MAGISTRATES COURTS OF QUEENSLAND

CITATION:	*Richardson v Ollis Construction Pty Ltd* [2019] QMC 5
PARTIES:	**Jason Richardson** (Complainant) **v** **Ollis Construction Pty Ltd (ABN 55 606 963 820)** (Defendant)
FILE NO/S:	MAG-153559/18(0)
DIVISION:	Magistrates Court
PROCEEDING:	Industrial
ORIGINATING COURT:	Toowoomba
DELIVERED ON:	8th May 2019
DELIVERED AT:	Toowoomba
HEARING DATE:	11 March 2019 and 25 March 2019. Written submissions on 8th, 9th, 26th and 29th April 2019.
MAGISTRATE:	Acting Magistrate Carroll
ORDER:	**The defendant is fined $75,000 plus professional costs of $1000 and $95.80 filing fees. The fine is referred to SPER. A conviction is not recorded.**
CATCHWORDS:	
LEGISLATION:	Work Health and Safety Act 2011 – s 17, 18, 19, 32, 275 Penalties and Sentences Act, 1992, s 9, 11, 13 and 48.
CASES:	*Reynolds v Orora Packaging Australia Pty Ltd* [2019] QDC 31 *Safework NSW v Carroll Springs Pty Ltd* [2017] NSWDC 222 *Nash v Silver City Drilling (NSW) Pty Ltd; Attorney-General for NSW v Silver City Drilling (NSW) Pty Ltd* [2017] NSWCCA 96 Sharon Steward v MAC PLANT PTY LTD and MAC FARMS PTY LTD [2018] QDC 20. *Code of Practice 2011, 'How to manage work health and safety risks'* *Code of Practice 2013, 'Managing risks of plant in the workplace'*

SOLICITORS: Mr Watson, Counsel for Workplace Health and Safety Queensland, for the complainant.

Mr Hegarty, Solicitor, DWF (Australia) for the defendant.

THE CHARGE

[1] The defendant has pleaded to a charge that being a company duly incorporated according to law and a person who had a health and safety duty under s19(1) of the *Work Health and Safety Act 2011*, 'the Act' failed to comply with the duty, as far as reasonably practicable, contrary to s 32 of the said Act and the failure exposed an individual to a risk of death or serious injury.

THE INCIDENT

[2] Shortly before 12:30 PM on 1 June 2017 on instructions from Ryan Ollis;-

(a) One, Bodhii George Dunlop,'Dunlop' purchased a new Makita HS7600SP 185mm circular saw which he was to use to rip cut six metre lengths of radiata pine framing timber in half lengthwise. On return to the workplace at 323 Bridge St, Toowoomba neither Ollis nor any other workers were present.

(b) Dunlop placed the lengths of timber between two utilities. He did not secure or clamp the timbers to be cut. He cut the first length of timber as required. While cutting the second length of timber it moved and started to move off the edge of the utility. As he reached down to grab the length of timber with his left hand to prevent it moving further or falling, the saw blade grabbed and jumped on the piece of timber. The moving blade cut across the palm of his left hand from his little pinky finger to the base of his thumb.

THE INJURIES

[3] Dunlop suffered a deep laceration to his left hand across his palm involving lacerations, nerves and bones in his hand. He was initially assisted by Ollis' wife before being transported to the Toowoomba base hospital and then to St Andrew's Hospital in Brisbane.

[4] Dunlop has since undergone approximately 10 surgical procedures to treat his injuries. He has developed PTSD and depression. He has received treatment from a psychologist and psychiatrist. He has been in receipt of worker's compensation since suffering the injury. I understand that his treating orthopaedic surgeon is of the opinion that his injuries are stable and stationary and he is about to be referred to the Medical Assessment Tribunal.

[5] A Functional Capacity Assessment Report in October 2018 indicated he would have difficulty in fulfilling the inherent requirements of his pre-injury duties.

PARTICULARS

[6] Relevantly, the particulars which are accepted by Mr Hegarty on behalf of the defendant, are as follows:-

(a) At all material times the defendant was engaged in the business of, inter alia, concreting, structural metal fabrication and erection.

(b) The principal of the defendant was Ryan William Ollis 'Ollis'. Dunlop had been employed by the defendant as an apprentice concreter for approximately three months. He was 19 years old. He was one of several employees of the defendant including tradesmen, experienced labourers, and apprentices.

(c) At the commencement of his employment with the defendant, Dunlop was given a brief verbal instruction/induction only. Some years prior, he had completed a general safety induction course (described as a 'white card safety induction') while attending TAFE.

(d) Dunlop received his instructions regarding his work from Ollis.

(e) The relevant work hazard was the use of the newly purchased saw to rip cut six metre lengths of radiate pine framing in half-length wise.

(f) The hazard gave rise to a serious risk of injury or death.

(g) The defendant ought to have known of the hazard, known the risks arising from the hazard and implemented reasonably practical controls to eliminate or minimise the risk.

(h) Dunlop did not receive specific instructions or training from the defendant in relation to the operation of the saw he was using at the time. He had previously used a circular saw.

(i) Dunlop was not instructed or advised to, or how to, secure the timber by use of clamps or other means nor as to the availability of, and how to use, a saw horse/s or frames.

(j) The defendant failed to adequately assess the hazard prior to Dunlop carrying out the task.

(k) The defendant failed to adequately supervise Dunlop in carrying out the task.

(l) The defendant failed to instruct Dunlop on how to adequately identify the work hazard and the consequential risks associated therewith.

(m) The defendant failed to advise Dunlop to purchase the timber pre-cut from the point of sale at the time he purchased the saw.

(n) The defendant failed to provide a safe system or work for workers operating the saw having regard to the provisions of the 'How to Manage Work Health a Safety Risks Code of Practice 2011 .

(o) The defendant failed to provide a safe system of work for workers operating the saw having to the provisions of the 'Managing Risks of Plant in the Workplace Code of Practice 2013' and/or provide a

standard or workplace health and safety equivalent to, or higher than, the standard required in the said codes of practice.

(p) Control measures which the defendant could have implemented, but did not implement included having specific regard to the 2011 Code of Practice, 'How to Manage Work Health and Safety Risks' and the 2013 Code of Practice, 'Managing Risks of Plant in the Workplace'.

RELEVANT STATUTORY PROVISIONS

[7] Sections 17, 18, 19, 32 and 275 of the Act are as follows:-

"17 Management of risks

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

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

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

18 What is reasonably practicable in ensuring health and safety

*In this Act, **reasonably practicable**, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including—*

(a) the likelihood of the hazard or the risk concerned occurring; and

(b) the degree of harm that might result from the hazard or the risk; and

(c) what the person concerned knows, or ought reasonably to know, about—

(i) the hazard or the risk; and

(ii) ways of eliminating or minimising the risk; and

(d) the availability and suitability of ways to eliminate or minimise the risk; and

(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

19 Primary duty of care

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

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

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

(c) while the workers are at work in the business or undertaking.

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

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

(a) the provision and maintenance of a work environment without risks to health and safety; and

(b) the provision and maintenance of safe plant and structures; and

(c) the provision and maintenance of safe systems of work; and

(d) the safe use, handling and storage of plant, structures and substances; and

(e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and

(f) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and

(g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

(4) If—

(a) a worker occupies accommodation that is owned by or under the management or control of the person conducting the business or undertaking; and

(b) the occupancy is necessary for the purposes of the worker's engagement because other accommodation is not reasonably available;

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

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

Note—

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

32 Failure to comply with health and safety duty—category 2

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 an individual to a risk of death or serious injury or illness.

Maximum penalty—

(a) for an offence committed by an individual, other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—1,500 penalty units; or

(b) for an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—3,000 penalty units; or

(c) for an offence committed by a body corporate—15,000 penalty units.

Note—

See also the note to section 31(1).

275 Use of codes of practice in proceedings

(1) This section applies in a proceeding for an offence against this Act.

(2) An approved code of practice is admissible in the proceeding as evidence of whether or not a duty or obligation under this Act has been complied with.

(3) The court may—

(a)have regard to the code as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code relates; and

(b) rely on the code in determining what is reasonably practicable in the circumstances to which the code relates.

Note—

See section 18 for the meaning of reasonably practicable.

(4) Nothing in this section prevents a person from introducing evidence of compliance with this Act in a way that is different from the code but provides a standard of work health and safety that is equivalent to or higher than the standard required in the code."

[8] Sections 9 (so far as is relevant), 11, 13 and 48 (so far as is relevant) of the *Penalties and Sentences Act 1992* 'PSA' are as follows:-

"9 Sentencing guidelines

(1)The only purposes for which sentences may be imposed on an offender are—

(a) to punish the offender to an extent or in a way that is just in all the circumstances; or

(b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or

(c) to deter the offender or other persons from committing the same or a similar offence; or

(d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or

(e) to protect the Queensland community from the offender; or

(f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).

(2) In sentencing an offender, a court must have regard to—

(a) principles that—

..

(b) the maximum and any minimum penalty prescribed for the offence; and

(c) the nature of the offence and how serious the offence was, including—

(i) any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim given to the court under section 179K; and

(ii) the effect of the offence on any child under 16 years who may have been directly exposed to, or a witness to, the offence; and

(d) the extent to which the offender is to blame for the offence; and

(e) any damage, injury or loss caused by the offender; and

(f) the offender's character, age and intellectual capacity; and

(g) the presence of any aggravating or mitigating factor concerning the offender; and

..

(h) the prevalence of the offence; and

(i) how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences; and

..

(q) anything else prescribed by this Act to which the court must have regard; and

(r) any other relevant circumstance

11 Matters to be considered in determining offender's character

In determining the character of an offender, a court may consider—

(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.

13 Guilty plea to be taken into account

(1) In imposing a sentence on an offender who has pleaded guilty to an offence, a court—

(a) must take the guilty plea into account; and

(b) may reduce the sentence that it would have imposed had the offender not pleaded guilty.

(2) A reduction under subsection (1)(b) may be made having regard to the time at which the offender—

(a) pleaded guilty; or

(b) informed the relevant law enforcement agency of his or her intention to plead guilty.

(3) When imposing the sentence, the court must state in open court that it took account of the guilty plea in determining the sentence imposed.

(4) A court that does not, under subsection (2), reduce the sentence imposed on an offender who pleaded guilty must state in open court—

(a) that fact; and

(b) its reasons for not reducing the sentence.

(5) A sentence is not invalid merely because of the failure of the court to make the statement mentioned in subsection (4), but its failure to do so may be considered by an appeal court if an appeal against sentence is made.

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).”

[9] The following documents were tendered to the Court:-

1. Statement of Agreed Facts.

2. Five photographs, three of the subject saw, one of the front page of the instruction manual for the saw, and one of four lengths of timber.

3. Complainant’s submissions on sentence, Exhibit 1.

4. A bundle of documents, Exhibit 2, comprising an email from Virginia Richardson to Mr Watson, an operation record for Mr Dunlop, an email from his treating surgeon, Dr McEneiry to WorkCover, a Functional Capacity Assessment Report for Dunlop, a copy of the Code of Practice ‘Managing Risks in the Workplace’, and a copy of the Code of Practice ‘How to Manage Work Health and Safety Risks’.

5. An affidavit of Ryan Hollis sworn 11 March 2019.

6. Undated supplementary affidavit of Ryan Hollis sworn in April 2019.

7. Written submissions from Mr Watson of 22 March 2019, 8 April 2019 and from Mr Hegarty of 9 April 2019.

8. SafeWork Method Statement.

SUBMISSIONS

[10] The defendant entered a plea of guilty on 25 March 2019. At the outset, Mr Watson, Counsel for the complainant, drew my attention to the decision of McGill SC DCJ in the matter of *Reynolds v Orora Packaging Australia Pty Ltd* [2019] QDC 31 handed down on 21 March 2019. The relevance of that decision is His Honour’s statements at par. 12-17. At par. 12 His Honour wrote, ‘[12] It was submitted that the 2011 Act (ie. The Act) is part of a national scheme of uniform legislation imposing duties in relation to safety, and penal provisions for breach of duty. I accept that that is so, and that may make the decisions of Courts in other states on legislation in the same terms relevant when determining questions of statutory constructions but most offences under the 2011 Act are dealt with as summary offences under the ordinary provisions of the law[7], relevantly the *Penalties and Sentences Act 1992.* That Act is most definitely not uniform with the sentencing

[7] s. 230(1AA)

legislation in other States. Accordingly, decisions of other States in relation to sentencing practices will not necessarily be of much assistance to Queensland Courts…'

[11] At paragraph 15 His Honour wrote, '[15] Courts should have regard to the decisions of the High Court of Australia when dealing with sentencing where those decisions turn on ordinary sentencing principles rather than turning on specific terms of the legislation of a particular State. Those principles should be treated as applying to Queensland subject to the express provision of the Queensland Act. Accordingly, in my view it is not appropriate to apply unquestioningly decisions in other States on offences under the local equivalent of the 2011 Act which are affected by the terms of the local sentencing statutes'.

[12] In the context of decisions of other States, I was referred to a decision of *Safe Work NSW v Carroll Springs* [2017] NSWDC 222 'The Carroll Springs Case' where on a plea of guilty the Court assessed the penalty at $100,00 but in accordance with the sentencing regime in place in New South Wales it was reduced to $75,000. Such a regime is not in place in Queensland and accordingly, the case is not so much help in this matter.

[13] In the light of the statements of McGill DCJ I will proceed on the basis that the ordinary principles of sentencing apply subject to the express provisions of the PSA.

[14] Mr Watson referred to two Codes of Practice promulgated pursuant to s. 275 of The Act. The Codes are readily available on the WorkSafe website. The 2011 Code, 'How to Manage Work Health and Safety Risk' explains at page 6 that the process known as 'risk management' involves four steps being:-

1. Identify the risks – find out what could cause harm.

2. Assess risks if necessary – understand the nature of the harm that could be caused by the hazard, how serious the harm could be and the likelihood of it happening.

3. Control risks – implement the most effective control measure that is reasonably practicable in the circumstances.

4. Review control measures to ensure they are working as planned.

[15] The Code, 'Managing risks of Plant in the Workplace' which commenced on 1 December 2013 addresses, inter alia, the risk management process which requires the employer to:-

1. At paragraph 2.1. Identify the hazards which involves the employer 'finding all the things and situations that could potentially cause harm to people', inspecting plant and reviewing safety information.

2. At paragraph 2.2. Assess the risks which involved 'considering what could happen if someone is exposed to a hazard combined with the likelihood of it happening, which is then; what is the potential impact of a hazard; how likely is it to cause harm.

3. At paragraph 2.3. Control the risk. This requires an employer, in the context of controlling risks associated with plant, to address the 'hierarchy of risk control' from the highest level of protection of liability to the lowest. Relevant to the present matter, the Code gives an example of an employer eliminating the hazard entirely by purchasing pre-cut timber rather than exposing the worker to risk of injury by using an electric saw.

4. Paragraph 3.3 is headed 'Instruction training and supervision' and instructs employers that they "must provide your workers and persons who are to use plant with information, training, instruction and supervision that is necessary to protect them from risks arising from the use of a saw."

[16] When Dunlop purchased the saw it was in some type of container or box. Also contained therein was an Instruction Manual entitled 'Circular Saw', Exhibit 3. This document is relevant in the context of the 2011 Code of Practice. At page 10 under the heading, 'Review available information', the Code states that, inter alia, 'manufacturers and suppliers can also provide information about hazards and safety precautions for specific substances…plant or processes (instruction manuals)'. On the bottom left side of the front cover of the Manual, the following appears, 'IMPORTANT..Read Before Using'. There is no evidence that Dunlop read this Manual, was instructed to do so, followed the instructions or warnings contained therein or was instructed to do so. On page 2, page 1 being the front cover, apart from the relevant specifications, the very first printed column is headed thus 'General Power Tool Safety Warnings'. Below are these words, " WARNING. Failure to follow the warnings and instructions may result in electric shock, fire or serious injury." The first column on page 4 of the Manual is headed, 'CIRCULAR SAW SAFETY WARNINGS Cutting procedures'. On page 4 and the following two pages are 35 numbered instructions and numerous illustrations advising on the safe operation of the saw. The relevant instructions are as follows:-

1. DANGER: Keep ands away from cutting area and the blade. Keep your second hand on auxiliary handle or motor housing. If both hands are holding the saw, they cannot be cut by the blades.

2. Do not reach under the workplace. The guard cannot protect you from the blade below the workplace.

3. Never hold the piece being cut in your hands or across your leg. Secure the workplace to a stable platform. It is important to support the work properly to minimise body exposure, blade binding or loss of control.

4. Below instruction numbered 4 is an illustration of a worker using a circular saw, both hands on the handles and the subject timber clamped to a frame.

5. Under instruction numbered 8 there is a highlighted sentence, 'kickback causes and related warnings…kickback is the result of saw misuse and/or incorrect operating procedures or conditions and can be avoided by taking proper precautions as given below.

6. Warning 9. 'Maintain a firm grip with both hands on the saw and position your arms to resist kickback forces. Position your body to either side of the blade, but not in line with the blade. Kickback could cause the saw to jump

backwards, but kickback forces can be controlled by the operator, if proper precautions are taken.

7. Warning 10. " When blade is binding or when interrupting a cut for any reason, release the trigger and hold the saw motionless in the material until the blade comes to a complete stop. Never attempt to remove the saw from the work or pull the saw backwards while the blade is in motion or kickback may occur. Investigate and take corrective actions to eliminate the cause of blade binding.

8. Warning 16, 'Always hold the tool, firmly with both hands. Never place your hand or fingers behind the saw. If kickback occurs, the saw could easily jump backwards over your hand leading to serious personal injury.' Below warning 16 is an illustration of how NOT to use the saw using only one hand.

9. Page 8 of the manual contains, inter alia, instructions on the use of the saw and an illustration of how to operate the saw using both hands.

[17] There is no evidence that Dunlop was instructed to read the Manual or that he was provided with the warnings or the advices contained therein.

[18] The defendant declined an opportunity to participate in a formal record of interview. Mr Watson submitted the range of penalty is $75,000 to $100,000 with the penalty falling at the mid to upper levels of that range plus costs of $1,000 and filing fees of $95.80.

[19] Mr Hegarty for the defendant submitted that it had entered an early plea, as early as 19 January 2019, and had no prior convictions. It had an unblemished record with the Queensland Building and Construction Commission.

[20] He acknowledged that Dunlop had been employed by the defendant for three months at the time of the incident, had a background of working for two years as a concreter performing roles similar to those he was performing for the defendant, had not received specific instructions regarding the operation of the saw he was using at the relevant time, had previously used a circular saw, had not used that type of saw before, had not been told how to use two saw horses on this particular task, had not been told to, and how, apply clamps to secure the timber to the horses. He also submitted that Dunlop had not encountered any problems cutting the first piece of timber although he had not used the saw guide shown in photo three. It would appear that he may have used the guide when cutting the second piece of timber but, if it was used in the position showing in photo three, it was incorrectly positioned and should have been placed below the horizontal member. I do not consider the positioning of the guide is of any relevance in the matter.

[21] He urged me to distinguish the Carroll Springs case for a number of reasons. In this regard I refer to my comments about that case as outlined above. He referred me to Mr Ollis' affidavits where he deposes to post incident work health and safety procedures implemented including costs thereof to date, plant equipment and the costs thereof purchased post incident, and particular paragraphs 15 and 16 of the affidavit of 11 March 2019 in which Mr Ollis deposes as follows:

'[15] Ollis' financial viability and capacity to continue to engage its employees and subcontractors is contingent on the outcome of these proceedings.

[16] If an excessive penalty was imposed, Ollis would have to consider his financial position and whether it can continue to trade. An excessive penalty would effect all outstanding, current and bookwork with clients, directly impacting employees and subcontractors reliant upon these jobs.'

[22] He tendered a SafeWork Methods Statement provided by Employsure, as referred to in paragraph 8a of Mr Ollis' first affidavit. This document addresses workplace health and safety advice and warnings relating to the operation of various items of plant equipment. Of particular relevance are two of the controls referred to at pages 10 and 11 that should be implemented when using a circular saw, namely 'two hands at all times are required for safe usage, and secondly, only use saw tools or benches that are sturdy and a good height to work at, make sure the material being cut is clamped or fixed to the bench or stools.' He submitted that I could make an order pursuant to s. 238 of the Act although he did not identify a stated project or any conditions that should be complied with when undertaking a project.

[23] He submitted that a penalty in the range of $30,000 to $50,000 is appropriate and further submitted that no conviction should be recorded.

DISCUSSION

[24] Reference is made in the Particulars of the Complaint to the defendant's alleged failure to comply with or have specific regard to two Codes of Practice. These Codes were issued pursuant to s. 274 of The Act however it is the use to which these Codes can be put in the present proceedings which is relevant and in this regard I refer to s. 275 of the Act which was in force as of 1 June 2017 and is set out above.

[25] Applying s. 275 of the Act and in the context of the two Codes of Practice referred to in paragraphs 14 and 15 hereof I am satisfied the defendant failed, as required by s. 19(1) of the Act, to ensure as far as reasonably practicable Dunlop's work health and safety because neither Ollis nor anybody else in a position to do so:-

1. Identified the risks associated with the task which Dunlop was instructed to undertake i.e. the risk of suffering serious injury while using the circular saw;

2. Gave any thought to assessing the risk i.e. appreciating the risk of serious injury if control measures were not put in place;

3. Implemented control measures i.e. instructed Dunlop in the safe operation of the saw, instructed him to use sawhorses or frames to which the timbers to be cut could be clamped; instructed him to clamp the timbers to the sawhorses or frames and supervised him in the task until satisfied that he was competent to perform same safely.

4. Gave any thought to reviewing the control measures. Obviously this could not be achieved because the control measures were never implemented in the first place.

[26] In the matter of *Steward v Mac Plant Pty Ltd & Mac Farms Pty Ltd* [2018] QDC 20, 'Steward', Her Honour, Fantin DCJ was considering an appeal from fines imposed by a Magistrate for offences against s. 33 of The Act and s. 215 of the Regulations thereto. As to the statutory regime of The Act, I adopt, with respect, Her Honour's comments at paragraphs 35 – 41.

[27] At paragraphs 51 to 54 Her Honour noted the provisions of sections 9, 11, 13, and 48 of the PSA.

[28] At paragraph 66 Her Honour referred to a recent decision of the New South Wales Court of Appeal in *Nash v Silver City Drilling (NSW) Pty Ltd; Attorney-General for NSW v Silver City Drilling (NSW) Pty Ltd* [2017] NSWCCA 96 (16 May 2017) 'Nash' where the defendant had pleaded guilty to a category two offence under s. 32 of the *Work Health and Safety Act 2011 (NSW)* (maximum penalty $1,500,000) for an incident that caused life threatening injuries including quadriplegia at a drilling rig in a coal mine. The court allowed the appeal and increased the fine imposed by the District Court from $112,000 to $212,500.

[29] At paragraph 68 of her judgment, Her Honour quoted from some of the relevant passages in the judgment of Basten JA (with whom the other Judges agreed). I respectfully agree with the principles referred to therein.

[30] Adopting the approach of Her Honour at paragraphs 122 to 129 of her judgment, I address the following.

The potential consequences of the risk

[31] At paragraph 123 Her Honour wrote, 'the risk to be assessed is not the risk of the consequence, to the extent that the worker was in fact injured, but the risk arising from the failure to take reasonably practicable steps to avoid the injury occurring.'

[32] Here the risk to Dunlop, a 19year old, arising from the failure to take reasonably practicable steps to avoid the injury occurring 'was the risk of him being injured while using a circular saw which he had not used before; at premises where he had only been employed by the defendant for three months; in circumstances where he had previously used a circular saw but not one of the type that he was using at the time; where he had not been instructed in the operation of the saw; where he was not to be supervised in its operation (In fact there were no other employees on site at the time); where he had not been told as the availability of, and how to use sawhorses or frames, and had not been instructed to and how to ensure that the timbers to be cut were clamped or secured to a frame of sawhorse. The risk, which in fact materialised and was completely avoidable, had the potential to cause Dunlop very serious injury.

The probability of the risk

[33] In the light of the above, the probability of the risk materialising was very high, was identifiable, obvious and foreseeable.

Availability of steps to lessen, minimise or remove the risk

[34] The risk could have been removed entirely by Ollis instructing Dunlop to buy pre-cut timbers. The risks could have been lessened or minimized by Ollis complying

with the two Codes of Practice, adhering to the warnings in the Instructions Manual, instructing Dunlop in the use of sawhorses and clamps, instructing him in the safe operation of the saw and supervising him until he was satisfied Dunlop was competent to operate the saw safely.

Whether those steps are complex and burdensome or only mildly inconvenient

[35] Advising Dunlop to buy pre-cut timbers involved nothing more than that. Instructing and supervising him was neither complex, burdensome not mildly inconvenient. Sawhorses were available on site and if not could be readily obtained. Likewise with respect to clamps. If Ollis could not attend to these matters himself, he employed 'several tradesmen and experienced labourers' who could have performed the task.

[36] It is clear that the defendant did not ensure that Dunlop complied with the instructions contained in the Safe Work Method Statement as outlined above.

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

[37] The maximum penalty is $1,500,000. It is clear that the employer did not comply with its statutory duties, the Codes of Practice or the Instruction Manual. The *Penalties and Sentences Act* s.9(1)(c) (deterrence) and s. 9(1)(d) (denouncement) are particularly relevant. Here, a young inexperienced worker who had been given a brief verbal induction only and who had completed a general safety induction course some years prior, was asked to use a circular saw which he had never used before. He was instructed to rip cut lengths of timber without being told as to the availability of, and how to use, sawhorses and to secure the timbers thereto. He was given no instruction or supervision in the safe operation of the saw. The defendant declined to take part in a formal record of interview. This was a serious dereliction of the defendant's duty to ensure Dunlop's workplace health and safety. The objective seriousness of this breach of the defendant's duty to ensure Dunlop's workplace health and safety was very high. It resulted in a young man suffering significant lifelong injuries which will adversely and severely impact on his enjoyment of the amenities of life and his earning capacity. There must be a deterrent to other employers that such dereliction of duty will not be tolerated by the Courts and such behaviour will be met with significant penalties.

[38] The foregoing must be balanced against the early plea of guilty, the absence of prior convictions, a favourable work history with the Queensland Building and Construction Commission, co-operation with the Workplace Health and Safety investigation, steps taken by the defendant, post incident, to address issues of workplace health and safety, the cost thereof and, in the light of section 48(1) of the PSA, the financial viability and capacity of the defendant to continue its business and employ its employees in the event that a significant fine is imposed.

[39] Obtaining the Employsure Report carries some, but not a lot of weight in the context of the mitigation of penalty. While it does demonstrate the defendant's willingness to address workplace health and safety issues in the workplace, allbeit after the incident, it can also be argued that a prudent and responsible employer of 12 employees, including apprentices, (this was a number at the start of the business two years earlier but reduced to eight as a result of adverse publicity about this incident) using a variety of high powered tools and other plant and machinery

referred to therein on and away from the employer's business address would have sought such advice some time prior to the subject incident anyway. Acquisition of plant such as scissor lifts, telehandler and vehicle mounted cranes, bobcat and excavator is as much a reflection of the type of work undertaken by the defendant's business and the equipment necessary to conduct such a business as it is of any desire to provide a safe place of work. It is very likely that such plant equipment would have been purchased in the normal course of business even if the subject incident had not occurred.

[40] Section 48 of the PSA requires the court when considering the amount of a fine penalty to have regard, as far as practicable, to ,

"(a) the financial circumstances of the offender;

(b) The nature of the burden that payment of the fine will be on the offender."

I refer in particular to paragraphs 8,10, 15 and 16 of Mr Ollis' affidavit of 11 March 2019 and his undated affidavit of April 2019. Since this incident, which occurred almost two years ago, he has known or ought to have known that the company was likely to incur a significant penalty in these proceedings, yet according to my calculations, in that time the company has purchased plant and equipment at a cost of $174,200.00. It will have incurred lease payments to Employsure of some $14,000.00 to 27 April 2019, a further $28,000.00 in lease payments will be made to 27 August 2022 and " $30,000.00 -$50,000.00 on operation costs, repairs and transport" has been spent on the purchased equipment. His claim that the financial viability of the company is at risk if an "excessive penalty" is imposed has to be seen in the light of the foregoing although it must be acknowledged that the company has only been in business since 2015.

CONCLUSION

[41] I do not propose to make an order pursuant to s. 238 of the Act. No such project or its costing was put before the Court.

[42] Taking all matters referred to above into account the defendant is fined $75,000.00 plus professional costs of $1,000 and $95.80 filing fees. The fine is referred to SPER. A conviction will not be recorded.