



GREENWAY CHAMBERS

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# SENTENCING IN WHS MATTERS

## WORK HEALTH AND SAFETY PRESENTATION

A PAPER PRESENTED AT GREENWAY CHAMBERS

ON 2 MARCH 2018

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1. This paper deals with three subjects:
  - a. A review of three key judgments of the Court of Criminal Appeal;
  - b. The recent High Court decision of *Dalgliesh* dealing with the sentencing discretion; and
  - c. Sentencing options provided by Part 13, Division 2 of the *Work, Health and Safety Act 2011* NSW (**WHS Act**), including the Court's discretion under s239 of the WHS Act to adjourn a proceeding on the basis of an undertaking without imposing a conviction.

### REVIEW OF WORK HEALTH AND SAFETY – COURT OF CRIMINAL APPEAL JUDGMENTS

2. Upon the transfer of Work, Health and Safety (**WHS**) prosecutions for serious breaches of duty from the Industrial Court of NSW to the District Court of NSW, the appellate jurisdiction of the Court of Criminal Appeal was enlivened.
3. The Court of Criminal Appeal has since considered a number of judgments of the District Court, and in each matter has helped improve understanding of a number of issues, including what constitutes a breach of duty and the proper exercise by the District Court of its sentencing discretion.
4. This paper focusses on three key decisions of the Court of Criminal Appeal in chronological order.

***Bulga Underground Operations Pty Limited v Nash* [2016] NSWCCA 37  
(11 March 2016)**

**Facts**

5. The Defendant company on or about 23 April 2010 was operating a long wall coal mine. Two employees were operating the primary piece of mining equipment. The purpose for which the piece of equipment was used was to cut a wall of coal, have that coal transported by conveyer away from the face and creating a void (a goaf), which void would then collapse. The process was a continual one and when the cutting drums could reach no further forward into the coal the machine moved forward. When moving forward the machine utilised metal struts which lifted, moved, then extended back to the floor of the mine.
6. The operation of the machine, particularly as regarding its forward movement, was automated however, it could be manually overridden and directed.
7. Following an occasion when the machine had moved forward an employee was found, by his co-worker, to have been crushed by the operation of a machine strut coming down. The employee was seriously injured.

**Conviction**

8. This matter was brought as a prosecution under the previous Act, ie. a prosecution pursuant to a breach of s8(1) of the *Occupational Health and Safety Act*. His Honour Judge Curtis found that only one particular of breach had been made out, that being that there should have been a third employee in place whose job it was to observe the other two operators, and where necessary, manually stop the machine from continuing to operate. His Honour found the matter to be of the lowest end of culpability and imposed a fine of \$50,000. His Honour also declined to make the usual costs order and ordered the Defendant to pay no more than 20% of the Prosecutor's costs.

**Appeal**

9. The Defendant appealed against its conviction. The Attorney-General appealed on the basis the sentence imposed by the Court was manifestly inadequate. The judgment of the Court of Criminal Appeal was primarily delivered by Bathurst CJ with whom Hidden and Davies JJ agreed.
10. On the question of the conviction, His Honour Judge Curtis postulated that if a particularised act or omission did not act in such a way as to ensure the safety of the worker's concern but only acted to minimise the risk of harm, then failure to act in such a way as to minimise the harm would not, in itself, constitute a breach of the Act.
11. The Court disagreed. Paragraph 109 states the following:

"In our view, a failure to take steps which are necessary but insufficient to ensure safety, or which limit the risk to the employee without entirely eliminating it, can constitute a breach of s8(1)."

12. The Court reiterated the central tenet that surrounded the issue of breach under the act in the following terms:

[127] For the purpose of s8 of the Act, the relevant question on causation is whether the act or omission of the employer was a significant or substantial cause of the employee being exposed to the risk of injury.”

[128] ... That question is to be determined by the application of common sense to the facts in question, appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter.

[130] ... The relevant question is not whether the omission was the cause of the injury to Mr McNab but rather whether there was a causal relationship between the act or omission and the risk to which he was exposed.

13. Regarding the appeal on sentencing, the Court determined that the sentence imposed at first instance was manifestly inadequate. In coming to that conclusion particular attention was paid to findings as to the level of culpability of the Defendant and also the objective seriousness of the offending.
14. His Honour Judge Curtis found that the “Defendant’s failure was of the lowest degree consistent with guilt”.
15. Their Honours in considering that finding examined the facts as set out in his Honours’ judgment. At paragraph 167 they state:

Nevertheless, the findings made by the trial judge in his liability judgment, when considered with the mitigating matters referred to, mean that the objective seriousness, whilst below the mid-range of offending, cannot be regarded at the lowest degree consistent with guilt.

16. Further, on the issue of whether the injury to Mr McNab was a matter to be had regard to in assessing the seriousness of the offending, their Honours stated at paragraph 172:

The extent of the harm that befell Mr McNab was a relevant matter for the assessment of objective seriousness of the offending. It was properly referred to when the trial judge was considering whether a s10 discharge was appropriate.

## **Deterrence**

17. His Honour Judge Curtis had found that general deterrence was not a matter that should be had regard to in the circumstances of the case. His Honour also did not have regard to specific deterrence given evidence of the company’s attitude to safety and the highly unusual event that gave risk to the risk.
18. The Court found (at [180]) that the Trial Judge should have given effect to the decision of the Industrial Relations Commission in Court session in *Capral Aluminium Limited v WorkCover Authority of NSW* (2000) 99 IR 29, which judgment determined that both aspects of deterrence (special and general) are matters which should normally be given weight and some substance in the sentencing process. The Court concluded that the failure of the Trial Judge to include in the sentencing a component for general and, to

a lesser extent, specific deterrence, was an error. The Court of Criminal Appeal re-sentenced the Defendant to a pay a penalty of \$100,000.

***Attorney-General of NSW v THO Services Limited (In Liquidation) (2016)***  
**264 IR 171 (17 October 2016)**

**Facts**

19. The facts of this matter are that a Year 10 work experience student had attended the premises of the Defendant company and had on the first day of such attendance been given exercises which required the use of welding equipment. The student carried out welding for a number of hours during the day and it was later discovered that for a considerable part of the day he had been welding without the filtered lens of the welding helmet being in position. By the end of the day the student had problems with his eye sight and eventually it was determined that he had lost up to 75% of the vision in both eyes.
20. The Defendant had entered a plea of guilty. The District Court was presented with an Agreed Statement of Facts and a sentencing hearing was undertaken. The Trial Judge (Judge Curtis) ordered that the charge be dismissed, pursuant to s10 of the *Crimes (Sentencing Procedure) Act 1999*. His Honour, prior to bringing down his ex tempore sentence decision, had not suggested to the parties that he was considering having regard to s10.
21. The Prosecutor appealed the sentence being one which was manifestly inadequate. This was the first appeal to the Court of Criminal Appeal following a prosecution pursuant to the *Work Health and Safety Act*.

**Appeal**

22. The judgment was primarily delivered by Justice Harrison with whom Justice Hoeben CJ at CL and Justice Campbell agreed. The Court found that the Trial Judge had made a number of errors and further found that the sentence imposed at first instance was manifestly inadequate. In doing so the Court made a number of relevant findings of principle:
  - a. At paragraph 59:

A summary of the authority relevant to the application of s10 to work, health and safety prosecutions is set out in Inspector Christopher *Downey v Menzies Property Services* [2004] NSWIRComm 259 at [45]-[60]. The section is available in circumstances that can be characterised as extraordinary and exceptional circumstances.
  - b. The role of general deterrence was again raised in the following terms in paragraph 62:

“If ever there were a case in which the need for general deterrence is obvious and critical this is such a case.”
  - c. Regarding the issue of breach, paragraph 66 stated:

... 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 proportion 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 for the need to take ever vigilant and practical approach to safety in similar circumstances. That is particularly so when one has regard to the terms of s3 of the *Work Health and Safety Act 2011* ...

- d. On the issue of causation, the Court at paragraph 73 repeated what it had said in *Bulga* at paragraphs 127-129; and
- e. At paragraph 92 the Court stated:

His Honours' judgment does not address the objective seriousness of the offence at all.

- 23. Following the appeal being upheld the Court re-sentenced the Defendant and imposed a fine of \$240,000.

### ***Nash v Silver City Drilling (NSW) Pty Limited [2017] NSWCCA 96 (19 May 2017)***

#### **Facts**

- 24. The Defendant company on or around 12 August 2012 was operating a drilling rig at a coal mine near Singleton. Part of the drilling process required the extraction of the copious amount of liquid. That liquid was, after it was expelled from the drilling hole, moved through a pipe so as to be deposited in a nearby sump. The pipe (**blooie**) passed underneath the drilling platform on which the operator worked. The blooie line had a right- angle elbow placed in it to ensure that the relevant material went to the necessary sump. A surge in pressure in the blooie line could result in that line unexpectedly and suddenly moving upwards. The blooie line in fact did move upwards rapidly striking the underneath of the drilling rig on which a person was working. The force of the impact caused severe injuries to the worker who was rendered a quadriplegic.
- 25. The Defendant company entered a plea of guilty and a sentencing hearing took place. The Trial Judge (Judge Curtis) sentenced the Defendant to a fine of \$112,000. His Honour declined to make an order that the Defendant pay the Prosecutor's costs.

#### **Appeal**

- 26. The primary judgment is written by Justice Basten with whom Justice Hoeben CJ at CL and Justice Walton agree. In a very thorough judgment the Court provides guidance and assistance with regard to a number of issues surrounding sentencing in this area of law.
- 27. The appeal by the Prosecutor was again that the sentence at first instance was manifestly inadequate. A second issue raised on the appeal went to the failure of the Trial Judge to award costs to the Prosecutor.

28. At paragraph 34 the Court dealt with the issue of an appropriate consideration of an assessment of the relevant risk involved on the facts of the case:

The sentencing Judge commenced his consideration with a proposition that greater 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. 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 on assessment of all of those factors.

29. At paragraph 42 when dealing with the issue of assessing objective seriousness of the offence, the Court stated:

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.

30. With regard to what has been a matter of some debate, that is whether the fact of the injured person having suffered significant injuries can be considered an aggravating feature pursuant to s21A of the *Crimes (Sentencing Procedure) Act* when a prosecution is brought pursuant to s32 of the Act, the Court at paragraph 42 states as follows:

Of the relevant aggravating factors, one is an offence which involves "a grave risk of death of another person or persons". This factor is satisfied in the present case. However, as exposing an individual to the risk of death or serious injury is an element of the offence, there are limited circumstances in which this aggravating factor can operate with respect to an offence under s32 of the *Work Health and Safety Act*. It is also an aggravating factor if "the injury ... cause by the offence was substantial". In this case the injury caused to Mr Kuyper was very substantial although the injury was a manifestation of the risk, it was a risk which was an essential element of the offence, not as materialisation. Accordingly, it is appropriate to take the nature and extend of the injury into account as an important aggravating factor.

31. On the issue of costs, the Court at paragraphs 69 and 70 found that, as a general rule, in matters involving the summary criminal jurisdiction, as with civil matters, costs will usually follow the event. The Court made some observations as to the circumstances where costs may not be awarded in full.
32. Having upheld the appeal the Defendant was sentenced to pay a fine of \$212,500 and ordered to pay the Prosecutor's costs.

## NATURE AND OPERATION OF THE COURT'S SENTENCING DISCRETION

### *The Director of Public Prosecutions v Charlie Dalgliesh (a pseudonym)* [2017] HCA 41

33. On 11 October 2017 the High Court once again had cause to opine upon the sentencing discretion vested in criminal courts. This matter concerned the sentence that was imposed upon a Respondent who had entered a plea of guilty to:

... one act of incest (charge 1) and one act of sexual penetration of a child under 16 (charge 4) upon Complainant A. He also pleaded guilty to and was convicted of, one act of incest (charge 2), one act of indecent assault (charge 3) upon Complainant B. A and B are sisters. At the time of the offending, A was aged between 9 and 13 years and B was aged between 15 and 16 years. B has been diagnosed with mild intellectual disability and attention deficit hyperactivity disorder.

34. The Prosecutor had appealed the Trial Judge's sentence to the Court of Appeal. That Court having rejected the appeal, the Prosecutor brought the matter to the attention of the High Court.

35. The effect of the Court of Appeal of Victoria's judgment was that whilst the sentence imposed upon the Respondent was too lenient it felt that the Judge at first instance as well as the Court of Appeal were restricted in the sentence able to be imposed by the operation of s5(2) of the *Sentencing Act of Victoria*. That section set out a number of matters that a Court needs to have regard to. One of those matters was:

(b) current sentencing practices.

36. As there had been previous decisions relevant to the offence of incest in Victoria, the Court of Appeal felt that in order to give effect to s5(2)(b) it was constrained as to the sentence that it could bring down, in that it could not impose a sentence that was appreciably more harsh than past sentences.

37. The High Court, in rejecting the idea that a criminal court was constrained by provisions such as s5(c) of the *Sentencing Act (Victoria)*, referred to a number of issues relevant to the exercise of discretion in sentencing.

38. In paragraphs [4]-[7] of the majority judgment the Court restated the requirement of the judicial officer who is engaged in "instinctive synthesis" exercise of determining an appropriate sentence and in doing so referred to what had previously been stated in *Elias v The Queen* (2013) 248 CLR 483 at 494, *Wong v The Queen* (2001) 207 CLR 584 at 611; and *Markarian v The Queen* (2005) 228 CLR 357 at 373 to 375. In paragraph [7] the Court stated:

While the instinctive synthesis must be informed by each of the factors listed in s5(2), the extent to which each factor bears upon the case is invariably a matter for judgment. The process of instinctive synthesis thus allows a measure of discretion to the sentencing Judge. The discretionary nature of the judgment required means that there is no single sentence that is just in all the circumstances. Nevertheless, it is well understood that a sentence may be so clearly unjust, because it is either manifestly inadequate or manifestly excessive, that it may be inferred that the sentencing discretion has miscarried.

39. At paragraph [10] the Court revisited the importance to be placed when exercising the sentencing discretion upon the maximum penalty prescribed for the offence. The Court in that regard quoted the following passage from *Markarian*:

Careful 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.

40. At paragraph [49] the Court looked at the issue of the importance of prior sentencing judgments, and stated:

49. In *Elias v The Queen*, French CJ, Hayne, Kiefel, Bell and Keane JJ said:

The administration of the criminal law involves individualised justice.

The imposition of a just sentence on an offender in a particular case is an exercise of judicial discretion concerned to do justice in that case. It is also the case that, as Gleeson CJ said in *Wong and The Queen*:

The administration of criminal justice works as a system ... it should be systematically fair, that involves, amongst other things, reasonable consistency.

As was explained by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in *Hili v The Queen*:

The consistency that is sought is consistency in the application of the relevant legal principles.

41. At paragraph [66] of the majority judgment the Court turned its attention to the effect of plea bargaining agreements upon sentences in the following terms:

66. It is well established that even an express plea-bargaining agreement between the prosecution and the accused cannot affect the duty of either the sentencing judge or a court of criminal appeal to impose a sentence which appears to the Court, acting solely in the public interest, to be just in all the circumstances. A manifestly inadequate sentence is a failure of the due administration of criminal justice.

42. In the separate judgment of Gageler and Gordon JJ, when dealing with the effect that must be given to prior sentencing judgments, their Honours stated at paragraph [83]:

83. Sentences are not binding precedents, but are merely “historical statements of what has happened in the past”. As was said in *Hili v The Queen*:

That history does not establish that the range is the correct *range*, or that the upper or lower limits to the range are the *correct* upper and lower limits. (emphasis added).

Examination of sentences imposed in comparable cases may inform the task of sentencing but such examination goes beyond its rationale when it is used to fix boundaries that, as a matter of practical reality, bind the Court.

43. This judgment demonstrates once again the breadth of sentencing discretion vested in judges at first instance and the overriding requirement for judicial officers to exercise that discretion in an independent and individual way in every sentence brought down.
44. It is interesting to note that both the Court at first instance and the Court of Appeal had been brought into error by the existence of a series of arguably inadequate sentences relating to a particular offence, and a consequent view that the Courts were bound by those prior, inadequate sentences.
45. One of the issues raised by the Court, not for the first time, which has particular relevance to the sentencing practices that are currently being exercised in the District Court, is the issue of the maximum sentence for the offence. It must be said that in a number of recent judgments the maximum penalty would appear to bear little relevance to the sentences imposed.

## **SENTENCING OPTIONS PROVIDED BY PART 13, DIVISION 2 OF THE WORK, HEALTH AND SAFETY ACT**

### ***Background***

46. Part 13 of the *Work, Health and Safety Act 2011* (NSW) deals with legal proceedings. Division 2, titled Sentencing for offences, extends the powers of the Court beyond the traditional criminal sanctions of fines and custodial sentences. It provides the Court with statutory authority to make one or more of the types of orders set out in the Division, “*in addition to any penalty that may be imposed*”: s235.
47. The penalties that may be imposed are not contained within Division 2. They are found in the sections that create the offences: see for example ss31-33.
48. Division 2, Part 13 applies if a court “*convicts a person, or finds a person guilty*” of an offence: s234. That is, the Court can make such orders on finding a matter proven without recording a conviction. The provisions in Division 2.
49. The available orders are:
  - a. Section 236 – Adverse publicity orders, requiring the offender to publicise “the penalty imposed and any other related matter”;
  - b. Section 237 – Orders for restoration, requiring the offender to take steps to remedy any matter caused by the commission of the offence;
  - c. Section 238 – Work health and safety project orders, requiring an offender to undertake a specified project for the general improvement of health and safety;
  - d. Section 239 – Release on the giving of a court-ordered WHS undertaking, permitting the Court, with or without recording a conviction, to adjourn the proceedings for up to 2 years and make an order for the release of the offender on the offender giving an undertaking with specified conditions;
  - e. Section 240 Injunctions, permitting the court to issue an injunction requiring the offender to cease contravening the Act;

- f. Section 241 Training orders, requiring a person to undertake, or to have workers undertake, a specified training course.

### **Section 239**

- 50. Section 239 is in the following terms:

#### 239 Release on the giving of a court-ordered WHS undertaking

- (1) The court may (with or without recording a conviction) adjourn the proceeding for a period of up to 2 years and make an order for the release of the offender on the offender giving an undertaking with specified conditions (a ***court-ordered WHS undertaking***).
- (2) A court-ordered WHS undertaking must specify the following conditions:
  - (a) that the offender appears before the court if called on to do so during the period of the adjournment and, if the court so specifies, at the time to which the further hearing is adjourned,
  - (b) that the offender does not commit, during the period of the adjournment, any offence against this Act,
  - (c) that the offender observes any special conditions imposed by the court.
- (3) An offender who has given a court-ordered WHS undertaking under this section may be called on to appear before the court by order of the court.
- (4) An order under subsection (3) must be served on the offender not less than 4 days before the time specified in it for the appearance.
- (5) If the court is satisfied at the time to which a further hearing of a proceeding is adjourned that the offender has observed the conditions of the court-ordered WHS undertaking, it must discharge the offender without any further hearing of the proceeding.

- 51. Matters to note about s239 are:

- a. It is an option available where the court determines not to record a conviction, as well as where it does record a conviction;
- b. The effect of the order is to adjourn the proceedings for up to 2 years;
- c. It requires the offender not to commit any offence against the Act during the course of the adjournment;
- d. If there is no further contravention of the Act and the undertaking has been complied with then the offender is then “discharged” without further hearing.
- e. Presumably if the offender does not comply with the undertaking then the matter can resume and the Court can proceed to impose some other or further sentence.

## R v Salvation Army NSW Property Trust

52. Section 239 has been applied once in NSW, by Curtis J in *R v Salvation Army NSW Property Trust*<sup>1</sup> (**Salvation Army**).
53. The Salvation Army pled guilty to a charge of failing to comply with its duty under s19(1) of the Act following a volunteer having his forearm crushed in an inadequately guarded conveyor.
54. His Honour found the objective gravity of the offence to be “modest”<sup>2</sup> and identified a number of mitigating factors, focussing in particular on the offenders ‘good character’ as a charity.<sup>3</sup>
55. His Honour found that there was minimal need for specific deterrence.<sup>4</sup> As for general deterrence his Honour saw:
- ...little need for penalty to deter persons operating charity stores, generally persons of altruistic bent given to the betterment of mankind, from failing to take measures to ensure that persons affected by their enterprise are kept free from harm.<sup>5</sup>
56. It would appear that his Honour was particularly concerned with the impact that any fine would have on the charity, noting that a “substantial fine” would adversely affect the services and programs which the offender currently provided to the community.<sup>6</sup> That concern was perhaps most clearly expressed in his Honour’s approach to costs, which his Honour declined to order despite consent, saying:
- Although costs have been agreed as to quantum in the sum of \$20,000, where the amount of those costs will be in direct proportion to the diminution of the defendant’s ability to provide care to the unfortunate over the Christmas period I decline to order that the defendant pay the prosecutor’s costs.<sup>7</sup>
57. His Honour did not record a conviction or impose a fine and determined to adjourn the hearing for six months, further ordering that if, at the further hearing, the offender has observed the conditions of an undertaking to conduct an audit of all mechanical equipment, the offender would be discharged without further proceeding.<sup>8</sup>
58. In *Salvation Army*:
- a. the culpability was ‘modest’;
  - b. there was a plea of guilty;
  - c. the offender was a charity;

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<sup>1</sup> [2015] NSWDC.

<sup>2</sup> At [11].

<sup>3</sup> At [13]-[18]

<sup>4</sup> At [21].

<sup>5</sup> At [22].

<sup>6</sup> At [18].

<sup>7</sup> At [32].

<sup>8</sup> At [31].

- d. there was an expression of remorse; and
  - e. no issue of parity with a co-offender arose.
59. The decision should be treated with some care as it predates the Court of Criminal Appeal decisions in *Bulga*<sup>9</sup> and *Tho Services*<sup>10</sup> discussed earlier in this paper.
60. In *Salvation Army* Curtis J did not appear to place much or any weight on general deterrence, in a manner inconsistent with those later decisions. Nor did his Honour identify expressly the existence of circumstances that could be characterised as extraordinary and exceptional that would have justified a decision to not record a conviction (see the discussion below as to the principles to be applied when determining not to record a conviction). Given how the later decisions of *Bulga* and *Tho Services* dealt with those matters, it is respectfully suggested that the decision in *Salvation Army* does not provide a useful reference point.

### Queensland Local Court decisions

61. The *Work Health and Safety Act 2011* (Qld) was made at the same time as the WHS Act as part of the national work health and safety law harmonisation program. Division 2 of Part 13 is in relevantly identical terms. One difference with NSW is that proceedings for contraventions of s32 of the Act are heard by magistrates in Queensland.
62. WorkCover Queensland publishes decision summaries of successful prosecutions under the WHS Act Qld before Magistrates in Queensland. Those summaries reveal that over a period between 2012 and 2014 there were 10 cases involving a breach of s32 which were dealt with by orders including an order under s239. The orders made under s239 were, in effect, to place the offender on a good behaviour bond for a period of time. In each case no conviction was recorded. In eight of the ten cases, a fine was imposed, the largest being \$60,000, another \$45,000 and in two cases the fine was \$40,000. It seems that in those cases the Magistrate had determined to impose a fine, but not record a conviction taking into account that the offender would, in effect, be placed on a recognisance that they would not offend again for a 2 year period.
63. Those decisions were made under a different sentencing regime which expressly permitted a Magistrate to convict and impose a fine, yet record no conviction. Section 12 of the *Penalties and Sentences Act (Qld)* 1992 deals with the exercise of the discretion to record a conviction and permits “a conviction without recording a conviction”. Subsection 12(4)(a) provides that a conviction without the recording of a conviction does not stop a court from making any other order that it may make under this or another Act because of the conviction. Accordingly, a court in Queensland has the power to impose any penalty, including a fine, while not imposing a conviction. There is no equivalent provision under NSW law.

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<sup>9</sup> *Bulga Underground Operations Pty Ltd v Nash* (2016) 93 NSWLR 338; [2016] NSWCCA 37

<sup>10</sup> *AG (NSW) v Tho Services Ltd (in liq)* (2016) 264 IR 171; [2016] NSWCCA 22.

## ***Under the WHS Act (NSW) can a fine be imposed without recording a conviction?***

64. In *R v Ingrassia*,<sup>11</sup> the Court of Criminal Appeal cited the general common law principle distilled by Windeyer J in *Cobiac and Liddy* that “*if a man be not convicted, he is not to be punished*”.<sup>12</sup>
65. The Court in *Ingrassia* went on to say:<sup>13</sup>
- It is contrary to common law principle that a person who has not been convicted of an offence should be punished by order of a court. No doubt, legislation expressed **in sufficiently clear terms** may displace that principle, but that has not been the language of s556A. The conditions which may be imposed (or, more accurately, to which an offender may be required to submit,) under 556A(1)(b) cannot be of such a nature that they involve punishment for an offence of which, by hypothesis, the offender has not been convicted.
66. Accordingly, a Court in NSW only has the power to impose a penalty without recording a conviction where there is a statute that in clear terms permits that course.
67. Section 239 provides in clear terms that the Court has the power to release the offender having found the offender guilty, but without having imposed a conviction. More generally s234 makes clear that the Division which permits certain orders to be made “applies” whether the Court convicts or merely finds an offender guilty. There is accordingly no question that a sentencing option open to the Court is to impose no conviction, or fine, but instead make one of the orders set out in Division 2.
68. However, Division 2 of Part 13 does not provide for penalties to be imposed. To the contrary, in s235 it states that the orders it contemplates are “*in addition to any penalty*”. More particularly, it does not contain terms that clearly permit a penalty to be imposed without recording a conviction in the manner of the Queensland *Penalties and Sentences Act (Qld)* 1992.
69. In the absence of such clear terms there does not appear to be an ability for a Court in NSW to impose a fine without recording a conviction, whether doing so in conjunction with an order under Division 2 or not.
70. The question of whether an order should be made pursuant to s239 of the WHS Act and the question of whether the Court can impose a fine without recording a conviction both arose recently in proceedings before Kearns J of the District Court. In earlier proceedings the corporation had been found to have contravened s32 of the WHS Act.<sup>14</sup> Kearns J has reserved his decision as to the sentence. It may be that some or all of these issues are addressed in his Honour’s decision.

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<sup>11</sup> (1996) NSWLR 41.

<sup>12</sup> *Cobiac v Liddy* (1969) 119 CLR 257 at 275.

<sup>13</sup> At 450.

<sup>14</sup> *SafeWork NSW v Freyssinet Australia Pty Ltd* [2017] NSWDC 290.

### ***Exercise of the discretion not to record a conviction***

71. Section 10(a) of the *Crimes (Sentencing Procedure) Act* NSW (**C(SP)Act**) contains a discretion to not record a conviction in circumstances where there has been a finding of guilt without imposing any conditions.
72. That same discretion is available under s239, provided that the mandatory conditions under s239(2) are imposed.
73. Those differences notwithstanding, there appears to be no good reason why the approach applicable to the exercise of the discretion to not proceed to a conviction after a finding of guilt under s10 C(SP)Act would not also apply to the exercise of the discretion to not record a conviction when orders are made under s239.
74. When exercising the discretion to not record a conviction the court must take into account the following matters:
  - a. The discretion, when applied to occupational health and safety offences, is available in rare, limited circumstances such that they must be considered to be extraordinary and exceptional.<sup>15</sup>
  - b. The discretion must be exercised consistently with the scheme and objects of work, health and safety legislation, which include preventing, deterring and punishing breaches of health and safety requirements.<sup>16</sup>
  - c. There is very limited scope for the exercise of the discretion where the offence is objectively serious and general deterrence and denunciation are important factors in sentencing for the offence.<sup>17</sup>
  - d. When considering sentencing an offender in relation to a serious breach of health and safety legislation, the varying aims of general and specific deterrence are particularly relevant in light of the objects and terms of the legislation.<sup>18</sup>
  - e. In relation to the question of deterrence, both general and specific, when sentencing an offender in relation to a serious breach of the legislation, the fundamental duty of the Court is to ensure a level of penalty for a breach as will compel attention to occupational health and safety issues so that persons are not exposed to risks to their health and safety in the workplace.<sup>19</sup>

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<sup>15</sup> *Inspector Christopher Downie v Menzies Property Services Pty Limited* [2004] NSWIRComm 259 (**Menzies Property Services**); *WorkCover Authority of New South Wales (Inspector Hopkins) v Profab Industries Pty Ltd* (2000) 49 NSWLR 700. *Attorney General of New South Wales v Tho Services Limited (in liquidation)* [2016] NSWCCA 221.

<sup>16</sup> *Menzies Property Services* at [55].

<sup>17</sup> *Application by the Attorney General under Section 37 of the Crimes Sentencing Procedure Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999* (No 3 of 2002) (2004) 61 NSWLR 305 (the High Range PCA Guideline Judgment) per Howie J at [131]–[132].

<sup>18</sup> *Capral Aluminium Limited v WorkCover Authority of New South Wales* [2000] NSWIRComm 71 at [73]–[74].

<sup>19</sup> *Ibid* at [73]–[74].

- f. It would be rare for the discretion to be exercised where the offence is an objectively serious breach of health and safety legislation.<sup>20</sup>
  - g. Foreseeability of the risk renders the offence more serious and raises questions about the proper exercise of the discretion.<sup>21</sup>
  - h. Considerations of extra curial punishment may be relevant to the exercise of the discretion.<sup>22</sup> Consideration of an offender's antecedents (which include professional status) arises with respect to personal deterrence and on the issue of adequacy of punishment; it arises generally on the application of the test of whether it would be inexpedient to inflict any punishment.<sup>23</sup>
75. If the Court applies the same approach to consideration of s239 it will only be in extraordinary or exceptional circumstances that an offender found to have contravened the WHS Act would be able to avoid a conviction, even where such an order is made.

INGMAR TAYLOR SC

MALCOLM SCOTT

2 March 2018

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<sup>20</sup> *Menzies Property Services* at [50].

<sup>21</sup> At [79].

<sup>22</sup> *R v Mauger* [2012] NSWCCA 51 at [21].

<sup>23</sup> *Baffsky* at [35].