should at once be noted that remorse is not necessarily the only subjective matter revealed by a plea of guilty. The plea may also indicate acceptance of responsibility and a willingness to facilitate the course of justice."
>
> The relevant principles are set out in more detail by Kirby J at [65] – [66].

The discount for a plea of guilty must be distinguished from a discount for remorse as was stated by Kirby J in *Cameron*:

> [65].....(4) The discount for a plea of guilty to the charge brought against the accused is to be distinguished from a discount for a spontaneous and immediate expression of remorse conducive to reform and for immediate cooperation with investigating police. The latter has always been treated as deserving of such recognition in the sentencing of an accused.

In *R v Jones* [2011] QCA 147 Daubney J (with whom Muir and White JJA agreed) stated:

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[45] *Gavin Scott Wesche and Scotts Transport Pty Ltd* (No. 2) (No. C86 of 2004), President Hall, Industrial Court

[46] consisting of Jerrard JA and Atkinson and Philippides JJ

> [12]The policy underlying s 13 is clear and well known. If an accused pleads guilty, and thereby obviates the need for a trial, significant time and cost benefits ensue for the benefit of the public and the administration of justice generally. Sentence hearings can be listed and dealt with expeditiously. Teams of prosecution and defence lawyers (the former always and the latter often paid out of the public purse) do not need to be engaged in the preparation and presentation of the trial. Witnesses do not need to be brought to Court. Members of the public are spared the burden (and personal cost) of jury service. Judges, court staff, and court facilities are able to be diverted to other duties. These practical factors combine to produce the proposition that by pleading guilty an accused assists in the administration of justice.
>
> [13] That is why s 13 requires a sentencing judge to consider expressly the fact that an accused has pleaded guilty. The sentencing judge is not bound to mitigate the sentence because of the plea of guilty, but if the judge determines not to mitigate the sentence then he or she is required to state that and give their reasons. Clearly enough, the starting point under s 13 is that a plea of guilty will attract favourable consideration by the judge in the sentencing process. If there is to be a departure from that, then the judge needs to give an explanation.

In *R v James* [2012] QCA 256 Henry J (with whom The President and Holmes JA agreed) stated (at pp 4-5):

> .....Section 13(1) of the *Penalties and Sentences Act* 1992 (Qld) merely provides that a sentencing court must take a guilty plea into account and may reduce the sentence which would have been imposed had an offender not pleaded guilty. It does not confine the extent of any reduction, if given, or the means by which it is to be achieved

In *R v Ungvari* [2010] 134 White JA (with whom McMurdo P and Muir JA agreed) stated inter alia:

> [31]..... It is important in the overall administration of justice that offenders be encouraged to plead guilty by an appropriate reduction in the sentence which would have been imposed upon them had they elected to go to trial. Such a course frees resources which would otherwise be devoted to a trial including the availability of courtrooms, the cost of a full trial, and inconvenience to witnesses.....

In *R v Safi* [2015] QCA 13 Fraser JA (with whom Holmes and Morrison JJA agreed) stated:

> [16] The question in this application is not whether there was such a non-compliance but what were the consequences of that non-compliance. I accept that the obligation imposed by s 13(3) is important. Where leniency is afforded on account of a plea of guilty, a statement to that effect serves the particularly important purpose of informing offenders of that fact. The publicity given to such statements encourages guilty offenders to plead guilty, thereby saving victims and witnesses of offences the trauma, disruption, and expense which may be involved in giving evidence and it saves the State the expense of prosecuting offences. Where it is evident that the guilty plea was in fact taken into account, however, those considerations will not necessarily justify the Court in reviewing a sentence merely because the sentencing judge did not clearly state that the plea was taken into account. The applicant relied upon the Court's observation in *R v Mallon* [1997] QCA 58 that one result of failure of a sentencing court to make the required statement in open court will be to "*place the imposed sentence in jeopardy.*" That observation does not suggest that a non-compliance inevitably must result in the sentence being reviewed in all cases.

Unlike other jurisdictions where the statutory sentencing regime prescribes certain maximum discounts for a plea of guilty,[47] in Queensland there is no such regime. The extent to which it affects a sentence will depend upon all of the relevant circumstances including the nature and consequences of the offence and circumstances personal to the offender.[48] In *R v Robertson* [2008] QCA 164[49] the court stated inter alia:

> [6] To the extent that decisions establish ranges within which sentences are regularly imposed for similar offending, it is of course right to take them into account, but in the end the proportion which the period to be served in prison bears to the whole term is to be fixed by taking into account all of the circumstances rather than by some rule of thumb. **The authorities do not condone, in any aspect of sentencing, some arithmetical approach under which a deduction is made from a pre-determined range of sentences**: the sentencing judge is obliged *"to take account of all of the relevant factors and to arrive at a single result which takes due account of them all."*

Just in concluding, I note the comments of President Hall warning against giving undue weight to such matters as *remorse*, distress at the incident, cooperation with the officers of WHS, and improved safety measures, as *"Too much may not be made of*

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[47] E.g. Criminal Law (Sentencing) Act 1988 (South Australia), ss 10B, 10C, 18A, 38, 58, where the maximum available discount being 30% (considered in *R v Nguyen* [2015] SASCFC 40)

[48] E.g. *R v Bulger* [1990] 2 Qd R 559,per Byrne J (with whom McPherson and Moynihan JJ agreed) (at p 563)

[49] Cited with approval in *R v Torrens* [2011] QCA 38 at [25]

mitigating factors less the objective gravity of the offence is diminished and the purpose of the Act restated."[50] However, those comments in relation to *"remorse"* would not apply in relation to discount for a *"plea of guilty"*, which the appeal courts have said is to be distinguished.

Fines (s 48)

Part 4 PASA deals with the imposition of fines. Section 48 obliges a Court when determining the amount of any fine to be imposed to take into account, *as far as practicable*, the financial circumstances of the offender and the nature of the burden that payment of the fine will be on the offender.

> **48 Exercise of power to fine**
> (1) If a court decides to fine an offender, then, in determining the amount of the fine and the way in which it is to be paid, the court must, as far as practicable, take into account—
> (a) the financial circumstances of the offender; and
> (b) the nature of the burden that payment of the fine will be on the offender.
> (2) The court may fine the offender even though it has been unable to find out about the matters mentioned in subsection (1) (a) and (b).

In *R v Meid* [2006] QCA 124 Jerrard JA (with whom McMurdo P and Chesterman J agreed) stated:

> [7] Section 48 of the Penalties and Sentences Act 1992 (Qld) requires that a court which has decided to fine an offender should set the amount of the fine, and the way in which it is to be paid, by as far as practicable taking into account the financial circumstances of the offender, and the nature of the burden that that payment of the fine will be on the offender.

In *R v Prentice* [2003] QCA 34 Williams JA (with whom Davies JA and Cullinane J agreed) stated:

> [11] The legislation provides that the penalty for a breach of the provision in question is to be a fine, and there is no doubt that serious contraventions of the Act will attract very substantial monetary penalties. The maximum fine per charge is now $40,500.00 for an individual and five times that for a corporation. The fine imposed must have a deterrent effect and send a message to other traders that such conduct will not be tolerated. The policy of the legislation is clearly to protect consumers and conduct of the type in question is likely to have serious consequences for consumers.
> .....
>
> [21] Though reference was made in the sentencing remarks to the applicant's *"capacity to pay"* it is unlikely that payment of the fine in total could be realistically achieved. I said in *R v Kiripatea* [1991] 2 Qd R 686 at 702 (with the concurrence of Shepherdson and Ambrose JJ) that a sentence *"should not be a crushing one, and there is good reason for avoiding a sentence which would effectively destroy any hope a prisoner may have for rehabilitation"*. Those remarks are, to my mind, apposite here. The fine in fact imposed is a crushing one and, if the applicant realistically sees he has no hope of satisfying it, the fine loses its effectiveness; the default provision becomes the sentence in fact.
>
> [22] Though fines of the magnitude imposed by the sentencing judge are appropriate to offences of this type when committed in the context of substantial business operations, the fine here, given the personal circumstances of the applicant, is manifestly excessive.
>
> [23] Whilst I am not satisfied that he was sentenced as if he was a corporation, it is of some significance that the personal fines on him were much greater than the personal fines imposed on each of Coppens and Conn, namely $700.00 and $500.00 respectively.

When arriving at an appropriate amount for a fine, a sentencing court must be cognizant that the financial circumstances of an offender may be such that the fine must be modified "*to ensure that deterrence is not transmogrified to oppression.*" In *Gavin Scott Wesche AND G Scotts Transport Pty Ltd (No. 2)* (No. C86 of 2004) President Hall accepted counsel for the respondent's submission that the fine should be modified because of the respondent's financial circumstances, stating:

> There is little to be said in mitigation, though in absence of any information to the contrary, I assume that the Respondent is a first offender. The Respondent's conduct is entirely blame-worthy. In reliance on past decisions, *viz, Williams v Bow Park Pty Ltd* (2003) 174 QGIG 531 and *Finn v Devan Management Pty Ltd* (No. 2) (2005) 178 QGIG 23, counsel for the Appellant submits that a fine of $60,000 is appropriate. Counsel for the Respondent accepts that, having regard to the objective gravity of the offence and the minimal mitigation, the submission that a fine of $60,000 is appropriate, is basically correct. However, the contention is that because of the Respondent's straightened **financial circumstances**, *the fine should be modified to ensure that*

[50] *Short v Lockshire Pty Ltd* (2000) 165 QGIG 521

deterrence is not transmogrified to oppression. The submission is that in the circumstances a reduced fine of $40,000 would be appropriate.

By his written submission counsel for the Respondent summarises the Respondent's position as follows:

> *"The Respondent is a small family company operating two trucks. Those trucks operate in the Hervey Bay area only. One truck is leased, and the other is worth approximately $10,000. The company also owns four trailers worth a total of $40,000. Mr. Scott has been attempting to sell the business for approximately two years. There is a real risk that the imposition of a fine, even at the level contended for by the Respondent, will drive the company into liquidation."*

Forty thousand dollars is the fine imposed on appeal in *Short v Lockshire Pty Ltd* (2000) 165 QGIG 521. *Short v Lockshire ibid,* was the first appeal after the maximum fine in the presence of the aggravating factor of death, had been increased to $300,000 in the case of the corporation. A fine of $40,000 was also imposed in *Neumann v RGB Winton Pty Ltd* (2003) 174 QGIG 1335. It was imposed explicitly to take account of the Respondent's straightened financial circumstances. In the circumstances of this case parity also favours imposition of a fine of $40,000. The fine imposed on each of Lollo Pipelines Pty Ltd and Lollo Plumbing Pty Ltd was $40,000. Forty thousand dollars seems to me to be the appropriate fine.

However, in *Peter Vincent Twigg AND Hughes and Hessey Pty Ltd* (C/2005/66) President Hall stated:

> The obligations imposed by the Act verge on absolute. Observance of the statutory obligations may require the doing of more than is reasonable and the expenditure of more than is reasonable. The Act does not create an exception for small business and does not provide a defence of impecuniosity. Rather, the approach of the Act, understandably in light of its objects, appears to be that those who cannot afford to ensure safety in embarking upon the undertakings and activities which are the subject of the Act, should refrain from embarking upon the undertakings and activities at all. Whilst it is appropriate to examine the financial circumstances of a Respondent with a view to avoiding oppression in sentencing, there is no justification for the granting of such indulgence to small and struggling businesses as to undermine the incentive to comply with the obligations imposed by the Act.

The fact that each case must be dealt with on its own unique set of circumstances was evident when *Twigg* was referred to in *Adam John Law and BBC Hardware Limited* (C/2006/31) where President Hall stated:

> In matters under the *Workplace Health and Safety Act* 1995, impecuniosity is sometimes raised as justifying the imposition of a more modest fine than would otherwise be the case where a struggling or fledging company has difficulty in meeting the very high standard set by the statute and by the statutory instruments made thereunder. That approach to sentencing was entirely rejected. But the decision does recognise that there will be cases in which, at the point of sentencing, a defendant *is in such stricken circumstances* that the sentencing court has to face reality, put aside the otherwise appropriate sentence and ensure that in seeking to encourage observance of the statute the court does not grind off the defendant's face.

Accordingly, the courts have recognized that in some circumstances a lower penalty may be equally burdensome to one offender with limited financial means as a higher penalty would be to a person with significant financial means and as such there would be a deterrent penalty imposed in either case.[51]

However, I note the following passage in the recent New South Wales case of *SafeWork NSW v Opcon Plumbing Pty Ltd; SafeWork NSW v Annous* [2018] NSWDC 350 where Scotting DCJ stated:

> [50] The Court is required to have regard to section 6 *Fines Act 1996* before imposing a fine. Where an offender seeks to have a fine reduced on the basis of a limited capacity to pay, it bears the onus of convincing the Court that it should exercise its discretion to limit the amount of the fine. The offenders' capacity to pay is relevant but not decisive: *Jahandideh v R* [2014] NSWCCA 178 at [16]. A substantial fine may still be warranted as a result of the seriousness of the offence and the need for general deterrence.
>
> [51] ..... I am satisfied that Opcon and Mr Annous have established that they have a limited capacity to pay a fine.

I will now consider the submissions.

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[51] see *Demaj v Hall* [2009] QDC 278

II. PROSECUTION SUBMISSIONS ON PENALTY

PROSECUTION SUBMISSIONS ON PENALTY
(Breach s 32 WHSA)

Defendant - [redacted]

Charge

[redacted] (the Defendant Company), a duly incorporated company holding a health and safety duty under s.19 (1) of the *Work Health and Safety Act* 2011 (Qld) (the 'Act'), is by complaint made on 12 September 2017, charged with a breach of s.32 of the Act, a failure to discharge the duty it held under the Act.

The prosecutor provided written submissions to the court and expanded upon those submissions with oral submissions. The prosecutor submits as follows:

Background

This charge arose from an incident on 1 April 2016, at the workplace [redacted] owned, at that time, by the defendant company and located at [redacted] Road, Goondiwindi, Queensland.

Legal framework

In his written submissions (at para 4-12) the prosecutor has set out the "legal framework" as follows:-

1. The objective of the Act is to provide a nationally consistent framework to secure the health and safety of workers and workplaces[52]. Section 3(1) details a number of means to how this object is to be achieved, most relevantly by:

   (a) protecting workers and other persons against harm to their health and safety and welfare through the elimination or minimization of risks from work or from particular types of substances or plant;

   ...
2. Section 3(2) of the Act is an extension of the objectives provided in s.3(1)(a) above, applying the overriding principal that workers and others should be given, so far as reasonably practicable, the highest level of protection against harm to their health and safety from hazards and risks arising from work, substances or plant[53].
3. What is required from a duty holder to ensure health and safety is set out by s.17, that is to manage risks by either:
   (a) eliminating the risks entirely; or
   (b) where it is not possible to completely eliminate the risks, to minimise them, so far as reasonably practicable.
4. The concept of *'so far as reasonably practicable'* is defined in s.18 of the Act, it is the measure of what reasonable actions could have been taken to discharge a duty owed under the Act and that section provides a non-exhaustive list of relevant matters to be taken into account when managing hazards and risks, as follows:
   (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[54].
5. The High Court in *Slivak v Lurgi (Australia) Pty Ltd*[55] found, in part, (at paragraphs 51 – 54) the question whether a measure is or is not reasonably practicable requires no more than the making of a value judgement in light of all the facts as known at the relevant time. When considering 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.
6. As a person conducting a business or undertaking, the defendant company owes a duty of care under s.19 (1) of the Act. This places a duty on the defendant company to ensure that workers, carrying out work activities as a part of its business or undertaking, were not exposed, so far as reasonably practicable, to risks to their health and safety.

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[52] s.3 (1) *Work Health and Safety Act 2011*
[53] Section 3(2) *Work Health and Safety Act 2011* & cl. 3 Explanatory Notes, Work Health and Safety Bill 2011.
[54] Section 18 *Work Health and Safety Act 2011*
[55] (2001) 205 CLR 304 [51] - [54]

7. As stated above, the defendant company is charged with an offence under section 32 of the Act which provides that a person commits a category 2 offence if –
   (a) the person has a health and safety duty; and
   (b) the person fails to comply with that duty; and
   (c) the failure exposes and individual to a risk of death or serious injury or illness.
8. As evidence of whether or not a person has complied with their duty, the Act permits the court to have regard to approved codes of practice to determine what reasonably practicable steps the defendant could have taken to ensure health and safety[56].
9. The applicable codes of practice being –
   (a) The *Children and young workers Code of Practice* 2006;
   (b) The *How to Manage Work Health and Safety Risks Code of Practice* 2011;
   (c) The *Safe design and operation of tractors Code Of Practice 2005*;
   (d) The *Rural Plant Code of Practice 2004*;
   (e) The *Managing the risks of plant in the workplace* Code of Practice 2013.

The offence

An agreed statement of facts has been prepared by the parties which details the defendant company's offending (see Ex 1).

At the date of this offence the defendant conducted a mixed agricultural and beef cattle production business or undertaking from a large rural workplace located at Goondiwindi, and it was a regular occurrence that work activities were undertaken via the use of mobile plant within the workplace.

On the 1st day of April 2016 a tractor and trailer combination was being operated within the workplace. Two young workers were using the combination to collect/retrieve poly siphon pipes from paddocks. The pipes were to be transported to a storage area some distance away. As the tractor and trailer was travelling along a dirt road on the property one of the workers, who had been standing on a small pad on the trailer drawbar, has been dislodged and been run over/struck by the trailer. Emergency services were called and attended. Despite medical intervention the young worker subsequently died from injuries he received.

WHSQ Inspectors attended on the incident scene, along with QPS personnel and undertook investigations. A series of photographs were taken by WHSQ Inspectors. In submissions he referred me to those photos (Exhibit 2 photos 1-17)

Submissions on sentence

The prosecutor submitted that the essence of the defendant company's breach could be described as a failure to properly prepare for the work activity – that is, to undertake a risk assessment and prepare a safe work method statement that properly considered the tasks to be carried out and put in place controls to address identified hazards posing a risk to the young workers.

Submissions on penalty

The prosecutor submitted in relation to the following relevant provisions of sections 9(1) and (2) of the PASA.

Deterrence (s 9(1) (c))

The prosecutor submitted that the circumstances of the offence by the corporate defendant, a failure to ensure the safety of young workers required an element of general deterrence. However, the defendant having now sold the farm property and no longer carrying on such an undertaking, specific deterrence was less of a consideration in imposing a penalty.

Denunciation (s 9(1) (d))

The prosecutor submitted that the breach was one that required a component of denunciation by the court, acting as the voice of the community, that young workers will not be placed in hazardous situations in a work environment and, if a breach results in a serious injury or death of such a worker, that significant penalties may be imposed.

Maximum penalty (s 9(2) (b))

The maximum penalty provided for an offence committed by a corporate defendant under section 32 of the Act is 15,000 penalty units which equates to a maximum fine of $1.5 million dollars.

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[56] Section 275 *Work Health and Safety Act 2011*

The prosecutor submits that this maximum penalty addresses the whole scale of offending which is to provide a sentencing regime, at one end, for offenders whose breach (or breaches) has occurred despite a careful and considered approach to safety in its business and to identification of hazards present and at the other end of the scale an offender whose actions and its approach to safety may be described as cavalier and grossly inadequate. He submits that this maximum penalty is also to accommodate an offender who may have a previous conviction for a health and safety breach. Underpinning the sentencing consideration, respectfully, is the gravity of the defendant's conduct with regard to the breach that has occurred. Its acts. Its omissions.

The prosecutor submits that the maximum penalty has substantially increased with the enactment of the current Act. The maximum penalty of $1.5 million for a corporate defendant respectfully, is the legislature responding to society's expectation that the highest level of protection should be provided to workers and others by persons conducting a business or undertaking and if there is a failure, substantial penalties may be imposed. He submitted that the objects of the Act, sets out the high standard expected of duty holders and reiterates the preferred approach is one of pro-active policing of hazards within a duty holder's workplace.

Nature of the offence and how serious the offence was (s 9(2) (c))
The prosecutor submitted that the work, tasked with operating large mobile plant when the workers had little experience in such activity, compounded by them working remotely, by themselves, unsupervised, without a proper consideration of how the pedestrian worker would be transported once the pipes had been collected has resulted in one of the young workers adopting a method of travel that has placed him a significant risk. He submitted that the persons who are perfectly placed to understand the activity was this duty holder. It is a significant aggravation of the breach by the duty holder that it gave little or no consideration for the safe transport of the worker once the collection task had been carried out and the pipes were required to be transport some distance to another area of the farm.

The extent to which the offender is to blame for the offence (s 9(2) (d))
The prosecutor submitted that the defendant brought the hazard in to existence and it was solely to blame for this offence.

Relevant authorities

In support of the submitted range against the corporate defendant the prosecutor tendered a Schedule containing a number of cases, and also tendered seven (7) decisions, which included a number of interstate decisions:
Williamson v VH & MG Imports Pty Ltd [2017] QDC 56; *Safe Work NSW & C-Wynn Building Contractors Pty Ltd [2018]* NSWDC 61; *Boland v Kentucky Fried Chicken Pty Ltd* [2017] SAIRC 16; *Safe Work NSW v Macleay River Protein Pty Limited* [2017] NSWDC 204; *Safe Work NSW v Thermal Electric Elements Pty Ltd* [2017] NSWDC 62; *Safe Work NSW v Turfco Australia Pty Ltd* [2018] NSWDC 191; *Attorney General of New South Wales v Tho Services Limited (in liquidation) (ACN 000 263 678)* [2016] NSWCCA 221.

The prosecutor carefully and thoroughly dissected each of those cases during his oral submissions.[57] I do not intend to regurgitate those decisions as I have comprehensively considered each of them. As is usual with these types of offences, they are factually different from each other, and from the circumstances in the present case, but they do offer a "guide" to assist me in arriving at an appropriate penalty. I agree with the prosecutor that factually the *Turfco case* would appear to be the factually closest to this case where the worker was killed when he was run over by the reversing turf harvester. The court considered the appropriate penalty was $500,000 but discounted it by 25% to take into account the plea of guilty.

Also, I note where Judge Deardon in *Williamson* stated that the appropriate penalty range in that case was between $200,000-$400,000 but "substantially" ameliorated the fine to $125,000 for the following reasons:

> [77] However, in the particular circumstances of the respondent company, the lengthy delays that have occurred in bringing this matter to finalisation, the issues involved with the *Barbaro* decision and its legislative over-ruling, and given that this is the first appeal to address the issue of the harmonized national work health and safety laws, it is appropriate to substantially ameliorate the penalty that would otherwise be appropriate. Accordingly, I consider the penalty on re-sentence should be a fine of $125,000.

During the adjournment I have had the opportunity to thoroughly consider these cases as well as all of the cases referred to by the parties.

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[57] T1-(17 -25)

Prosecutor's proposed penalty

The prosecutor submitted that having regard to the circumstances of this breach, two young workers tasked to undertake pipe retrieval work, remotely, unsupervised, operating large plant with an, in part, inadequate work method (no safe transportation for the pedestrian worker) the appropriate penalty range was $450,000 to $650,000 with a penalty falling at the middle to upper level of that range.

PROSECUTION SUBMISSIONS ON PENALTY
(Breach s 33 WHSA)

Defendant - [redacted]

Charge

[redacted] (the Defendant Company), a duly incorporated company holding a health and safety duty under s.21 (2) of the *Work Health and Safety Act* 2011 (Qld) (the 'Act'), is by complaint made on 12 September 2017, charged with a breach of s.33 of the Act, a failure to discharge the duty it held under the Act.

The prosecutor provided written submissions to the court and expanded upon those submissions with oral submissions. The prosecutor submits as follows:

Background

This charge arose from an incident on 1 April 2016, at the workplace '[redacted]' owned, at that time, by the defendant company and located at [redacted], Goondiwindi, Queensland.

Legal framework

In his written submissions (at para 4-13) the prosecutor has set out the "legal framework" as follows:-

10. The objective of the Act is to provide a nationally consistent framework to secure the health and safety of workers and workplaces[58]. Section 3(1) details a number of means to how this object is to be achieved, most relevantly by:

    (a) protecting workers and other persons against harm to their health and safety and welfare through the elimination or minimization of risks from work or from particular types of substances or plant;

    ...

11. Section 3(2) of the Act is an extension of the objectives provided in s.3(1)(a) above, applying the overriding principal that workers and others should be given, so far as reasonably practicable, the highest level of protection against harm to their health and safety from hazards and risks arising from work, substances or plant[59].

12. What is required from a duty holder to ensure health and safety is set out by s.17, that is to manage risks by either:
    (a) eliminating the risks entirely; or
    (b) where it is not possible to completely eliminate the risks, to minimise them, so far as reasonably practicable.

13. The concept of *'so far as reasonably practicable'* is defined in s.18 of the Act, it is the measure of what reasonable actions could have been taken to discharge a duty owed under the Act and that section provides a non-exhaustive list of relevant matters to be taken into account when managing hazards and risks, as follows:
    (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[60].

14. The High Court in *Slivak v Lurgi (Australia) Pty Ltd*[61] found, in part, (at paragraphs 51 – 54) the question whether a measure is or is not reasonably practicable requires no more than the making of a value judgement in light of all the facts as known at the relevant time. When considering 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.

15. As a person conducting a business or undertaking, the defendant company owes a duty of care under s.21(2) of the Act. This places a duty on the defendant company to ensure that plant at the workplace was without risks to the health and safety of any person at the workplace.

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[58] s.3 (1) *Work Health and Safety Act 2011*
[59] Section 3(2) *Work Health and Safety Act 2011* & cl. 3 Explanatory Notes, Work Health and Safety Bill 2011.
[60] Section 18 *Work Health and Safety Act 2011*
[61] (2001) 205 CLR 304 [51] - [54]

16. As stated above, the defendant company is charged with an offence under s.33 of the Act which provides that a person commits a category 3 offence if –
    (a) the person has a health and safety duty; and
    (b) the person fails to comply with that duty.
17. As evidence of whether or not a person has complied with their duty, the Act permits the court to have regard to approved codes of practice to determine what reasonably practicable steps the defendant could have taken to ensure health and safety[62].
18. The applicable **codes of practice** being –
    (a) '*Managing the risks of plant in the workplace*'- *Code of Practice 2011*, relevantly:
        i. *Part 3.3. 3.6 and 3.7 which details the expectations of a duty holder's maintenance system, including regular inspection and maintenance of plant in accordance with manufacturers specifications or, in the absence of these, a competent person's recommendations to ensure control measures implemented remain effective;*
    (b) Inspection and maintenance is reiterated in the *Safe design and operation of tractors Code Of Practice 2005* wherein it states, relative to tractors –
        i. Part 5.1 Maintenance
        Duty holders should maintain tractors in a safe operating condition by making regular inspections and following the manufacturer's recommended servicing and maintenance procedures. Logbooks should be maintained which record scheduled maintenance and repairs performed and any modifications which might affect the safe operation of the tractor;
    (c) Inspection and maintenance is again reiterated in the *Rural Plant Code of Practice 2004* at Part 6 *'Preventative Measures'*, specifically at Part 6.1 and 6.2.
19. The nature of the breach has two components – one with regard to the maintenance and repair of the tractor and trailer being used at the material time. The second aspect relates to the level of training and instruction given to the two young workers with regard to identifying and addressing defects on these items of plant.

The offence

An agreed statement of facts has been prepared by the parties which details the defendant company's offending (see Ex 1).

The prosecutor submits that at the date of this offence the defendant conducted a mixed agricultural and beef cattle production business or undertaking from a large rural workplace located at Goondiwindi, and that it was a regular occurrence that work activities were undertaken via the use of mobile plant within the workplace. On the 1st day of April 2016 a tractor and trailer combination was being operated within the workplace to collect/retrieve poly siphon pipes from paddocks. During this activity an incident occurred. WHSQ Inspectors attended that date and the tractor and trailer was subsequently inspected (refer *'QPS Statement of Sergeant Dieckmann'*) where it was identified that the tractor and trailer had a number of defects namely –

Tractor:

(a) Right brake inoperative;
(b) Left brake pedal did not release fully when disengaged – required manual manipulation to release it;
(c) Excessive wear in steering linkages resulting in 'half a turn' of free play in steering wheel;
(d) All four tyres suffering excessive age cracks to their sidewalls, with the right front steering tyre also suffering tread delamination in one section exposing the steel belt;
(e) Excessive play in the 'high and low' range gear selector lever mechanism;
(f) inoperative front and rear head/tail lights;

Trailer:

(g) lack of brakes;
(h) rear tyre suffering tread delamination with steel belt exposed;
(i) inoperative tail lights;
(j) excessive wear in suspension components.

A series of photographs were taken by WHSQ Inspectors. In submissions he referred me to those photos (Ex 2 photos 1-10).

The tractor and trailer combination being operated with the defects identified posed a risk to workers who may be in the near vicinity of the operating plant. The tractor operator would also be at risk from the defects if the plant collided or overturned

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[62] Section 275 *Work Health and Safety Act 2011*

as a result of the defects impacting on that person's control of the plant. With regard to these defects, the prosecutor submitted that the reasonably practicable steps that the defendant could have taken to minimise the risks to health and safety were to:

a) have a system in place to ensure the plant was adequately inspected to ensure it was safe to operate and, if it was not, remove the tractor and trailer from service until it had been repaired;
b) have adequate systems for the identification and undertaking of maintenance on its plant, namely the tractor and trailer.

Submissions on penalty

The Prosecutor submitted that the essence of the defendant company's breach can be described as a failure to have implemented adequate systems (control measures) for maintenance of its plant and, following on from that, have a system for adequate pre-start instruction to be given to workers who are tasked with operating the plant so that they may identify defects in the plant and not put such plant in to use.

The prosecutor further submitted that the *assessment of hazards* (here from defective plant) forms an integral part in the risk management process which requires, in its first step, a duty holder to turn their mind to its operating plant and what risks may arise from its use – here it is patently obvious that plant would require, at times, inspection, repair and maintenance. The lack of repair and maintenance of these items of plant, which were in use, underlies the defendant company's breach.

Further compounding the breach he submitted, was that the workers were young and inexperienced, tasked with operating the plant where they were not given adequate and sufficient instruction in how to properly identify defects in plant, and it was therefore incumbent on the defendant to have such a system in place and to ensure appropriate instructions and supervision were given in pre-start operational inspection to enable them to carry out this task adequately.

Neither of these two factors could have been carried out as the plant was put into service. In his oral submissions the prosecutor submitted:[63]

> That's the first aspect of it, the pre-start and the instruction and how to undertake that safely. The second aspect relates to the defects that are placed on that particular – or identified post-incident by the QPS mechanical inspector, and they're detailed at paragraph 51(a) through to (i). The inexperienced workers would not have known how to properly identify a brake not operating. They may not know that the left brake on the tractor – at paragraph sub (c) there under 51, that that's not the ordinary way to operate it. An inexperienced worker, particularly with regard to vehicles, may not know how much play should be in a steering wheel to operate it. And as far as identification of tread delamination on tyres and those sorts of things, workers – young workers – are going to need instruction on those things. Those things couldn't – proper instruction couldn't have been given in relation to any of those things because the tractor was put into service with those defects to be operated by those two young lads.

The prosecutor submitted that whilst it remained unexplained why this maintenance/repair work did not occur an aggravating feature was that the defendant did not identify that there had been an omission. It was attendance by departmental inspectors in relation to an incident involving the tractor and trailer that then led to the defects being identified. It is also concerning the multitude of defects in respect to these two items of plant. He submitted that the breach was serious because *"the items of plant remained in service and were operated whilst in this defective condition."*

The checks to be undertaken to identify the defects, and a system of instruction in how to perform those checks, would form a component of any properly instituted maintenance program and would form a part of the everyday activities of a duty holder, operating the same type of business, intent on discharging its duty under the Act. The means by which this defendant company could have discharged its duty were readily available.

Penalties and Sentences Act principles

The prosecutor submitted in relation to the following relevant provisions of sections 9(1) and (2) of the *Penalties and Sentences Act* 1992 ("PASA").

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[63] T1-15

Maximum penalty (s 9(2) (b))
The maximum penalty provided for an offence committed by a corporate defendant under s 33 WHSA is 5,000 penalty units which equates to a maximum fine of $500 000 dollars.

The prosecutor submits that these maximum penalties address the whole scale of offending, which is to provide a sentencing regime, at one end, for offenders whose breach has occurred despite a careful and considered approach to safety in its business and the hazards present and at the other end of the scale an offender whose actions and its approach to safety may be described as cavalier and grossly inadequate. He submits that underpinning the sentencing consideration, is the gravity of the defendant's conduct with regard to the breach that has occurred. The acts. The omissions.

He submitted that the maximum penalty has substantially increased with the enactment of the current Act, and that for a corporate defendant, was the legislature responding to society's expectation that the highest level of protection should be provided to workers and others by persons conducting a business or undertaking and if there is a failure, substantial penalties may be imposed. The objects of the Act, he submitted, sets out the high standard expected of duty holders and reiterates the preferred approach is one of pro-active policing of hazards within a duty holder's workplace.

Deterrence (s 9(1) (c))
The prosecutor submitted that the circumstances of the offence by the corporate defendant, a failure to ensure plant was safe for workers to both, operate and to be safe and not pose a risk when in the vicinity of it, which could have been achieved by ensuring rudimentary maintenance protocols were followed, requires an element of specific deterrence to form a part of any penalty imposed. It is also submitted that any penalty also include a component of general deterrence *to ensure duty holders, proactively, bring appropriate levels of focus to maintenance issues, and systems of inspection and instruction, as they relate to large items of plant routinely used in a business or undertaking.*

Nature of the offence and how serious the offence was (s 9(2) (c))
In this regard the prosecutor submitted as follows:

a) The work, undertaking load-shifting activities with a large powerful tractor towing a heavily laden trailer picking up and transporting diverse materials, at times around workers, within the workplace is easily described as hazardous in nature;
b) That work was carried out with defective plant;
c) The defendant knew the plant was to be operated by young, inexperienced workers who would be heavily reliant on the defendant to ensure it was safe to operate;
d) The inadequacy of the controls was a direct result of this defendant's failure to act on maintenance deficiencies and is compounded by an inadequate system for identification of defects and instructions to workers in how to carry out that inspection;
e) The deficiencies had occurred sometime prior to the incident;
f) There is no suggestion management of the defendant had identified the deficiencies in the item of plant and had been intending to have the plant repaired or maintained – it would appear management were unaware of the deficiencies in the plant until the matter was identified through an investigation by WHSQ Inspectors and QPS personnel;
g) This is a case where a defendant had to embark on a risk assessment process to consider and decide on what controls to implement with regard to its mobile plant. Here, without adequate controls in place, the plant fell in to disrepair and nonetheless, remained and was placed in to use;
h) The type of defects identified on the plant may be described as common and well known areas that require routine inspection and maintenance;
i) It was both reasonable and practicable for this defendant company to effectively implement a safety system for the identification and repair/maintenance on its plant; such a system would include instruction for workers in how to identify plant defects.

The extent to which the offender is to blame for the offence (s 9(2) (d))
In this regard the prosecutor submitted that the defendant brought the hazard in to existence. It has at its core a failure to implement an adequate maintenance and supervision system to ensure defects were identified and resulted in plant being repaired and until that occurred, and to ensure its workers safety, the plant was removed from service and not operated by its workers.

Relevant authorities

In support of the submitted range against the corporate defendant the prosecutor referred me to a number of decisions relating to breaches by corporations of section 33, acknowledging that there were very few and were quite diverse in their facts. However, he did submit that two of those did provide the most useful assistance being *Tranzblast Coating Services (Aust) Pty Ltd* ('Tranzblast') and *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd*[64]. I have perused all of the cases provided. The case of *Soulio v Chives North Pty Ltd* [2016] SAIRC 5 did not provide any assistance to me.

***Tranzblast Coating Services (Aust) Pty Ltd* ('Tranzblast')**

In his oral submissions in relation to this case the prosecutor stated:

> It has some similarities with regard to the matter your Honour is to deal with. The glaring distinction though is that, in the case of Tranzblast, the defective plant wasn't being operated by young children. The defects were noted and that's set out there in the second paragraph, your Honour. It was a coating company – a specialist coating company. It had defects, the most significant of which was the brakes, nonoperational headlights, and taillights and a warning light. The defendant in that case had systems in place for maintenance. Indeed, it had a mechanic on site. There was negligible cost, if any, to have that plant properly maintained.
>
> What had occurred is that the plant had – was only used from time to time, and the maintenance system that the defendant had in place, this item had fallen through the – the gaps in that system. Magistrate noted that it would have been relatively easy for them to have identified the defects if a proper maintenance schedule had been implemented. The finding there by Magistrate Shepherd in the Ipswich Magistrates court was such that the defects themselves wouldn't be immediately obvious. His Honour made the – the observation they would require the item to be – perhaps be tested by someone who was competent to identify that the brakes weren't operating correctly, those sorts of things. A penalty of **$50,000** was imposed.

Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd

The prosecuted submitted that *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd*[65], had some factual similarities to this present matter and also provided some useful jurisprudence with regard to the approach to sentencing under the Act. I have discussed this case and the relevant passages of her Honour's decision under the heading "The Law".

That decision concerned a defective tractor operated as a part of a large banana farm business. The defect related to a lack of a seatbelt on the tractor rendering the operator at risk of death/serious injury if they were ejected or the tractor rolled over. A fitted ROP device would also be rendered ineffective in the case of a rollover as an operator would likely be ejected from the tractor in a rollover event. The tractor rolled over due to the actions of the operator.

In this decision her Honour allowed an appeal by the prosecution against the sentences imposed in the Tully Magistrates Court in respect to two breaches, one under the *Work Health and Safety Act* 2011 and one under its Regulation. The Act breach related to a breach of s.33.

The prosecutor referred to her Honour's comments (at paragraphs 66 – 69), noting the relevant sentencing principles for an offence under the Act by referring to a decision of the New South Wales Court of Appeal considering the equivalent New South Wales legislation[66]. Her Honour then applied those principles (at paragraph 122 – 130) and determined (paragraph 135) the objective seriousness of the defendant's conduct fell in the middle of the range for a category 3 offence (s.33 breach). After finding the penalty of $2 000 imposed by the Magistrate was manifestly inadequate, her Honour stated (paragraph 144) –

> a. *"With respect to the first respondent, the maximum penalty for a category 3 offence is $500 000. Doing the best I can to weigh all the relevant considerations set out above, in circumstances where there are no comparable decisions, in my view an appropriate undiscounted penalty is $100 000. The first respondent is entitled to a significant discount or amelioration in recognition of the mitigating factors outlined above, the fact this is a complainant's appeal, and in light of the low penalty range submitted by the complainant/appellant."*

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[64] [2017] QDC 20
[65] [2017] QDC 20
[66] *Nash v Silver City Drilling (NSW) Pty Ltd; Attorney General for New South Wales v Silver City Drilling (NSW) Pty Ltd* [2017] NSWCCA 96

2. Her Honour set aside the penalty of $2 000 and, taking the above in to account, imposed a penalty of $35 000.

The prosecutor submits that following her Honour's reasoning from that decision and applying those sentencing principles to this matter, the following features support the contended range –

The potential consequences of the risk

Here, a pedestrian worker being struck by large, heavy mobile plant operating within the workplace would very likely lead to death or serious injury. An operator of that plant would also be at risk death or serious injury from collision from the state of the tractor's brakes.

The probability of the risk

The likelihood of the risk occurring was obvious, identifiable and foreseeable. The plant had been operating and, in all likelihood, would have continued to be operated in the defective state.

The availability of steps to lessen, minimise or remove the risk

Her Honour's comments under this heading are, respectfully, adopted. Here, the defendant knew or ought reasonably to have known about the risk and that there was a simple, readily available and not costly way of eliminating or minimising the risk: the plant ought to have been subject to a regular inspection and any identified deficiencies, rectified and until that was done, the plant ought to have been removed from service. Its maintenance system should have extended to adequate instruction in pre-start inspection and identification of defects and instruction on what to do if defects were identified.

Whether those steps are complex and burdensome or only mildly inconvenient

Again, her Honour's comments are applicable. The cost associated with implementing an inspection and maintenance regime were negligible, as would be a system to remove defective plant from service until repaired.

The particular offence in the context of the penalties imposed by the Act

It is respectfully submitted that this defendant's breach falls in the middle to upper range of objective seriousness. It was aware the plant was to be and would be operated within its workplace. It was aware of the workers who would be operating the plant. There was no adequate system with respect to identification of defects in regard to this item of plant through a properly conducted pre-start operational check of the plant. As a result it was not identified that the plant had fallen in to a defective state and it was placed in service, continuing in use throughout the workplace placing pedestrian workers in its vicinity when being operated, along with any operators of the plant, at risk of serious injury or even death.

Prosecutor's proposed penalty

The prosecutor submitted that having regard to the defects relating to these items of mobile plant, the most serious of which related to inoperative brakes and grossly worn tyres, and taking in to account the level of blame that may be attributed to the corporate defendant, the sole person responsible for its maintenance and for adequate instruction to workers who may be tasked to operate the plant, an appropriate penalty range is $75,000 to $100,000 with a penalty falling at the middle to upper level of that range.

PROSECUTION SUBMISSIONS ON PENALTY
(Breach s 46 WHSA)

Defendants - [redacted] **and**

The prosecutor provided written submissions to the court and expanded upon those submissions with oral submissions. The prosecutor submits that although both defendants are charged with an offence under s 46, clearly the factual circumstances grounding each breach are different. He submits as follows:

1. *The breach of s 46 by* [redacted] *was a failure to consult, cooperate and co-ordinate activities with all other persons who have a duty in relation to the same matter.*

2. *The breach of s 46 by* [redacted] *as an officer of* [redacted] *was for failing to discharge a health and safety duty held under s.27 (1) in that he did not exercise due diligence to ensure that the person conducting the business or undertaking, namely* [redacted] *complied with its duty imposed on it under the Act. The applicable codes of practice are particularized in the complaint.*[67]

Background
The agreed set of facts are contained in Exhibit 1.

The legal framework
In his written submissions (at para 5-17) the prosecutor has set out the "legal framework" as follows:-

5. The objective of the Act is to provide a nationally consistent framework to secure the health and safety of workers and workplaces[68]. Section 3(1) details a number of means to how this object is to be achieved, most relevantly by:
   (a) protecting workers and other persons against harm to their health and safety and welfare through the elimination or minimization of risks from work or from particular types of substances or plant;
   ...
6. Section 3(2) of the Act is an extension of the risk management objectives provided in s.3(1)(a) above, applying the overriding principal that workers and others should be given, so far as reasonably practicable, the highest level of protection against harm to their health and safety from hazards and risks arising from work, substances or plant[69].
7. What is to occur in circumstances where more than one person has a duty in relation to the same matter is captured in s.16 of the Act where it states –
   More than 1 person can have a duty
   (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.
8. What is required from a duty holder to ensure health and safety is set out by s.17, that is to manage risks by either:
   (a) eliminating the risks entirely; or
   (b) where it is not possible to completely eliminate the risks, to minimise them, so far as reasonably practicable.
9. The concept of *'so far as reasonably practicable'* is defined under s.18 of the Act, it is the measure of what reasonable actions could have been taken to discharge a duty owed under the Act and provides a non-exhaustive list of relevant matters to be taken into account when managing hazards and risks, as follows:

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[67] *'Work health and safety consultation, co-operation and co-ordination'* – Code of Practice 2011 (Parts 1.2, 5); *'Managing the risks of plant in the workplace'*- Code of Practice 2011 (Parts 3.3, 3.6)
[68] s.3 (1) *Work Health and Safety Act 2011*
[69] Section 3(2) *Work Health and Safety Act 2011* & cl. 3 Explanatory Notes, Work Health and Safety Bill 2011.

(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[70].

10. The High Court in *Slivak v Lurgi (Australia) Pty Ltd*[71] found, in part, (at paragraphs 51 – 54) the question whether a measure is or is not reasonably practicable requires no more than the making of a value judgement in light of all the facts as known at the relevant time. When considering 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.
11. As a person conducting a business or undertaking, the defendant company owes a duty of care under s.46 of the Act. This places a duty on the defendant company to consult, cooperate and coordinate activities with all other persons where it holds a duty in relation to the same matter; here, work carried out by young workers using rural plant.
12. [redacted], as the officer of [redacted] holds a duty under section 27 of the Act to exercise due diligence to ensure that the person conducting the business or undertaking, namely [redacted] complies with its duties under the Act.
13. Section 27 of the Act casts a positive duty on officers like [redacted] to be proactive and to continuously ensure the person conducting the business or undertaking's compliance with its duties and obligations under the Act[72].
14. Due diligence is defined by section 27(5) of the Act, as taking reasonable steps:
    (a) to acquire and keep up-to-date knowledge of work health and safety matters; and
    (b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations; and
    (c) to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and
    (d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and
    (e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act; and
    (f) to verify the provision and use of the resources and processes mentioned in paragraphs (c) to (e).(example omitted)
15. Both defendants are charged with an offence under section 46 though clearly the factual circumstances grounding each breach are different.
16. As evidence of whether or not a person has complied with their duty, the Act permits the court to have regard to approved codes of practice to determine what reasonably practicable steps the defendant could have taken to ensure health and safety[73].
17. The applicable codes of practice as particularised in the complaint being –
    (a) *'Work health and safety consultation, co-operation and co-ordination'* – Code of Practice 2011. Relevantly;
        i. *Part 1.2 which, in part, outlines - In situations where you share responsibility for health and safety with another person, the requirement to consult, co-operate and co-ordinate activities with other duty holders will help address any gaps in managing health and safety risks that often occur when:*
            - *there is a lack of understanding of how the activities of each person may add to the hazards and risks to which others may be exposed ;*
            - *duty holders assume that someone else is taking care of the health and safety matter;*
            - *the person who takes action is not the best person to do so.*

        The outcome of consulting, co-operating and co-ordinating activities with other duty holders is that you each understand how your activities may impact on health and safety and that the actions you each take to control risks are complementary.

        ii. *Part 5 - How to consult, co-operate and co-ordinate activities with other duty holders – where it outlines the process for undertaking consultation with other duty holders.* ***(extract attached)***
    (b) *'Managing the risks of plant in the workplace'*- Code of Practice 2011. Relevantly;

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[70] Section 18 *Work Health and Safety Act 2011*
[71] (2001) 205 CLR 304 [51] - [54]
[72] Clause 27 *Work Health Safety Bill 2011*, Explanatory Notes
[73] Section 275 *Work Health and Safety Act 2011*

i. *Part 3.3 which outlines the requirement for persons conducting a business or undertaking to provide the necessary information, training, instruction, and supervision to protect workers from the risks associated with the use of the plant; and*
ii. *Part 3.6 which details the expectations of a duty holder's maintenance system, including regular inspection of plant to ensure control measures implemented remain effective. (extract attached)*

The offence

The defendant company [redacted] was engaged by [redacted] to provide *farm management services* to (at that time) [redacted] business [redacted] which was a mixed agricultural and beef cattle production rural property located at Goondiwindi. [redacted] had three employees, two young casual workers and one permanent (a leading hand, [redacted]. These persons reported to the defendant [redacted]

The prosecutor submitted that it was a regular occurrence that work activities were undertaken on the property via the use of *mobile plant*. [redacted], through his position as farm manager was responsible for delegating various tasks to be carried out on the property. The individual defendant had discussed with [redacted] for the two young workers to carry out pipe retrieval work via the use of a tractor and trailer on the property.

On the 1st day of April 2016 a tractor and trailer combination was being operated within the workplace to collect/retrieve poly siphon pipes from paddocks. Both defendants were aware this work was being undertaken by the two young workers. During this activity an incident occurred where one of the young workers was dislodged from a trailer he had been standing on and he was run over/struck by the trailer sustaining fatal injuries.

The defendant [redacted] (sole director of [redacted][4]), was the person who carried out the Farm Manager's duties at [redacted] property on behalf of his company. As such, he owed a duty pursuant to s 27(1) WHSA. The prosecutor submits that the section casts a positive duty on officers like [redacted] to be proactive and to continuously ensure the person conducting the business or undertaking's compliance with its duties and obligations under the Act.[75]

He further submitted that at the material time [redacted] as the sole director and controlling mind of the defendant company, he was in a position to *"influence and control how systems were developed and implemented and resources allocated for consultation, coordination and cooperation to meet those circumstances where multiple duty holders had a duty with respect to the same matters that the defendant company had."*[76] The prosecutor submitted that [redacted] was fully aware of the corporate duty holder [redacted] and the individual [redacted] as his company had a farm management contract in place with the first and he had line of management responsibilities with the second.

The prosecutor submitted that in relation to the defendant [redacted] the most reasonably practicable steps that the defendant company could have taken to *consult, cooperate and coordinate with the other duty holders* was to:

(c) ensure it consulted, through its worker the individual defendant, with [redacted] as to the manner of how the pipe retrieval work was to be carried out – specifically how the pedestrian worker would travel to the pick-up area and later to the storage area once the trailer was fully laden;
(d) ensured an adequate risk assessment was undertaken by one of the duty holders on the work activities;
(e) ensured a safe work method statement for undertaking the work was prepared by one of the duty holders and a plan in place to discuss it with the workers;
(f) ensured there was in place a system for the adequate instruction of the workers in pre-start inspection on the plant and any identified defects were properly managed;
(g) ensured there was in place adequate close supervision, at the pipe retrieval site, for the young inexperienced workers;
(h) ensured it had in place its own supervision of the work activities being carried out by other duty holders.

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[74] section 9 of the *Corporations Act* 2001 (Cth)
[75] Clause 27 *Work Health Safety Bill 2011*, Explanatory Notes
[76] At para 28 of written submissions.

In relation to the defendant [redacted] the prosecutor submitted that the breach concerning the individual defendant was in *failing to exercise due diligence by not ensuring the defendant company*:

(i) had developed, implemented and followed a system where, as here, his company held a duty along with others in regard to instructing young workers carrying out work with rural plant on a property his company had farm management responsibilities for so that those work activities were undertaken in a safe manner; and

(j) had implemented adequate systems of work where workers would be supervised, here plant operators, to ensure they did not operate deficient plant, that the defects were identified and reported and that the defective plant was removed from service until repaired.

The prosecutor expanded upon his written submissions stating:

> Section 46 requires an element of consultation and coordination and cooperation between parties, parties being duty holders. [redacted] was engaged by [redacted] to carry out farm management. It was engaged by the owner of the property. The owner of the property had employed a leading hand, but they expected that farm management company, [redacted] to provide the adequate and proper oversight in relation to the day-to-day activities.
>
> Given the nature of activities here, young workers being tasked to operate the tractor and trailer to pick up pipes, it was incumbent on it and the essence of its breach is that it was required to consult with those other duty holders, primarily [redacted] and also [redacted] as to how to do that work safely. There was no evidence that it had done any of those things that it was required to do under section 46.
>
> And [redacted] breach is set out there at paragraphs 70 through to 80. His breach can be succinctly captured at paragraph 75, your Honour. He was aware that the work was to be carried out. He was aware of his responsibility as a director of [redacted] He ought to have ensured it had systems in place for that engagement to occur. There was no evidence of any such systems being in place. [77]

Submissions on penalty

The prosecutor submitted in relation to the following relevant provisions of sections 9(1) and (2) of the *Penalties and Sentences Act* 1992 ("PASA").

Maximum penalty (s 9(2) (b))

I note that s 46 WHSA provides for a maximum penalty of 200 penalty units ($20 000) in respect of an individual (s 27(3) WHSA). A company may be fined a maximum of $100 000 (s.181B PASA).

The prosecutor submits that these maximum penalties address the whole scale of offending, which is to provide a sentencing regime, at one end, for offenders whose breach has occurred despite a careful and considered approach to safety in its business and the hazards present and at the other end of the scale an offender whose actions and its approach to safety may be described as cavalier and grossly inadequate. He submits that underpinning the sentencing consideration, is the gravity of the defendant's conduct with regard to the breach that has occurred. The acts. The omissions.

The prosecutor submits that the maximum penalty prescribed for a breach of this provision highlights, the legislature responding to society's expectation that the highest level of protection should be provided to workers and others by persons concerned in the conduct of a business or undertaking and, if concurrent duties are held, there will not be any ability to avoid responsibility for that duty. He submits that if there is a failure, by any person who holds a duty in circumstances where multiple duty holders are present, substantial penalties may be imposed. The objects of the Act set out this high standard expected of duty holders, and he submitted that it therefore becomes paramount that officers of corporate duty holders turn their minds and resources to ensuring that adequate systems are in place.

Deterrence (general) (s 9(1) (c))

In relation to [redacted] the prosecutor submitted that the circumstances of the offence by the defendant company, being a failure to ensure, as a concurrent duty holder, that plant was safe and adequate for workers to operate by not ensuring consideration was given to how the task was to be performed and consideration given to rudimentary maintenance protocols being in place and, if defective plant was identified, removed from service, requires an element of

[77] T-15, 16

general deterrence to form a part of any penalty imposed to ensure duty holders holding a concurrent duty with respect to workers using plant to bring appropriate levels of focus to decisions on use of plant that is adequate to undertake the task and that maintenance issues as they relate to plant are adequately addressed.

In relation to the defendant [redacted], the prosecutor submitted that the circumstances of the failure was to implement adequate systems within the defendant company to ensure any concurrent duties were discharged by it and the lack of evidence of any such systems, requires an element of specific as well as general deterrence to form a part of any penalty imposed to ensure officers of corporate

Denunciation (s 9(1) (d))
This is one of the only purposes for which sentences may be imposed on an offender *"to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved"*. Although not referred to in his written submissions, the prosecutor in his oral submissions stated that although general deterrence looms large in this case, there was also an element of denunciation that the court should take into account , but did not expand upon this submission.

Nature of the offence and how serious the offence was (s 9(2) (c))
In addressing this provision, the prosecutor submits as follows:

a) A young worker died whilst engaged in a high-risk activity – performing activities on and around mobile plant to collect siphon pipes in a remote part of the workplace;
b) The plant was not adequately inspected (pre-start) and it was put in to use whilst it had multiple defects;
c) Both workers were young children, and both were inexperienced;
d) The workers were tasked with carrying out this activity unsupervised;
e) There was no safe work method statement prepared or adequate work instructions given with regard to this work task;
f) Insufficient consideration was given to what plant was suitable for the task in that the pedestrian worker had no means to travel to the storage area some kilometres away once the trailer was fully laden.
g) There is little the company, and therefore its officer, can point to that would demonstrate it consulted with the other duty holders to ensure that this work activity was carried out safely.

The extent to which the offender is to blame for the offence (s 9(2) (c))
In addressing this provision the prosecutor submits that in relation to [redacted] it failed to engage in any consultation with the other duty holders with respect to the work activities to be undertaken by the young workers other than it, through its officer, gave an instruction that the work is to be carried out and thereafter relied solely on the duty holder [redacted] to provide instructions/supervision to the workers on the task. Neither defendant discussed what would form the basis of those instructions/supervision.

In relation to the defendant [redacted] the prosecutor submits that as the controlling mind of the defendant company [redacted] and having a positive responsibility to ensure that it had systems developed and implemented to ensure consultation took place, this did not occur. The responsibility fell directly on [redacted].

Accordingly, he submits that the responsibility for each defendant's breach rests squarely on each.

Any damage, injury or loss caused by the offender (s 9(2) (e))
Unfortunately, in this case a young worker has died.

In applying the principles enunciated from the *Nash* decision applied in *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd*[78] the prosecutor submitted:[79]

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[78] [2017] QDC 20
[79] At para 41 of written submissions.

The potential consequences of the risk

Here the consequences of two young, inexperienced and arguably unsupervised workers tasked to undertake siphon pipe retrieval/collection in a remote area of a large rural property from defective and inadequate mobile plant would very likely lead to death or serious injury from any mishap. Here, as there was inadequate consideration firstly to how the pre-start inspection of the plant was undertaken, defective plant was placed in to service. Secondly, there was inadequate consideration given as to how the second pedestrian worker would travel to the storage area once the trailer was fully laden (there was no other seating on the plant) it resulted in a young worker placed at a risk by travelling on the trailer in circumstances where he has fallen and received fatal injuries. It may reasonably be expected that the above deficiencies would have been identified, or the chance of them being identified vastly improved, if effective consultation with the other duty holders, as required by the Act, had taken place.

The probability of the risk

The likelihood of the risk occurring was obvious, identifiable and foreseeable. The nature of the work to be carried out required the young unsupervised workers to pick up pipes over a large area and to then transport them some several kilometres to the storage area. There was no seating on the trailer once it was laden and no extra seating on the tractor. Suitable plant or an alternative method of transport for the pedestrian worker should have been provided and instructions given to the young workers with regard to same. The workers were left to devise their own method of transport. These deficiencies would have been identified if an adequate risk assessment and safe work method document was prepared. The plant brought to site was defective. It should not have been in service.

The availability of steps to lessen, minimise or remove the risk

Here, the defendant knew or ought reasonably to have known about the risk and that there was a simple, readily available and not costly way of eliminating or minimising the risk: ensure there was an adequate pre-start inspection system in place for the mobile plant and that a risk assessment and preparation of work method statements were to be undertaken prior to the work commencing. Properly completed, the pre-start inspection would have identified the defects and led to removal of the plant from service. Similarly, properly completed a risk assessment would have identified the need for transport for the pedestrian worker.

Whether those steps are complex and burdensome or only mildly inconvenient

The cost associated with the above steps were minimal and would be expected to form a part of any business' usual work health and safety systems.

The particular offence in the context of the penalties imposed by the Act

Given the nature of the risk presented to two young workers by the absence of any consultation on the tasks and decisions on how to undertake them safely – which has occurred through a lack of systems – leading to provision of inadequate plant for the task being undertaken it is respectfully submitted that the defendant's breach falls in the middle to upper range of objective seriousness

Relevant authorities

In regard to the defendant [redacted] the prosecutor submitted that he was not cognizant of any relevant cases an 'officer' had been prosecuted for a breach by a corporation of s.46 with regard to their responsibilities of due diligence. During the adjournment my research also failed to locate any relevant cases in this regard.

In support of the submitted range against the defendant company [redacted] the prosecutor relies on two decisions being *A W Geotechnical Pty Ltd (Magistrate Shearer, Magistrates Court, Brisbane on 28/11/17)* and *Boland v Trainee and Apprentice Placement Service Inc* [2016] SAIRC 14.

I have considered those matters and the submissions. These cases are clearly distinguishable to the facts in the present case.

Prosecutor's proposed penalties

The prosecutor submitted in respect of the defendant company, [redacted], having regard to the seriousness of the incident and the lack of any evidence of effective coordination and consultation by the defendant company, an appropriate range is $20,000 to $40,000 with a penalty falling at the higher end of that range.

In respect of the individual defendant [redacted] as an officer who failed to ensure a corporation met its duty under the Act, he submits for a penalty in the amount of $7,500 is appropriate.

III. DEFENCE SUBMISSIONS ON PENALTY

DEFENCE SUBMISSIONS ON PENALTY
(Breach s 32, 33 WHSA)

Defendant - [redacted]

Counsel provided written submissions to the court and expanded upon those submissions with oral submissions. At the outset of his written submissions he stated:[80]

> It is submitted as important to recognise that the elements comprising the Category 3 charge (as to the mechanical condition of the tractor or trailer) are unrelated to the tragic events which underpin the Category 2 charge. There is no factual link or allegation that the mechanical condition of the tractor or trailer played any role, or had any effect on, the incident involving [redacted]. It is recognised that their condition created other distinct risks, and this fact is not downplayed.

Counsel distinguished each of the cases relied on by the prosecutor submitting that the culpability of the defendant in each of those cases was '[redacted]'.

In relation to each of the relevant matters in s 9 PASA he submitted as follows:

Maximum penalty - (s 9(2) (b)
Counsel submitted that a maximum penalty is intended for cases falling within the worst category of cases for which the penalty is prescribed[81] and to determine whether a particular matter is within the "worst case" requires a consideration of both the nature of the crime and the circumstances of the particular criminal.[82] He submitted that this is reflective of the need to consider the circumstances to reveal whether the particular conduct of the offender which can be considered toward the top end of the scale caught by the offence.[83] Where an offence, although grave, is not so grave as to warrant the imposition of the maximum, the Court is required to consider where, on the entire spectrum from least to worst the facts, the particular case lies.[84] In doing so, he submitted that the Court is to adopt an *"instinctive synthesis"* approach to consideration of all relevant factors, necessarily balancing the many different and conflicting features.[85] In relation to the offence categories he stated:[86]

> e. In considering the level of penalty for a particular charge, it is appropriate to consider the existence of the tiering of these offences and the differences in maximum penalty.[87]
> f. When each provision is considered it can be noted that the elements of each provision build, from mere non-compliance with a duty (Category 3), to non-compliance which exposes someone to a risk (Category 2), and finally exposing someone recklessly (Category 1).
> g. Further, both the Category 2 and 3 offences apply to an extremely wide range of conduct, encompassing all duties outlined in sections 19 to 29 of the Act. These duties include not only the primary duty of care applying to all persons controlling an undertaking or business, but also to designers, manufacturers, importers and suppliers of things used in business, as well as workers and officers.
> h. Accordingly, in considering whether a particular matter falls within a worst case or elsewhere on the spectrum, the fact the offence provision applies to such a wide variety of matters is relevant.[88]

I agree with this submission.

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[80] Defendant's Submissions as to Sentence (at p 1)
[81] *Ibbs v The Queen* (1987) 163 CLR 447 as referred to in *Veen v The Queen (No.2)* (1988) 164 CLR 465 at 478.
[82] *Rv Kilic* (2016) 259 CLR 256, per Bell, Gageler, Keane, Nettle and Gordon JJ at [18]
[83] R v Chivers [1993] 1 Qd R 432 at 436-437 per Thomas J
[84] *Rv Kilic* (supra) at [19]
[85] *DPP \J Dalgliesh* (2017) 349 ALR 37 at [5] per Kiefel CJ, Bell and Keane JJ
[86] Defendant's Submissions as to Sentence (at p 5)
[87] Steward v Mac Plant Pty Ltd and Mac Farms Pty ltd [2018] QDC 20 per Fantin DCJ at [69], relying on Nash v Silver City Drilling (NSW) Pty Ltd [2017] NSWCCA 96
[88] Baumer v R (1998) 155 CLR 51 at 57

Nature of the offence and how serious the offence was (s 9(2) (c))
Counsel submitted:[89]

> a. Each of s32 and s33 form part of a three-level tier of offences under Division 5 of Part 2 of the WHS Act. These three offences relate to "health and safety duties" created under sections 19 to 29 of the WHS Act.
> b. In addition, there are further miscellaneous offences of a lower level in both the WHS Act and its regulation.[90]
> c. The highest level of offence is that found under s31 - the Category 1 offence, which has a maximum penalty for corporate entities of 30,000 penalty units, or$3million:
> d. An offence under s32 is a Category 2 offence, having a maximum penalty half of that for a Category 1 offence, while an offence under s33 is a Category 3 offence which has a maximum penalty one sixth of a Category 1 offence.
> e. In considering the level of penalty for a particular charge, it is appropriate to consider the existence of the tiering of these offences and the differences in maximum penalty.[91]
> f. When each provision is considered it can be noted that the elements of each provision build, from mere non-compliance with a duty (Category 3), to non-compliance which exposes someone to a risk (Category 2), and finally exposing someone recklessly (Category 1).
> g. Further, both the Category 2 and 3 offences apply to an extremely wide range of conduct, encompassing all duties outlined in sections 19 to 29 of the Act. These duties include not only the primary duty of care applying to all persons controlling an undertaking or business, but also to designers, manufacturers, importers and suppliers of things used in business, as well as workers and officers.
> h. Accordingly, in considering whether a particular matter falls within a worst case or elsewhere on the spectrum, the fact the offence provision applies to such a wide variety of matters is relevant.[92]

The extent to which the offender is to blame for the offence (s 9(2) (d))
Counsel submitted that:

1. [redacted] accepted that it was responsible for failing to ensure the health and safety of [redacted], thereby resulting in his death and the Category 2 charge under s 32 of the WHS Act; and

2. [redacted] accepted that, as owner of the equipment, it was responsible for the failure to maintain and supply its mechanical plant, in particular for the mechanical state of repair of both the International Harvester Tractor Model 766 and dual axle trailer the subject of, and resulting in, the Category 3 charge under s 33 of the WHS Act.

Any damage, injury or loss caused by the offender (s 9(2) (e))
Counsel submitted as follows:[93]

- In relation to the issue of damage, injury or loss caused by the conduct the subject of the charges, in relation to the Category 2 offence it is clear that [redacted] was exposed to a risk and this risk eventuated. As a result, [redacted] was injured and passed away the following day. It is also clear the death of [redacted] affects his family, in particular his brother [redacted] who was present at the time of the incident, and his parents who were present immediately after the incident.

- There is no allegation that the conduct of [redacted] relevant to the Category 3 offence caused any damage, injury or loss to any person

Offender's character, age and intellectual capacity (s 9(2) (f)) and (s 11)
In relation to [redacted] corporate character counsel submitted that the defendant [redacted] has no prior convictions.

The presence of any aggravating or mitigating factor concerning the offender (s 9(2) (g))
In relation to these matters counsel submitted as follows:[94]

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[89] Defendant's Submissions as to Sentence (at p 4-5, para 11)
[90] such as the offence in s 46 of the WHS Act.
[91] *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd* [2018] QDC 20 per Fantin DCJ at [69], relying on *Nash v Silver City Drilling (NSW) Pty Ltd* [2017] NSWCCA 96
[92] *Baumer v R* (1998) 155 CLR 51 at 57
[93] Defendant's Submissions as to Sentence (at p 6, para 13)
[94] Defendant's Submissions as to Sentence (at p 6-7, para 16)

a. in relation to the s 32 offence, the death of [redacted] and the impact on his family, are accepted as aggravating factors, as is the fact [redacted] and his brother [redacted] were aged 14 at the time of the offence.

b. in relation to the s 33 offence, it is submitted there are no aggravating circumstances - the risks are not alleged to have resulted in any loss or damage to any person, or to have had an effect in relation to the events underpinning the Category 2 offence;

c. the pleas of guilty by [redacted] in relation to both charges should be treated as a mitigating factor;

d. [redacted] has not unnecessarily prolonged finalisation of the matters agreeing to a large majority of facts and allowing tender of documents by consent to facilitate the process; and

e. [redacted] did not require the family of [redacted] and in particular his brother [redacted] to go through any defended trial of the matters involving the Category 2 offence (or, for that matter, the Category 3 offence).

The prevalence of the offence (s 9(2) (h))
In relation to *prevalence* counsel submitted as follows:

a. In relation to Category 2 offences, while many such matters are brought before the Courts, it is difficult to establish many such matters that are within an agricultural setting in Queensland.

b. A similar situation is found in relation to Category 3 offences, in that the provision applies to all duties in Part 2 Div 2 to 4 of the WHS Act. In addition, there have been only a very small number of prosecutions under s 33.

I accept this submission, and also for the reasons which I have already stated above. Prevalence is not a relevant factor for my determination in these matters before me.

How much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences (s 9(2) (i))
It is accepted that the defendant co-operated fully in the investigation of the offences.

Any other relevant circumstance (s 9(2) (r))
Counsel advised that since the incident [redacted] have positively responded by employing a safety officer, introducing a new employee safety and induction handbook, risk register, and processes and training that have been undertaken since the incident.[95]

Relevant Authorities

In his written submission defence counsel distinguished each of the cases relied upon by the prosecution stating his reasons that the culpability of [redacted] was less than in those cases[96]. He also referred to a number of cases published on the WHSQ website, stating that the culpability of [redacted] was comparable to that in *Case E189693* where the defendant company was fined $200,000. As I have stated at the outset, without the actual sentencing remarks these cases are of no assistance.

Summary of submissions

I take into account the submissions by the parties. Whilst the cases referred to are clearly distinguishable, it is the reality that each case will always differ and must be dealt with on its own unique set of circumstances. This is one of those cases. However, for the reasons outlined by the prosecutor, I just cannot accept the defence submissions that the culpability of the defendant in each of the cases referred to was greater than [redacted]

In relation to sentencing, defence counsel submitted that:

> "the reality of the New South Wales sentencing process under their legislation mandates certain percentage reductions in certain circumstances, as opposed to the reality of what occurs in Queensland. And this is demonstrated in Judge Fantin's decision in my respectful submission. There may be considered a uniform process but the reality, I respectfully submit, is that we are different societies, and that there is variation in relation to the levels of penalty that may be considered appropriate by yourself"[97]

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[95] See Exhibit 2, documents 25-28
[96] Defendant's Submissions as to Sentence (at para 25-31)
[97] T1-40

Whilst accepting this submission, it is in light of the comments in the passage by DCJ in *Williamson v VH & MG Imports Pty Ltd*[98] which I referred to above that *"there is no single "correct" sentence in any given matter, but it is fundamental to a fair system of justice, that sentencing be undertaken with as much consistency as possible".*

In referring to each of the relevant matters which this court must consider in s 9 PASA, the prosecutor has carefully and thoroughly outlined in his submissions the reasons for the penalty range contended in respect of each offence. I accept those submissions.

[98] [2017] QDC 56 (at para [73])

DEFENCE SUBMISSIONS ON PENALTY
(Breach s 46 WHSA)

Defendants - [redacted]; and
[redacted]

Counsel provided written submissions to the court and expanded upon those submissions with oral submissions. He submits as follows:

[redacted]

Nature of the offence and how serious the offence was (s 9(2) (c))
In his written submissions in relation to the defendant [redacted] counsel stated inter alia:

> 10. In relation to the *nature of the offences and their seriousness*, on the facts before the Court and on which it may base its consideration, it is submitted:
>
> a. Regard should be had to the fact the offence does not fall within the tiering of offences identified as Categories 1 to 3. The maximum penalty for a breach of s46 is well below that of a Category 3 offence;
>
> b. Further, s 46 does not involve consideration of whether or not a particular duty under the WHS Act has been complied with. Section 46 is clear in its wording that all persons who hold duties relating to the same matter must consult, cooperate and coordinate activities, that, holding a duty is merely a prerequisite for the obligation to consult - it is submitted the complainant's submission that s 46 imposes a duty of care is incorrect;[99]
>
> c. Similarly, where the complainant refers to *"what reasonable practicable steps the defendant could have undertaken to ensure health and safety"*,[100] with respect this similarly conflates the construction of the WHS Act - s46 contains no element of *"reasonable practicability"* with regard to ensuring health and safety. It requires only that the persons consult, cooperate and coordinate activities.
>
> 11. In relation to the extent of [redacted] blame for the incidents the subject of the charges:
>
> a. [redacted] accepts that it is responsible as charged for failing to consult with [redacted] in relation to the work carried out by [redacted] and [redacted] using farm equipment at the property;
>
> b. It is appropriate for careful consideration to be given to the Agreed Statement of facts as to the conduct in evidence on which the Court is able to make its assessment as to culpability.
>
> 12. In relation to the issue of **damage, injury or loss** caused by the conduct the subject of the charges, the complainant alleges that the conduct of [redacted] in failing to consult with [redacted] caused the eventuation of the risk which ultimately resulted in the death of [redacted] With respect, such allegation fails to take account of the relationship between all Defendants.
>
> 13. [redacted] and [redacted] are both what are colloquially known as family companies. [redacted] is owned by [redacted] and his parents. [redacted] is wholly owned by [redacted] Both companies have a common director in [redacted]
>
> 14. Section 46 requires duty holders in relation to the same matter to consult. In the Explanatory Note to the provision on its introduction, it was stated -
>
> ***Clause 46** sets out the duty to consult with other duty holders. Managing work health and safety risks is more effective if duty holders exchange information on how the work should be done so that it is without risk to health and safety. Co-operating with other duty holders and co-ordinating activities is particularly important for workplaces where there are multiple PCBUs. This clause requires duty holders to consult, co-operate and co-ordinate activities with all other persons who have a work health and safety duty in relation to the same matter. This duty applies 'so far as is reasonably practicable'. The phrase 'so far as is reasonably practicable' is not defined in this context, so its ordinary meaning will apply.*

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[99] See complainant's submissions on s46 charges at [11]
[100] See complainant's submissions on s46 charges at [16]

> 15. While the intention behind s46 is readily translatable to instances such as a building site (where multiple businesses may be working at the same time), the instance before the Court is completely different.

In relation to [redacted] ***culpability*** counsel submitted:

> 24. Rather, it is submitted that the correct approach is consideration of factors such as the number of duty holders involved, and the number, variation, and inter-relationship of activities concerned. An instance where there is a failure to consult, co-operate and coordinate activities on a site where there are a large number of unrelated duty holders involving a wide range of activities (such as on a high-rise construction site) would be considered to result in a high culpability, and in circumstances where a prior incident has occurred on that type of site even higher still. This is not the instance here.
>
> 25. Having regard to the cases identified above, [redacted] submits its culpability would be on par with the cases provided, in particular given the interrelationships between [redacted][101]

Counsel adopted the same submission for [redacted]

[redacted]

In relation to [redacted], counsel adopted the same submission as [redacted] in relation to the approach to s 46.

Further, in relation to [redacted] counsel did not agree with the prosecutor's submission at paragraphs [28]-[30] regarding the application of s 27 in relation to s 46. He submitted that such an approach was incorrect and irrelevant. Having accepted that his client held a duty under s 27, thereby satisfying the perquisite for application of s 46, he goes on to state *"But whether his conduct is either in compliance or breach of s 27 is irrelevant."* [102] He submits that his client accepts that he did not consult with [redacted] or any other duty holder and that *"was for the court to determine on the facts before it, the culpability of his failure"*. Counsel expanded upon this in his oral submissions stating inter alia:

> Section 46 is a separate offence provision and its construction relies upon a prerequisite followed by an obligation. The prerequisite is that you have multiple duty holders under the Act and those duties relate to the same matter. Once you have that prerequisite, the obligation arises. The obligation is to consult, cooperate and coordinate activities.
>
> With the greatest respect to Mr. Watson, to raise issues relating to risk and due diligence is not an appropriate approach to determining the content of the breach. If a finding is made, and there is the plea of guilty given in both instances, that both [redacted] held duties under the legislation and those duties were in relation to the same matters, then the consideration is did they consult, cooperate and coordinate activities? And it is accepted, which is why there is the plea of guilty, that this was not done in relation to the work of young [redacted].
>
> This goes further in relation to sentencing. In reliance upon the principles in *Nash v Silver Drilling* is, in my respectful opinion, misconceived. Those decisions – or that decision and those approaches deal with consideration of category 1, category 2 and category 3 offences under the Act. Those offences presuppose a breach of particular duties identified, and those duties are identified in sections 19 through to 29. Each of those duties requires, in some way or form, that the duty holder ensure that the risk in relation to exposure – or that exposure to risk is reduced, and this is where the connection is made with the consideration as to, well, what were the risks that were actually relevant to the duty which has been breached.
>
> In my respectful submission, it's an inappropriate method to assess a breach of section 46 by reference to possible, probable or definite risks that relate to the duty holder. The proper approach is to consider what the provision, being section 46, requires, and then looking at, well, what it requires, what are the factors that are relevant. And I address that in great detail within my submissions. But it is appropriate to reiterate that the proper approach is to look at who are the duty holders, what is the inter-relationship, and then where would that factor within the range of duties that might be appropriate.[103]

"offender's character, age and intellectual capacity" - (s 9(2) (f)) and (s 11)

Counsel submitted in relation to the defendant [redacted] stating that: *he was 35 years old married with three children; has a Bachelor of Applied Science majoring in Agronomy; has an extensive working history in the cotton farming industry and is well regarded; in 2012 he was awarded the Monsanto Cotton Grower of the Year award and in 2013 was awarded Young Australian Farmer of the Year; he also received a 2014 Nuffield Farming Scholarship (sponsored by the*

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[101] Written submissions for defendant

[102] At paragraphs 8-9 of written submissions for defendant [redacted]

[103] T1-39

Cotton Research and Development Corp) studying fertilizer efficiency; he currently holds a position as a paid director of [redacted] *which is a member elected position for a three year term (elected 2016); he also holds the voluntary positions of* [redacted] *of the McIntyre Valley Cotton Growers Association (MVCGA) and is the MVCGA representative to Cotton Australia and Vice-chair of the Old Nuffield Scholarship trust; he is also on the committee of the Goondiwindi Junior Cricket Association and is on the Goondiwindi Sports and Recreation committee, as well as volunteering for the Goondiwindi Junior Rugby Club.*

Counsel submitted that [redacted] suffers *health concerns* which were a relevant factor in consideration[104]. In this regard he tendered a letter from Dr Nicholson dated 4/9/18 stating that the defendant was known to their practice since 1999 and that [redacted] suffers from cerebral palsy and is being treated for depression. However, without further evidence, bearing in mind the relevant authorities which I have alluded to above,[105] although relevant I am not prepared to contribute any weight to this aspect.

It is obvious from the numerous character references and material filed,[106] and the information before me, that [redacted] is a person of very good character. He is well respected in the community and a significant contributing member, as well as in the rural industry.

"the presence of any aggravating or mitigating factor concerning the offender" - (s 9(2) (g))
Counsel submitted in relation to [redacted] that:[107]

> there are no aggravating circumstances - it is incorrect to apply the "risk" considerations as submitted by the complainant as the obligation to consult under s46 does not engage any concept of risk prevention. This is to be compared with each of the duties under sections 19 to 29, where a duty holder in some form is required to ensure against 'risk". It is in this context that the "risk" consideration becomes relevant;

In relation to the individual defendant [redacted], counsel adopted the same submission.

"the prevalence of the offence" - (s 9(2) (h))
Counsel reiterated the prosecutor's submission that there were very few cases brought before the Court for breach of s46 of the WHS Act, with only two s 46 matters being those referred to by the prosecutor

"how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences" – (s 9(2) (i))
It is accepted that each defendant co-operated fully in the investigation of the offences, taking part in interviews voluntarily and answering investigator's questions openly and honestly.

"any other relevant circumstance" – (s 9(2) (r))
Counsel advised that since the incident, in an effort to further understand his duties and obligations as a company director, [redacted] undertook the Australian Institute of Company Directors (AICD) course for company directors.

Also in his submissions counsel advised that a safety officer has now been employed, and I note document 27 in that regard[108]. There is also evidence in relation to processes and training that have been undertaken since the incident.[109]

Summary of submissions

I take into account the submissions by the parties. The breach of section 46 WHSA:

- by [redacted] as the PCBU, was for a failure to *consult, cooperate and co-ordinate activities* with all other persons who have a duty in relation to the same matter.

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[104] See Exhibit 2, document 22
[105] *R v Gaerlan* [2014] QCA 145; *Muldrock v R* [2011] HCA 39 stated at [53]: *R v Andrews* [2012] QCA 266 McMeekin J (at [33]-[35]; *R v Bowley* [2016] QCA 254 at [34; *Doig v Commissioner of Police* [2016] QDC 320 Deveareaux SC DCJ (at [16])
[106] See Exhibit 2, documents 23, 24
[107] Written submissions for defendant Progress Farming
[108] Exhibit 2, documents 27 titled *"Job Description For New Leaf Ag Safety officer"*
[109] See Exhibit 2, documents 25,26

- by [redacted] as an officer of [redacted] was for *failing to discharge a health and safety duty held under s 27(1)* in that he did *not exercise due diligence to ensure that the person conducting the business or undertaking, namely* [redacted] complied with its duty imposed on it under the Act.

Unfortunately there is a lack of authorities to assist me. In regards an [redacted], I am not aware of any cases where an individual 'officer' has been successfully prosecuted for a breach by a corporation of s.46, with regard to their responsibilities of due diligence.

In relation to a corporation, the only relevant case is *Boland v Trainee and Apprentice Placement Service Inc*[110] which also happened to be the very first prosecution for a breach of the consultation duties under the harmonized WHS laws. Whilst the *Boland case* involved an injury, it would appear that the duty does not require and injury, and therefore even a failure to undertake consultation alone could expose a duty holder to prosecution if no '*reasonably practicable*" steps have been taken.

It is my view that the term "*reasonably practicable*" in s 46 does not have the same meaning attributed to the term in s 18 which would appear only to apply in respect of a *"duty to ensure health and safety"*. Instead the term must be given its "*ordinary meaning*". [111] Accordingly, I agree with the defence submission that s 46 contains no element of *"reasonable practicability*" with regard to ensuring health and safety, and that it requires only that the persons *consult, cooperate and coordinate activities*. Consistent with the authorities discussed previously the words *"reasonably practicable"* indicate that the duty does not require an employer to take every *possible* step that could be taken.

The terms "*consult, cooperate and coordinate activities*" in s 46 are not defined in the Act. It is my view that the ***extent of consultation*** required will depend on the *risk* profile of the workplace in which multiple duty holders are located, or where workers are exposed to hazards. The duty is constrained insofar as a duty holder must consult to an extent that is *reasonably practicable*, which incorporates the degree of risk as a consideration.

Defence submitted that the failure to consult was not "*causative of the incident.*"[112] The prosecutor did not submit that. Nor do the injuries sustained form part of my consideration *"as far as the content of section 46 is concerned".*[113]

Although both defendants were charged with an offence under s 46, clearly the factual circumstances grounding each breach were different, as outlined by the prosecutor in his submissions. All of the matters submitted by the prosecutor, including those relating to *risk* and *due diligence*, were relevant matters for this court to consider in the sentencing process.

In relation to the *culpability* of each defendant, whilst accepting that worksites differ, I do not agree that this case is on par with the cases referred to. In sentencing each case must be dealt with on its own unique set of circumstances, and this is one of those occasions. It is my view, particularly for the reasons outlined by the prosecutor, that the culpability of each defendant should be placed towards the higher end, notwithstanding the relationships between the parties and no evidence of prior incidents on the worksite.

I accept the defence submission that *Nash* was to do with a s 33 breach. However, it was my understanding that the prosecutor's submissions in reference to *Nash* (and the degree of risk), was in relation to the assessment of the *degree of culpability* of each defendant in order to determine the *objective seriousness* of each offence, to assist at arriving at an appropriate penalty within the penalty range he was relying on. This was done in the context of the pleas of guilty on the agreed facts by the defendants.

In referring to each of the relevant matters which this court must consider in s 9 PASA, the prosecutor has carefully and thoroughly outlined in his submissions the reasons for the penalty range contended in respect of each defendant. I accept those submissions.

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[110] [2016] SAIRC 14

[111] Clause 46 *Work Health and Safety Bill* 2011, Explanatory Notes; *Slivak v Lurgi (Australia) Pty Ltd*[111] and *Baiada Poultry Pty Ltd v The Queen*[111]

[112] See Defence written submissions on s 46 charges at [16]

[113] *Boland v Trainee and Apprentice Placement Service Inc* [2016] SAIRC 14 at para [5]

IV. CONCLUSION

During the adjournment I had the opportunity to thoroughly consider all of the submissions, the documentary material filed and the numerous cases referred to.

I take into account the *victim impact statement* which was read to the court by young [redacted] mother on behalf of the family. It was an extremely emotional statement by a grieving mother, outlining the utter devastation that this tragedy has had upon the family which they will never fully get over. No amount of fine imposed by this court can in any way compensate for their tragic loss.

I accept that the defendants by their conduct, including [redacted] emotional statement of remorse to the court, have demonstrated *genuine remorse*. Although he gave his permission to [redacted] for the use of the tractor to complete the task of picking up the irrigation pipes *"because it is slower and is better visually compared to the ute"*[114], [redacted] was not aware that the boys would complete the task unsupervised by [redacted]. Despite this, he fully co-operated with the authorities participating in a record of interview on behalf of himself and the companies, making full admissions and taking full responsibility. It is also acknowledged that subsequent to this tragedy the defendants have taken a number of steps in order to ensure compliance with their workplace obligations, including employment of a safety officer.

As I have alluded to above, the authorities clearly warn against giving undue weight to matters such as remorse, obvious distress at the incident, cooperation with the officers of Workplace Health and Safety, and improved safety measures, as *"Too much may not be made of mitigating factors less the objective gravity of the offence is diminished and the purpose of the Act restated."*[115]

However, those comments in relation to *"remorse"* do not apply in relation to discount for a "*plea of guilty*", which the appeal courts have said is to be distinguished.

In this case a *timely plea of guilty* was entered and pursuant to s 13 PASA I will be reducing my penalty accordingly. The timely pleas demonstrated each defendant's acceptance of responsibility and a willingness to facilitate the course of justice. Also, the pleas have avoided the need for a lengthy trial and the trauma to witnesses having to give evidence, particularly in this case, [redacted] brother [redacted]. It also recognized that the pleas have avoided the considerable expenses, ultimately borne by the community of a lengthy trial. In this case I would have estimated at least a (3 -5) day hearing. For these reasons a significant reduction in penalty should be afforded for each defendant.

Each defendant has *no prior relevant history* and I accept that each is well known in the community and the rural industry as good corporate citizens. I accept that [redacted] is otherwise a person of *good character*. I also accept that he does suffer from a medical condition, but for the reasons I have stated above I am not prepared to contribute any weight to this aspect.

The accident occurred not due to the total absence of a protective system of work, but to a flawed protective system, which had placed the young workers at risk. The eventual result was the death of a young inexperienced employee. As I have referred to above, this case is a timely reminder that *due diligence*:

> *"is not done by merely hoping others would or could do what they were told, but also ensuring they have the skills to execute the job they are required to do and then ensuring compliance with that in accordance with the safe standards established. Compliance requires a process of review and auditing, both formal and random, in order to ensure that the safe standards established are in fact being adhered to and under ongoing review".*[116]

Counsel for the defendants was right when he submitted that:

> *"There is no evidence as to what exactly happened; we just simply don't know. And whilst my learned friend has indicated a few times that [redacted] became dislodged, we just simply don't know whether a choice was made..."*[117]

However, the defendants' obligations were to ensure that both [redacted] were free from risk of injury or death from workplace activities. The defendants were aware that both workers were very young and inexperienced in the

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[114] Agreed Facts, (at page 5 paragraph n)
[115] *Short v Lockshire Pty Ltd* (2000) 165 QGIG 521
[116] *WorkCover Authority (New South Wales) (Inspector Mansell) v. Daly Smith Corporation (Aust) Pty Ltd and Smith* [2004] NSWIR Comm 349 per Staunton J at [131]
[117] T1-37

rural environment and as the prosecutor submitted *"the most looming factor would be that tasking young workers to work in what could only be described as a fairly hazardous environment supports the range that's contended."*[118]

The hazards in question of *"working with rural plant, namely towing a trailer"* and *"riding on moving plant, namely the trailer"* led to the death of a child worker. Both the tractor and trailer were in a completely unsatisfactory mechanical condition [119] which *"posed a hazard to workers who may have had caused to operate them"*, and *"the items of plant also posed a risk to pedestrian workers who may be in the near vicinity to it when it is in operation"*.[120] These hazards should have been identified and removed before that death occurred. It is unacceptable that young [redacted] had to die before the breakdown in the system which produced the hazards, was revealed. If the obligations had been discharged, young [redacted] would not have been killed. As the prosecutor submitted, *"It is difficult to imagine a more vulnerable category of worker than young, inexperienced workers."*[121]

In setting a fine the court must give recognition to the need for specific and, of most relevance in these cases, general deterrence. Denunciation (which includes retribution) is also a relevant consideration. Specific deterrence is not a significant consideration here as: *the company has sold the property; the defendants have taken steps to address their WHSA obligations; and the subject tractor and trailer have been sold for destruction.*

However, in the present case, general deterrence and denunciation are of significant importance. Employers must realise the onerous duties imposed upon them under the WHSA and the heavy responsibility they carry for the safety of ALL of their employees, and if a breach results in a serious injury or death of a worker, that significant penalties may be imposed. Further, this duty is "heightened" where (as in the present case), the employees are very young and very inexperienced. [122]

The penalties I am about to impose are not because the child [redacted] lost his life, but because of the failure to provide a safe working environment. The penalties have to be assessed in the light of the conduct involved *and* the risk to an employee emanating from a failure to provide a safe workplace. This is not one of those cases where the maximum penalties should be imposed and it is not submitted in this regard.

For the reasons I have stated above in arriving at a sentence that is *"just in all of the circumstances"*, I accept the prosecutor's submissions that the appropriate penalty to be imposed for each offence is in the *"middle to upper level"* of the ranges as submitted by him. However, it is my view for the reasons stated above, that there should be a further reduction in penalty to give due recognition of the timely pleas of guilty. Further, although fines of the magnitude sought by the prosecution, in light of the cases relied upon, are appropriate to offences of this type, a sentencing court must be cognizant that the financial circumstances of a defendant may be such that the fine must be modified to *"to ensure that deterrence is not transmogrified to oppression."*[123]

In support of his submission for fines at the lower range defence counsel tendered the "*Financial Reports*" in respect of [redacted] (financial years ended 30 June 2016, and 2017) and [redacted] (financial year ended 30 June 2017). In respect of the financial position of the defendant [redacted] defence counsel tendered his *"Notice of Assessment"* for the years ended 30 June 2016 and 2017. It is plainly obvious that the financial position of each defendant is such that significant fines would have a severe adverse financial impact upon them. However, when taking into account all of the relevant matters I do not agree with defence submissions that the penalty for each offence should be at the "lower" end of the appropriate range. To do so would not give appropriate weight to general deterrence and denunciation in light of the seriousness of the offences.

Defence counsel sought one penalty to be imposed in respect of the defendant [redacted] [124] although acknowledging that:

> 31. Given the paucity of cases available, in particular in relation to s 33, this Honourable Court may wish to specify separate levels of penalty in relation to each offence.[125] However, while the Court might make a statement as to the separate levels of

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[118] T1-16
[119] "Statement of Agreed Facts" (at para 51)
[120] "Statement of Agreed Facts" (at para 52)
[121] Prosecutor's written submission (s 32) at para 33
[122] *Attorney General of New South Wales v Tho Services Limited (in liquidation) (ACN 000 263 678)* [2016] NSWCCA 221 Harrison J (with whom Hoeben CJ at CL and Campbell J agreed) (at [65])
[123] Per President Hall in *Gavin Scott Wesche* (ante)
[124] S 49 PASA

penalty which would have been imposed but for mitigating factors, to properly take into account all of the mitigating factors and thereby apply totality in fixing an "appropriate" sentence, it is submitted as appropriate that a single fine be imposed for both offences.

I agree. It is my view that a separate fine should be imposed for each offence.

Accordingly, I consider the appropriate fine in respect of each defendant as follows:

V. SENTENCES

[redacted] - *(1 x breach s 32) (G'windi Court File No. 532/17)*

Convicted and Fined $400,000.00
Ordered to pay Professional costs of $1000 and $92.55 court costs

If this matter had gone to Trial and I found the defendant guilty, I would have imposed a fine in the range of $700,000-$800,000.

[redacted] - *(1 x breach s 33) (G'windi Court File No. 533/17)*

Convicted and Fined $ 50,000.00
Ordered to pay Professional costs of $1000 and $92.55 court costs

If this matter had gone to Trial and I found the defendant guilty, I would have imposed a fine in the range of $80,000 - $100,000.

[redacted] - *(1 x breach s 46) (G'windi Court File No. 531/17)*

Convicted and Fined $ 20,000.00
Ordered to pay Professional costs of $1000 and $92.55 court costs

If this matter had gone to Trial and I found the defendant guilty, I would have imposed a fine in the range of $40,000 - $60,000.

[redacted] - *(1 x breach s 46) (G'windi Court File No. 529/17)*

Convicted and Fined $ 5,000.00
Ordered to pay Professional costs of $1000 and $92.55 court costs

If this matter had gone to Trial and I found the defendant guilty, I would have imposed a fine in the range of $8,000 - $9,000.

I further order that each amount be transferred to SPER.

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[125] *R v Nagy* [2004] 1 Qd R 63 at [39]

"Conviction recorded/not recorded" (s 12 PASA)

I am cognizant of a number of authorities in relation to section 12[126]. Unless a conviction is compelled by the sentencing legislation, all relevant circumstances must be taken into account by the sentencing Court, and none of the matters specified in subs (2) has general predominance. Each is to be kept in balance and none of them overlooked.

I note that it was the position under the previous *Workplace Health and Safety Act 1995* that a conviction being recorded was rare for a first offender:

> "I notice that both in the case of Lollo Pipelines Pty Ltd and Lollo Plumbing Pty Ltd, the Industrial Magistrate recorded a conviction. As I understand it (see above), the Respondent is a first offender. It is rare for a conviction to be recorded on a first offence under the *Workplace Health and Safety Act 1995*. Nothing adverse is said about the Respondent's industrial character. It seems to me that having regard to s. 12 of the *Penalties and Sentences Act 1992*, I should refrain from entering a conviction."[127]

The prosecutor submitted that a conviction should be recorded against each defendant given the seriousness of the defendant company's breach and the level of control and influence the individual defendant had to put systems in place for the defendant company to discharge its duty and the total lack of such systems.

Defence counsel submitted that a conviction should not be recorded in relation to each defendant, particularly the fact that this is the first offence for each defendant. I accept his submissions in this regard.

Accordingly, I order in respect of each defendant that a conviction NOT be recorded.

(B.R. Manthey)
Magistrate
Place: Goondiwindi
Date: 7 / 12 / 2018

[126] E.g. *R v Tobin* [2008] QCA 54 (at [32]-[34]); *R v Brown; ex parte Attorney-General* [1994] 2 Qd R 182 at 185; [1993] QCA 271, *R v Briese; ex parte Attorney-General* [1998] 1 Qd R 487 at 493; [1997] QCA 010, *R v Cay, Gersch and Schell; ex parte A-G (Qld)* [2005] QCA 467 at [40].
[127] *Gavin Scott Wesche and Scotts Transport Pty Ltd* (No. 2) (No. C86 of 2004), President Hall, Industrial Court,

EXHIBIT No. 1
Williamson V NEW LEAF
Progress Report Cobish
DATE 17 SEP 2018

-A-

B.R. Mostley
Magistrate

MAGISTRATES COURT OF QUEENSLAND

Goondiwindi

REGISTRY: GOONDIWINDI
NUMBER: MAG-

IAN DAVID WILLIAMSON (WHSQ) v [redacted]

IAN DAVID WILLIAMSON (WHSQ) v

IAN DAVID WILLIAMSON (WHSQ) v

IAN DAVID WILLIAMSON (WHSQ) v

STATEMENT OF AGREED FACTS

OVERVIEW

1. On the 1st of April 2016 a workplace incident occurred that resulted in a young worker sustaining fatal injuries.

2. The incident occurred at a workplace on a rural property known as [redacted], located at [redacted] Road, Goondiwindi.

3. [redacted] was killed when he was run over/struck by a trailer which was being towed by a tractor.

4. The property was owned at that time by the defendant [redacted]. The property has since been sold.

5. [redacted] is a duly incorporated entity pursuant to the *Corporations Act* 2001 (Cth). It was incorporated in 1989 with the company name [redacted] Pty Limited. That name ceased to exist on 9 November 2016 after the sale of the property and from that time the company continued to operate under the (new) name [redacted]. Its ACN and directors remained the same.

6. [redacted] and his parents - [redacted] - were directors of [redacted] and are the shareholders of that company.

7. [redacted] is approximately 3,700 hectares in size and is a mixed agriculture and beef cattle production farm consisting of - 900 hectares used for irrigation farming; 2000 hectares used for dry land cultivation and the remaining area is grassland for cattle grazing.

8. Adjoining the [redacted] property is the property [redacted] a similar, though larger (10,000 hectares) business of mixed agriculture and beef cattle production.

9. [redacted], a duly incorporated entity pursuant to the *Corporations Act* 2001, purchased [redacted] in 2014 (the year of [redacted]

registration). [redacted] is not related to the defendants other than as outlined below.

10. [redacted] is the sole director of [redacted] which provides farm management services to its clients. [redacted] is a duly incorporated entity pursuant to the *Corporations Act* 2001.

11. At the material time, that is 1 April 2016, [redacted] had two clients: [redacted] respectively. [redacted] was formed at the request of [redacted] in order that it could engage [redacted] through a company as Farm Manager of [redacted]

12. At the material time [redacted] was, through [redacted], the Farm Manager of [redacted] and the adjoining property [redacted]

13. [redacted] was paid monthly for management services it provided to the [redacted] property.

14. [redacted] received payment for his farm management duties by way of distribution through [redacted]

15. As Farm Manager of [redacted] was responsible for cropping programs, how much of the area is planted, what crops and varieties are planted, looking after the machinery and what operations occur on the farm.

16. His role as farm manager also meant he is responsible for the machinery used on [redacted] and its maintenance, hiring of workers for the farm and his role also includes training and supervision of employees on [redacted]

17. At the time of this incident occurrence [redacted] had one full time employee - [redacted] employed as a lead farm hand - and two part-time employees, [redacted] - employed as casual farm hands during their school holidays.

18. As at the time of the incident, [redacted] had worked for the company since February 2015. His role as Lead Farm Hand included completion of the day to day farming work under the direction of [redacted]. It also included the training and supervision of casual employees, including [redacted]

The Jakins Family

19. A homestead located on [redacted] was rented by [redacted] and [redacted] They lived there with their twin boys - [redacted] ('the deceased') and [redacted] did not work in the farming enterprises of [redacted] or [redacted]

20. Both boys were boarders during the school term at a school in [redacted] and returned home for the holidays.

21. As at the 1st of April 2016 (incident date) both boys were 14 years of age (born on [redacted] 2001).

22. Sometime late 2015 [redacted] approached [redacted] about the boys doing general farm work on the school holidays which included tractor driving. [redacted] told [redacted] that the boys did not have much experience with tractors and would need to be shown how to drive them.

23. The boys were first employed on the [redacted] property during 2015 Christmas school holidays.

Commencement of work on the properties

24. The boys started working on [redacted] in the December 2015 school holidays. They completed time sheets and submitted them to [redacted]. They received payment for their work.

25. They performed various farm jobs including cattle work, cleaning out sheds, changing nozzles on the irrigator and spraying burrs. [redacted] said he was aware that the boys started driving tractors to do grading work on [redacted] using late model John Deere tractors.

26. It was arranged that over the 2016 Easter school holidays the boys would mainly work on [redacted]. On 29/3/16 they did some work on [redacted]. The next day they started work on [redacted] As at the time of the incident they had done four shifts on this property.

Induction/ training

27. Prior to commencing work in the 2015 Christmas holiday period the boys were inducted by [redacted] who was the lead farm hand on [redacted]. He attended the homestead and took the boys through induction paperwork. This process involved going through an induction booklet and checklist. They were also shown a *Flexibility Employment Agreement* which was later signed; (this agreement also allowed them to work on [redacted].

28. [redacted] resides on [redacted] and is employed by [redacted] as the lead farm hand. He is responsible for the day to day running of that farm. His supervisor is [redacted] duties involve speaking with [redacted] daily on work to be done and every Monday he meets with [redacted] lead farm hand) to discuss the operations on both farms. [redacted] is not responsible for hiring employees. His role includes induction, supervision and training of employees.

29. [redacted] was aware that they had very little experience in working on farms and had not done much in the way of operating machinery or mechanical work. The boys were *"14 year olds"* so he treated them as if they did not have any experience.

30. In relation to tractor work, [redacted] showed [redacted] how to do pre-start checks and provided him with one-on-one training on a John Deere 7930 and 8350 tractor during the 2015 Christmas work period. A few days later, [redacted] trained [redacted] The training undertaken was not documented. Subsequent to the training the boys did road grading work on [redacted] roads using the tractor. [redacted] was present for the training of the boys on the tractors by [redacted]

31. The John Deere tractors on [redacted] are late model tractors and fully automatic.

32. [redacted] considered both boys were very comfortable in asking any questions about anything they were unsure of. [redacted] states he never had to tell the boys to slow down or similar, and that they both listened and showed themselves to be quick learners and very responsible. He recalled one occasion when [redacted] made an error (by looking over his shoulder)

while grading and drove the tractor slightly off the levy bank. [redacted] immediately turned the tractor off and contacted [redacted] for assistance. [redacted] told [redacted] about this incident.

33. The tractor at [redacted] was an older tractor. The morning of 1 April 2016, the boys received training from [redacted] in relation to the operation of the tractor. This instruction took place over approximately two hours, until [redacted] was satisfied the boys could operate the tractor and appeared confident to do so.

The incident

34. On the incident date the two boys were tasked by [redacted] with picking up poly siphon pipes on the [redacted] property.

35. They were to undertake this task with a tractor and trailer combination. They were working by themselves. They had previously undertaken the job with [redacted] using a utility and the trailer.

36. The task involved one person driving the tractor at a walking pace and one person walking along, picking up the pipes and placing them on to the trailer.

37. Travelling to the pickup location [redacted] was sitting on the trailer as the tractor had only one seat. The boys commenced to pick up pipes with [redacted] driving the tractor. The boys swapped driving the tractor at least 10 times. They picked up and loaded about 300 pipes.

38. A full load of pipes had been collected and, in accordance with their work instructions, they were to be transported, again by the tractor trailer combination, to a storage area located some distance away from the pick-up area.

39. To get to the storage area the tractor/trailer had to travel along one of the properties dirt roads.

40. Immediately prior to the incident [redacted] was driving the tractor travelling to the storage area with a fully laden trailer and his brother [redacted] was standing on the front drawbar of the trailer holding one of the trailer's upright posts.

41. As they continued to travel along [redacted] became aware that his brother was no longer standing on the drawbar and subsequently observed him on the ground behind the trailer apparently having been run over by the trailer. He stopped the tractor, sought assistance by telephoning his parents and commenced CPR on his brother.

42. Emergency services, the boy's parents and farm personnel subsequently attended the incident scene and rendered emergency medical assistance.

43. [redacted] was taken to Lady Cilento Hospital, Brisbane. He died on 2/4/16. He was 14 years old. The autopsy report states that death was caused by multiple injuries, due to, or as a consequence of a trailer overrun.

44. The incident occurred approximately 2 kms from the farm buildings.

45. The incident was reported to emergency services and also to Workplace Health and Safety Queensland ('WHSQ').

[redacted] – breach of s.32 of the duty it held under s.19(1) of the *Work Health and Safety Act* 2011 (the 'Act')

46. WHSQ attended the incident scene and undertook investigations which established at the material time –
    a. the property [redacted] was a workplace as that term is defined in the Act;
    b. [redacted] was employed on a permanent basis by [redacted] as the leading farm hand;
    c. in the role of farm manager, [redacted] is responsible for machinery and its maintenance and includes training and supervision of employees on [redacted];
    d. the farm manager oversees [redacted] from an operations and safety point of view; also oversees other employees; has daily conversations with [redacted] about what needs to occur, priorities, safety on farm and how employees are going; these discussions are not recorded;
    e. At the date of the incident, [redacted] was essentially run as a family enterprise. It was independently certified under the "myBMP" (Best Management Practices) program, an initiative supported by the Cotton Research Development Corporation and Cotton Australia,
    f. [redacted] ('deceased') and [redacted] were employed by [redacted] as casual farm hands on *'Individual Flexibility Agreements'* and were workers as that term is defined in the Act;
    g. the boys duties were described in that document as all aspects of irrigation farming;
    h. the boys were carrying out work for [redacted] namely picking up siphon pipes, with the aid of a tractor and trailer combination;
    i. the International tractor and trailer combination involved in the incident were owned by [redacted]
    j. [redacted] commenced farm work on the [redacted] property on 7 December 2015;
    k. [redacted] commenced farm work on the [redacted] property on 30 March 2016;
    l. prior to the incident the deceased had worked a total of 23 days as a casual farm hand on these two properties;
    m. [redacted] had done tractor work for a total of 7 days while [redacted] had done tractor work for 10 days;
    n. [redacted] had asked [redacted] on the Tuesday prior to the incident whether a tractor could be used to pick up pipes because it is slower and is better visually compared to the ute; [redacted] told [redacted] *"it was okay to use the tractor for the job"* but was unaware that the boys would complete the task unsupervised and without also using the utility;
    o. the weight of the tractor was 6.68 tonne and the weight of the trailer and pipes was 1.34 tonne;
    p. the boys had undertaken picking up siphon pipes on prior occasions however had completed that task with a utility vehicle towing a trailer;
    q. picking up the pipes is undertaken twice a year;
    r. no risk assessment had been undertaken on the task of picking up the siphon pipes with a tractor and trailer combination;
    s. no safe work procedure had been developed for the same task;
    t. no instruction had been communicated to the boys prohibiting them travelling on the trailer nor was an alternative method provided to enable the second worker to be transported to the unloading area within the property;
    u. there was inadequate supervision of the boys to ensure they were not at risk from the work activity there were performing.

47. After the incident, a Farm Report was prepared by [redacted]. Of relevance it states:
    a. [redacted] *should not have been sitting on trailer.* [redacted] *should have been supervised".*

[redacted] - breach of s. 33 of the duty it held under s.21(2) of the Act

48. [redacted] owned the tractor and trailer and had it available for the workers on the incident date.

49. Its Farm Manager and its leading hand had discussed using the combination to pick up the siphon pipes and it was agreed for it to be used by the workers to undertake this task.

50. A workplace incident occurred during the course of the tractor and trailer being used to pick up siphon pipes.

51. The International Tractor and trailer were seized and mechanically inspected post-incident (19/4/16) by technical personnel (Sgt Dieckmann) from the Queensland Police Service. A report was prepared which identified the tractor and trailer were in an unsatisfactory mechanical condition, noting the following –

    <u>Tractor:</u>

    a. the tractor was a 1971 to 1976 International 7660 rear wheel drive tractor;
    b. the right brake on the tractor was inoperative;
    c. the left brake on the tractor was operating but would not fully release when disengaged causing the operator to manually pull the pedal back with his foot to obtain full release of the left brake;
    d. the steering on the tractor had excessive wear and play in numerous steering components causing approximately half a turn of free play in the steering wheel;
    e. the right front tyre on the tractor had tread delamination in one section of its tread exposing the steel belts and all other tyres had excessive age cracks in their sidewalls;
    f. there was excessive wear and play in the high and low range selector lever mechanism (the gears);

    <u>Trailer:</u>

    g. the trailer was not fitted with brakes on any of the four wheels;
    h. the suspension had excessive wear;
    i. the right tyre had tread delamination with the steel belt exposed on a section of its tread width.

52. The tractor and trailer, in the condition they were with the above identified defects, posed a hazard to workers who may have cause to operate them. These items of plant also posed a risk to pedestrian workers who may be in the near vicinity to it when it is operating.

53. [redacted] had a duty to ensure that the tractor and trailer were subject to regular mechanical inspection and, if repairs were required, to ensure the plant was removed from service until those repairs were carried out. While [redacted] acknowledged he had performed basic maintenance on the tractor within the last 12 months, and he could ask for repairs to any machinery if something major was wrong, no such request was made.

54. The tractor and trailer were subsequently sold to a entity, Neil's Parts Australia Pty Ltd, for destruction

[redacted] - breach of s.46 of the Act

55. WHSQ undertook investigations in relation to [redacted].

56. At the material time, [redacted] undertook farm management through its sole director, [redacted], at the property '[redacted]

57. Its activities extended to all facets of the farming operation including employing workers, providing instruction to farm employees and general management of the farming enterprise on behalf of its clients.

58. [redacted], through its director [redacted] had employed, on behalf of [redacted] two young workers as casuals during school holiday period to carry out farm labouring duties at the [redacted] property.

59. At the material time [redacted] was the owner of the '[redacted] property and a client of [redacted].

60. [redacted] had one full time employee, [redacted] who was employed as a lead farm hand. [redacted] was responsible for the day to day running of the [redacted] farm property and his supervisor was [redacted] (as farm manager).

61. [redacted] had a duty under s 46 of the Work Health and Safety Act 2011 to consult, cooperate and coordinate with other duty holders, here being [redacted] and [redacted], in relation to the matter of young workers undertaking farm hand duties using rural plant.

62. [redacted] through its director [redacted] was aware that the young workers were to undertake the task of siphon pipe retrieval as [redacted] had instructed the leading hand ([redacted] of the property to have the work completed.

63. Further, [redacted] was aware that the task was to be performed by two young casual farm workers via the use of a tractor and trailer combination. [redacted] told [redacted] *"it was okay to use the tractorfor the job"* but was unaware that the boys would complete the task unsupervised and without also using the utility.

64. [redacted] was aware that the workers were inexperienced generally in farm labouring duties.

65. [redacted] was aware the workers were inexperienced in operating moving plant on the farm property.

66. [redacted] was aware the task was to be performed remotely away from farm buildings.

67. The two young workers were tasked by [redacted] to carry out the pipe retrieval work by themselves, without supervision.

68. Whilst the workers were inducted in to [redacted] new employee document, there was no risk assessment or safe work procedure prepared for the work task of collection of siphon pipes using the tractor and trailer combination.

69. The WHSQ investigation did not establish that any consultation, coordination or cooperation

had occurred between [redacted], [redacted] and [redacted] with regard to how the work activities would be safely undertaken by the young workers, specifically, conduct of a risk assessment in to the work task and decisions on how to carry out the work activity safely, including instructions on supervision to be given to the workers undertaking this work activity.

[redacted] - breach of s.46 of the duty he held under s.27 of the Act

70. WHSQ undertook investigations in relation to this individual defendant.

71. [redacted] is the sole director and worker of [redacted]. That entity carries on a farm management business.

72. The defendant is an officer, as that term is defined in the Act, of [redacted] for the purposes of s27 of the Work Health and Safety Act 2011 and thereby holds a work health and safety duty under that section.

73. [redacted] was, at the material time, the owner of the [redacted] property and a client of [redacted] in the provision of farm management services.

74. At the material time [redacted] had one full time employee, [redacted], who was employed as a lead farm hand. [redacted] was responsible for the day to day running of the [redacted] farm property and his supervisor was [redacted].

75. [redacted] had a responsibility to ensure that appropriate systems are in place, and followed, to ensure [redacted] consults, cooperates and coordinates with its clients and other duty holders on matters where persons have work health and safety duties in relation to the same matters, here [redacted] and [redacted], in relation to the matter of young workers undertaking farm hand duties using moving rural plant.

76. The defendant was aware that the workers were to undertake this task as he had instructed the leading hand of the property to have the work completed.

77. Further, the defendant was aware that the task was to be performed by two young casual farm workers via the use of a tractor and trailer combination. [redacted] told [redacted] *"it was okay to use the tractorfor the job"* but was unaware that the boys would complete the task unsupervised and without also using the utility.

78. The defendant was aware that the workers were inexperienced generally in farm labouring duties.

79. The investigation did not establish that any consultation, coordination or cooperation had occurred between [redacted] and [redacted] and [redacted] with regard to the work activities being undertaken by the young workers, specifically in regard to completion of a risk assessment in to the work task and decisions on how to carry out the work activity safely were completed, including instructions on supervision to be given to the workers during the work activity.

80. The investigation did not establish that [redacted] had systems in place to undertake the consultation, coordination and cooperation with its client, [redacted] or the duty holder, [redacted] in those circumstances where duty holders may hold duties in relation to the same matter

OTHER MATTERS

81. The defendants were co-operative throughout the investigation.

82. The defendants do not have any prior convictions for any Work Health and Safety Breach.

83. The defendants have entered timely guilty pleas.