Work Health and Safety

By His Honour Judge A Scotting

This article seeks to address some practical issues arising from the conduct of prosecution of offences provided for by the *Work Health and Safety Act 2011* (the Act) and the *Work Health and Safety Regulations 2011*.

Pleas of Guilty

The judges are appreciative of the considerable effort that goes into the written submissions that we get particularly in pleas of guilty, but we would like to suggest some subtle changes in focus.

First, the facts in WH&S are long and on occasions unduly so. That results in the Court having to summarise the facts and that involves a risk of failing to identify an essential point, in aggravation or in mitigation. It would be of assistance if written submissions did identify the essential facts with references to the paragraph numbers of the Statement of Facts. It would be even better if the parties could agree on a simplified version of the facts that could appear in the judgment. As an aside, a comprehensive set of Agreed Facts should usually alleviate the need to tender investigation reports and other documentation.

Second, the most essential findings in a plea of guilty are the facts relevant to objective seriousness. It is surprising that many sets of submissions do not focus on this element. The principles relevant to objective seriousness are set out in a number of judgments.[1]

The most common aggravating factor is the causation of injury or death as a result of the offence. A section 32 offence does not require an injury to be sustained but only that an individual is exposed to a risk of serious injury or death. Accordingly, the causation of serious injury or death establishes the aggravating factor because the harm was greater or more deleterious than may ordinarily be expected for the offence in question.[2] The long term impact on the injured worker is useful information and could be aggravating or mitigating.

The most significant mitigating factor that can be established and has a demonstrable effect in mitigation of sentence is an early plea of guilty. The application of a 25% discount has a real bottom line impact when the most likely outcome is the imposition of a fine. Further, an early plea is likely to reduce the costs claimed by the prosecution.

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Capacity to pay is also significant. There is always some utility in placing the defendant in a class of capacity. While an appropriate penalty for the offence is $100,000 and the defendant has the capacity to pay that fine, it is useful for the Court to know generally how that capacity relates to other PCBUs for whom capacity to pay is absolutely not an issue. Second, the evidence that needs to be gathered to establish a limited capacity to pay will vary. Third, if there is a limited capacity to pay then there may be the need to limit the costs awarded too. Finally, limited capacity to pay may not be relevant at all if the circumstances warrant the imposition of a substantial fine.[3]

Insufficient attention has been paid to date to the 'Other Orders' that the Court can make pursuant to Division 2 of Part 13 of the Act. A Court may make any of the other orders in addition to any other penalty imposed, if the Court finds a person guilty or convicts the person of an offence.[4] This clearly includes when an order is made pursuant to section 10 *Crimes (Sentencing Procedure) Act 1999*. Inherent in the New South Wales approach is that the entry of a conviction is considered to be punitive, or may lead to legal and social consequences that extend beyond any punishment imposed by a Court.[5] However, this is not the position in other jurisdictions, particularly Queensland.

An offender may voluntarily undertake such matters to be relied on in mitigation of the penalty to be imposed.[6] For any of the other orders to be successfully made, the Courts require the assistance of the representatives of the parties as to the cost and availability of suggested measures and methods to ensure compliance.[7]

Recent examples of other orders made by the District Court include adverse publicity orders[8], Work Health and Safety undertakings and training orders.[9]

Defended Hearings

The Practice Note (PN) applies to all prosecutions commenced after 5 November 2018. It was conceived because a number of defended hearings had to be adjourned to accommodate late evidence or changes of position in the prosecution case.[10] Notwithstanding that the PN applies to cases commenced after 5 November 2018, we are endeavouring to apply it as closely as possible to cases that were commenced before that date. This involves the prosecution justifying that their case is settled and appropriately disclosed and the parties have

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taken all reasonable steps to limit the matters in dispute and to proceed accordingly.

It should be noted that the requirements imposed on a defendant by the PN are voluntary, as it does not have the force of legislation requiring the defendant to impinge on the right to silence.[11]

The PN is consistent with counsels' duty to limit the matters in dispute and to run only the matters that are necessary to properly represent the legitimate interests of the client.

When *Investa* was run by two experienced Senior Counsel the matter completed within eight days of its 15 day estimate. Statements were tendered by consent without requiring deponents for cross-examination, expert reports were received and there was an extensive set of Agreed Facts. Each party presented one folder of 'Critical Documents' that prevented the need to go searching for documents in a large tender bundle.

The default order of the Court will be from now on that an expert's evidence-in-chief will be given by way of the tendering of their reports. In *Investa*, the parties consented to calling the experts simultaneously, which was also helpful in resolving the issues between them. While this process is encouraged, it will remain a matter for consent in appropriate cases.

A lot of photographic evidence is presented in these matters and often the photographs tendered are small, produced in black and white or are otherwise of poor quality. It is of considerable assistance to witnesses and the Court to have photographs, plans and maps presented in large scale and in high resolution, if possible.

Written Submissions after the Completion of the Evidence.

There have been a number of cases where the Court is being asked if the parties can be given time at the end of the evidence for the preparation of written submissions. While this will remain to be determined by the trial judge in the circumstances of the case, it raises two issues. First, the Court treats these matters as judge alone trials and the parties and the victims are entitled to a verdict as soon as possible. This means that in appropriate cases we will try to allocate writing time into our schedule to get judgments out. If a case runs over time or we do not know when a case will finish, these arrangements will be compromised, so it will be necessary to set out the dates in advance if this arrangement is to be entered into.

Recent Cases of Interest

There have been a few recent decisions of the CCA that shed some light on the penalties to be imposed for section 32 offences.[12] These cases highlighted the simplicity of the steps that could be taken in avoiding the risk as a very important factor in assessing the objective seriousness and thereby the appropriate penalty for an offence. It is relatively clear that these decisions, together with other decisions of the Court of Criminal Appeal, have placed upward pressure on monetary penalties imposed for Category 2 offences.

The High Court has also recently considered the scope of the operation of the Act[13] and has granted special leave in relation to whether prosecutions under the Act should be given priority to coronial proceedings.[14]

ENDNOTES

1 See e.g., *Bulga Underground Operations Pty Ltd v Nash* [2016] NSWCCA 37 and the cases referred to in footnote 12.
2 *R v Youkhana* [2004] NSWCCA 412 at [26].
3 *Jahandideh v R* [2014] NSWCCA 178 at [16].
4 ss 234 and 235 of the Act.
5 *R v Mauger* [2012] NSWCCA 51 at [39] per Harrison J, quoting *R v Ingrassia* (1997) 41 NSWLR 447 at 449.
6 See e.g., remedial training for a class of workers; *SafeWork NSW v Wholesale Joinery Pty Ltd* [2018] NSWDC 91 at [41]-[42].
7 Toni Schofield and Belinda Reeve, 'The Role of the Judiciary in Occupational Health and Safety Prosecutions: Institutional Processes and the Production of Deterrence', (2012) 54(5) *Journal of Industrial Relations* 688 at 702.
8 *SafeWork NSW v KD & JT Westbrook (No2)* [2019] NSWDC 15 for the reasons at [59]-[67] and the orders are at [75]-[79].
9 *SafeWork NSW v Yan Huai Wu and Zenger (Aust) Pty Ltd* [2018] NSWDC 211.
10 *SafeWork NSW v Investa Asset Management Pty Ltd* [2018] NSWDC 173 (*Investa*).
11 Division 2A of Part 5 *Criminal Procedure Act 1986.*
12 *A-G (NSW) v Ceerose Pty Ltd* [2019] NSWCCA 35, A-G (NSW) v DSF Constructions Pty Ltd [2019] NSWCCA 33, *A-G (NSW) v Macmahon Mining Services Pty Ltd* [2019] NSWCCA 8 and *18 Morris McMahon & Co Pty Ltd v Safework NSW* [2018] NSWCCA 36.
13 *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2
14 *Helicopter Resources Pty Ltd v Commonwealth* [2019] FCFCA 25.