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Précis Paper

Sentencing in Work Health and Safety Matters

Prosecutions and sentencing for breach of the *Work Health and Safety Act 2011* (NSW)

Discussion Includes

- Overview of key offences under the *Work Health and Safety Act 2011* (NSW)
- *Bulga Underground Operations Pty Ltd v Nash* [2016] NSWCCA 37
- *Attorney General of NSW v Tho Services Limited (in liquidation) (ACN 000 263 678)* [2016] NSWCCA 221
- *Nash v Silver City Drilling (NSW) Pty Ltd* [2017] NSWCA 100
- Advice for solicitors facing a client charged with a s 32 criminal offence

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Sentencing in Work Health and Safety Matters

1. In this edition of BenchTV, Malcolm Scott (Barrister, Greenway Chambers, Sydney) and Ingmar Taylor SC (Barrister, Greenway Chambers, Sydney) discuss prosecutions and sentencing in work health and safety matters, three important recent decisions of the NSW Court of Criminal Appeal, and what a practitioner needs to know when advising a client charged with a criminal offence under the *Work Health and Safety Act 2011* (NSW).

Overview of key offences under the *Work Health and Safety Act 2011* (NSW)

2. There are three key offences under the *Work Health and Safety Act 2011* (NSW) (WHS Act). The most common offences under the *WHS Act* are those found in sections 31, 32, and 33:
    - s 31 is the most serious offence, and refers to when a person acts with recklessness, and that recklessness causes serious injury, or death (a s 31 offence has never been made out in NSW)
    - s 32 offences are more frequently made out – they refer to the duty of a PCBU (person conducting a business or undertaking) to ensure the health and safety of either people with which they are directly engaged, or over whose work they have control, and the people affected by their work health and safety method
    - s 33 refers to breach of duty

Maximum fines that the District Court could impose upon a convicted defendant under sections 31, 32, and 3

3. S 31 has a maximum fine for a corporation or PCBU of $3 million, and for an officer of a PCBU, or an individual acting as a PCBU, $600,000, or 5 years jail. S 32 has a maximum fine for a PCBU of $1.5 million, and for an officer of a PCBU, or individual acting as a PCBU, $300,000. These are serious criminal charges, and the sentencing will reflect that.

4. A s 33 offence, which is usually heard in the Local Court, has a maximum fine of $150,000 for an individual, and $500,000 for a corporation. So even at the lower level, the maximum penalties are still significant.

5. These fines have increased significantly since the introduction of the *WHS Act 2011* so it is important to be aware when looking at earlier cases that the maximum penalty was lower under the *Occupational Health and Safety Act* 2000 (NSW).

6. Although s 31, 32, and 33 have been mentioned as the most common sections under which prosecutions are made, the *WHS Act* does have a number of other sections under which they can also be made.

7. The Court of Criminal Appeal has recently handed down three important decisions in the area of work health and safety - *Bulga Underground Operations Pty Ltd v Nash* [2016] NSWCCA 3, *Attorney General of NSW v Tho Services Limited (in liquidation) (ACN 000 263 678)* [2016] NSWCCA 221, and *Nash v Silver City Drilling (NSW) Pty Ltd* [2017] NSWCA 100 – which will be discussed in detail below.

8. Each overturned sentencing decisions of the District Court in this area of criminal law, providing guidance to the Court as to the correct approach.

9. It is first important to understand what these types of prosecutions involve. They generally come about because of some accident in the workplace – someone is injured, sometimes, killed – and WorkSafe inspectors come on to that site and can, if they think it appropriate, do more than simply identify steps that should be taken - they can investigate the potential for a criminal charge.

10. While these cases are usually taken against companies, they are also sometimes taken against individuals, and it is a criminal offence that then comes before the Court for determination. The common reaction of companies is to say 'it was just an accident...we shouldn't be blamed for something that was so unlikely'.

11. A number of questions are raised in these cases, including:
    - whether, if something is very unlikely, the sentence will be affected
    - questions arising over costs
    - question arising over advising defendants in relation to costs
    - whether the size of the company is relevant when determining the sentence

Bulga Underground Operations Pty Ltd v Nash [2016] NSWCCA 37

12. Bulga was an underground mine. It had a shearing machine, which involved an automatic prop being put in place. The worker in question was struck on the head by a piece of rock. He fell, and a prop was placed by the shearer on top of him. The result of that was that the worker was killed, and the company was prosecuted.

13. The company argued that it was such an unusual event that it was outside an issue of foreseeability. The company was convicted, and sentenced (around $55,000).

14. The company appealed its conviction, and very unusually, the prosecutor appealed the sentence on the basis that it was an inadequate sentence.

15. The Court looked at, and repeated, the key tenet in this area of work, which relates to whether or not a risk is created, and whether or not the acts or omissions of the company are causally related to that risk being created. If it *is* causally related, then there is generally not much else work to be done.

16. About five weeks earlier, there had been a rock fall, which perhaps should have prompted the employer to think that it was possible that the operator could be hit by a falling rock.

17. The judge at first instance agreed with only one aspect of the prosecutor's case, which was that if they had employed someone, whose job it was to check that the person in the dangerous area was not struck by rocks, was within sight, and there was an emergency stop button, it is highly likely that the risk of death would have been reduced.

18. The fine of $55,000, awarded at first instance, was found by the Court of Criminal Appeal to have been manifestly inadequate.

19. The Court held that the trial judge had erred in assessing the penalty because no effect was given to those aspects of sentencing of general and specific deterrence.

20. Specific deterrence is achieved by putting an aspect into a sentence to remind a company that in the future it must have regard to the dangerous matters arising – so hitting a mining company (with perhaps a $1 billion worth of share equity) with a $55,000 fine might not be a sufficient reminder to it that it needs to take real care with safety.

21. General deterrence is more to make a statement to other companies in the industry that if a criminal act of this kind is committed, a significant penalty will incur, in order to preemptively warn other companies to not end up in the same position as the defendant has.

22. The judge at first instance had not added any amount for either specific or general deterrence. He was of the view that the incident was very rare, unusual, and unlikely to happen again, and therefore that there was no real need for specific deterrence.

23. The Court of Appeal held that there are cases of long-standing that say as a general rule that general and specific deterrence will be elements of a sentencing *unless there are exceptional circumstances.*

Attorney General of NSW v Tho Services Limited (in liquidation) (ACN 000 263 678) [2016] NSWCCA 221

24. This case was again an appeal of a sentence that was manifestly inadequate.

25. A 15-year-old student was doing work experience at a large manufacturing plant. On his first day there, he was given some welding exercises. For most of the day, the boy had

been welding without the filtered lens of the welding mask. By the end of the day, he had blurred vision. As it turned out, he lost 75% of his vision in both eyes.

26. The company pleaded guilty on the basis that it accepted that it had not given the boy instruction to put the visor down, and had not properly supervised him in checking that he kept the visor down. The judge at first instance determined that because this case was unusual, a s 10A would be appropriate (even though it was a plea of guilty, and there was a statement of facts agreed to by both parties).

27. There was no conviction recorded, and the company was ordered to do no more than pay $29,000 in costs.

28. S 10A of *the Crimes (Sentencing Procedure) Act 1999* (NSW) gives the Court the discretion to not record a conviction even when a crime is proven. The trial judge's primary reason for determining not to record a conviction was that to not do so might discourage other companies from offering work experience.

29. The case went to appeal, on the basis that the sentence was manifestly inadequate – which the Court of Criminal Appeal indeed found to be the case.

30. Justice Harrison wrote the primary judgment, with which Justice Hoeben CJ at CL and Justice Campbell agreed. Justice Harrison pointed to the fact that s 10A, with regard to this type of offence, has a considerable history, and that the case law only permits a s 10A to be appropriate in the most extraordinary circumstances, particularly when dealing with a corporation. None of those exceptional circumstances arose in this matter.

31. His Honour went on to discuss general deterrence, commenting that 'if ever there was a case in which the need for general deterrence is obvious and critical, this is such a case'.

32. The Court of Appeal imposed a fine of $240,000, which is after a 25% discount for an early plea, and without any specific deterrence.

Advising clients about discounts for pleading guilty

33. S 22 of the *Criminal Procedure Act 1986* (NSW) provides for a discount for a plea of guilty of up to 25%. The amount actually receivable from that 25% will depend upon when the plea of guilty is entered into, and the utilitarian value of that guilty plea. So a discount in the sentence is one great advantage of an early plea of guilty.

34. The other advantage of an early plea of guilty for a defendant is that the defendant will have some influence over the facts that are presented to the judge. Usually, a plea of guilty is determined on the basis of agreed facts. The prosecutor may well be willing to let

some facts go in order to reach agreement that will allow the matter to come before the Court for a sentence.

35. This advantage can sometimes have quite a significant impact on the penalty imposed. Statement of facts is a very powerful weapon, and is recognised under the *Evidence Act 1995* (NSW). Once there is an agreed statement of facts, signed by both parties, neither party is able to produce evidence, or make an argument, that is contrary to an agreed fact.

Nash v Silver City Drilling (NSW) Pty Ltd [2017] NSWCA 100

36. An operator was severely injured during a drilling operation, and he became quadriplegic.

37. Again, there was an issue as to whether or not this was foreseeable, how difficult it was to overcome, the level of risk, and how obvious that risk was.

38. The judge at first instance imposed a small fine.

39. An appeal was brought again on the basis of inadequate sentencing, which the Court of Appeal upheld. The primary judgment was written by Justice Basten with whom Justice Hoeben CJ at CL and Justice Walton agreed.

40. Justice Basten has greatly assisted the Courts and practitioners by spending a reasonable amount of time in his judgment going through a number of issues with regard to sentencing in this area of crime.

41. This area of criminal law is odd - it is a hybrid, and it does not neatly fit into the general jurisprudence of crime, nor the relevant criminal legislation – due in part to the fact that unlike most crime, there is no intent in this sort of crime.

42. The Court of Appeal accepted that what happened to the victim was an unlikely event, but said that it was not the only factor to be taken into account when determining culpability. Foreseeability is one factor to be taken into account when determining culpability. However, several features of the risk must also be looked at, including:
    - the level of risk (low/moderate/high)
    - if there is a risk of serious injury or death, what needs to be done to overcome that serious risk

43. Although the events in this case were unlikely, the risk of injury if those unlikely events occurred was a risk of an extreme injury, and it would not have been very costly to have dealt with that risk. So the mere unlikelihood of the events in this case was not sufficient enough to reduce the penalty, and there was found to be a high level or culpability.

44. A company is expected to take reasonably practicable steps to remove risks, even if they are unlikely, and the level of culpability will be high if was relatively easy to deal with that risk, particularly if it is a risk of serious injury or death.

45. 'Reasonably practicable' is defined in the *WHS Act* under s 18. The prosecutor has to prove beyond reasonable doubt that dealing with the risk was a reasonably practicable thing for the company to do.

46. Justice Basten also addressed the issue (which has troubled practitioners ever since the *WHS Act* has come into effect) as to whether the existence of serious injury or death was itself an aggravating factor when it came to sentencing.

47. S 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) contains a list of matters, which if proven beyond reasonable doubt, are matters of aggravation, and will therefore affect the sentence.

48. One of those matters is whether a risk is created of serious injury or death. Justice Basten held that this matter could not be a matter of aggravation, because it is already an element of the s 32 offence under the *WHS Act*).

49. Another issue, however, is the degree of injury that is caused to the victim, which Justice Basten says *is* a relevant matter of aggravation, because the section does not deal with injury, it deals with risk. But where it can be proven beyond reasonable doubt that the victim was seriously injured or killed, then the culpability rises and the sentence rises, because there is a degree of aggravation.

50. The maximum penalty that could be imposed in this case was $1.5 million. The penalty imposed at first instance was $112,000. The Court of Criminal Appeal imposed a head sentence of $250,000, with a discount of 15% for the plea of guilty. (Only a 15% discount was applied out of the maximum 25% available because it was not a plea at the earliest opportunity).

51. The relevance of the size of a company is another issue discussed in this case. The company in this case - Silver City Drilling - had around 1000 employees, so it was a significant operation.

52. At paragraph [59], Justice Basten discusses how the Court should approach different defendants of different size when it is looking at a maximum fine of $1.5 million. He opines that the amount of fine will be affected by the size of a corporation.

53. The Court also dealt with costs.

54. At first instance, the judge had not awarded prosecutor's costs. He determined that this had been a case in which a number of matters originally pleaded were not relevant to the final judgment, and so he did not order costs to be paid.

55. The Court of Appeal said about the general principle that a defendant who is found guilty should have to pay the prosecutor's costs that when a criminal court is exercising its summary jurisdiction, the costs of giving effect to that jurisdiction will be as if the matter was before a civil court – so costs follow the cause. If the prosecution wins, therefore, it will normally expect to have its costs paid by the defendant.

56. Another issue arose over the potential culpability of individuals who are either directors or managers of a corporation that is being prosecuted.

57. The obligation of an officer of the PCBU under s 27 of the *WHS Act* is to exercise due diligence to ensure that the PCBU meets its duties. If an officer fails in his or her duty to exercise due diligence, he or she will be convicted of a criminal offence, and may face a substantial fine.

Advice for solicitors facing a client charged with a s 32 criminal offence

58. It is important for solicitors to understand what they face when dealing with a client who has just been served with a summons charging their company, or them personally, with a s 32 criminal offence. Careful consideration of the matters outlined below must be made by a solicitor in advising such a client.

59. In relation to matters in which the level of culpability is in the middle range, the fines that are coming out of the District Court at the moment are somewhere around $250,000 to a head sentence of $500,000.

60. A discount will be applicable if a guilty plea is entered into.

61. It is important for the solicitor to work out in their own mind, as best they can, what the objective seriousness of the offence is; this will take some time.

62. The solicitor for the defendant will be given the brief of evidence by the prosecutor, and must determine whether there is reasonable prospect of success. The solicitor must also look for whether or not the prosecution brief has big holes in it. For example, there may be no ability of the prosecutor to prove that there were reasonably practicable steps that could be taken. This could require the solicitor to seek relevant expert technical advice.

63. If there are not big holes in the prosecutor's brief, then the solicitor must talk to the client about the advantages of pleading guilty, and their likely prospects of succeeding in the event that they choose not to enter in a plea of guilty.

64. The advantages of pleading guilty are a significant, including savings:

- in their own legal costs, and avoiding a potentially long and drawn-out case
- on the prosecutor's costs
- from the discount of up to 25% of the sentence (if the plea is entered at the earliest opportunity)

65. There is, however, no formula when it comes to sentencing for crimes of this nature. The High Court in the case of *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 held that a mathematical approach to sentencing is wrong.

66. It needs to be at the forefront of minds of both the solicitor and the client that these are offences of strict liability and that the elements of these offences are straightforward. So when the prosecutor has the evidence to prove those elements beyond a reasonable doubt, the defendant will be found guilty. This needs to be expressed very plainly and very clearly to a defendant client.

BIOGRAPHY

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Malcolm Scott is a leading prosecutor in the area of WHS. In addition, Malcolm has for many years practised in the areas of general common law and insurance contract law, employment law, medical negligence and succession.Even though Malcolm primarily acts as a prosecutor , he has for many years also appeared for defendants.

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Ingmar Taylor SC was called to the Bar in 1997, and was appointed Senior Counsel in 2012. He specialises in employment and industrial law, including all matters arising under the Fair Work Act, and WH&S matters. He appears for employers, unions, Government and the Fair Work Ombudsman. His particular expertise includes cases concerning conditions of employment, enterprise bargaining, dismissal, rights of registered organisations, contracts of employment and workplace safety matters involving fatalities. Ingmar is also a mediator.

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Cases

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Legislation

Work Health and Safety Act 2011 (NSW)

Occupational Health and Safety Act 2000 (NSW)

Crimes (Sentencing Procedure) Act 1999 (NSW)

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Papers

Ingmar Taylor & Malcolm Scott, 'A Brief Overview of Prosecutions and Sentencing for Breach of the *Work Health and Safety Act 2011* (NSW), Greenway Chambers, 30 August 2017