CITATION: *John Carroll v Energy Resources of Australia* [2005] NTMC 067

PARTIES:	JOHN CARROLL
	-v-
	ENERGY RESOURCES OF AUSTRALIA
TITLE OF COURT:	Local Court
JURISDICTION:	Work Health Court
FILE NO(s):	20516496
DELIVERED ON:	28 October 2005
DELIVERED AT:	DARWIN
HEARING DATE(s):	28 September 2005
DECISION OF:	D LOADMAN, SM

CATCHWORDS:

ALLEGED BREACH SECTION 16 (1)(b) AND 23(4) MINING MANAGEMENT ACT
FAILURE TO MAINTAIN AND OPERATE SITE SO AS TO MINIMISE RISK TO SAFETY AND HEALTH OF WORKERS RESULTING IN SERIOUS INJURY – GUILTY PLEA - PENALTY
Mining Management Act 2001

REPRESENTATION:

Counsel:

Plaintiff:	Mr Anderson
Defendant:	Mr Henwood

Solicitors:

Plaintiff:	Solicitor for the Northern Territory
Defendant:	Cridlands Lawyers

Judgment category classification:	B
Judgment ID number:	[2005] NTMC 067
Number of paragraphs:	53

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20516496

BETWEEN:
John Carroll

Plaintiff

AND:
Energy Resources of Australia

Defendant

DECISION

(Delivered 28 October 2005)

Mr David LOADMAN SM:

THE INCIDENT

1. The defendant is charged that:-

> In or about mid May 2004 and 12 July 2004, at the Ranger Uranium mine site near Jabiru in the Northern Territory of Australia ("the site"), did breach an obligation imposed by Section 16 of the *Mining Management Act* by failing to operate and maintain the site so far as was practicable to minimise risk to the safety and health of the workers on the site and in doing so did cause serious injury to Damien Justin Evans in circumstances where you ought reasonably have known that the breach might cause death or serious injury, contrary to Section 23(4) of the *Mining Management Act.* Specific particulars of the charges are as follows:-

(1) Failing to supervise, or adequately supervise, the workers who re-erected the feed chute trolley for Ball Mill 2 in mid May 2004 to ensure that the trolley was properly re-erected.

(2) Failing to inspect the trolley between about mid May 2004 and 12 July 2004 to check that the trolley had been properly re-erected.

(3) Failing to instruct, or adequately instruct, Evans as to the safe performance of the task of replacing the seals on Ball Mill 2, including removal of the feed chute, on or prior to 12 July 2004.

(4) Failing to warn Evans of the hazard presented by the articulated support beam on the trolley for Ball Mill 2 on or prior to 12 July 2005.

THE GROUNDS

2. The charge has its genesis in an incident which occurred in one of three mills located near Jabiru comprising part of the operation of the Ranger Uranium Mine carried on by the defendant ("ERA"). The operations of ERA include mining and processing of uranium ore to produce uranium oxide for export markets. The mill in question is referred to as a "Ball Mill" and is designated by the number 2. There is another Ball Mill. There is also a Rod Mill located in the complex and each of them contain equipment which is utilised to produce uranium oxide. The ore enters each of these mills by what is described as a feed chute. The end part of the feed chute is called a "feed spout" and maybe removed from the mill in two recognised ways. Firstly, by removing a cover and pulling the feed spout back from the entrance to the mill and replacing the relevant seal in situ. Alternatively, the feed chute as a whole can be disconnected from the superstructure and pulled away from the mill. In order to accomplish the last mentioned procedure, a number of nuts depicted in a photograph comprising part of Exhibit P2, need to be removed. If so unbolted, the feed chute, weighing in

excess of one tonne, is supported on a removable steel frame called "a feed chute trolley". The feed chute may then be moved away from the mill on that trolley so as to gain access to the feed spout. Although, as the Court understands it, the feed chute trolley in each one of the three mills comprised an identical design, there was a single distinction in respect of the feed chute trolley located in Ball Mill number 2. The design required ERA to construct the same in accordance with a design drawing which was tendered as Exhibit P3. In essence due to space restrictions at Ball Mill 2, a single supporting beam was articulated and its two constituent parts, when supporting the feed chute, were secured by two industrial steel bolts. Removal of the lower and thereafter the higher of those two bolts would then enable the beam to be folded in, but it is emphasised the folding could only occur once the upper pin was removed, that being the critical pin or bolt. This feature was absent from the feed chute trolley structure in Ball Mill 1 and the Rod Mill.

3. The design drawings P3, contain the following legend in a rectangle located in the left hand portion of the drawing:-

WARNING!
DO NOT REMOVE PIN UNTIL SLINGS & LIFTING EQUIPMENT HAS BEEN INSTALLED

<u>OPERATING INSTRUCTIONS</u>

1. SECURE TROLLEY
2. RIG UP, TROLLEY EXTRACTION CHAIN BLOCK
3. LOWER CHUTE GRADUALLY INTO THE SUPPORT CRADLE WITH THE AIDE OF THE FLANGE BOLTS
4. RIG UP LIFTING GEAR AND TAKE WEIGHT. ESTIMATED LOAD 3-4 TONNES
5. REMOVE PIN M10 AT THIS LOCATION ONLY TO ALLOW SUPPORT TO FOLD.
6. LOWER CHUTE TOWARD FLOOR, CHECKING FOR LOOSE BALLS AS CHUTE NEARS FLOOR.

4. In addition, that same document, relevantly at the bottom of the drawing after the words "notes", lists five directions, the last of which is relevant, namely:-

> "5. Warning:- Do not remove pin from support structure until slings and lifting equipment are in place"

5. Neither of these warnings or the thrust of them was brought to the notice of Damien Justin Evans ("Evans"), a fitter and turner by trade, who was engaged by the defendant a week after Easter 2004, specifically on 19 April 2004. With five other fitters, his job was to maintain the plant and machinery, attending to routine preventative maintenance and breakdowns if or when they occurred. Evans was under the supervision of the maintenance supervisor employed by ERA.

6. On 12 July 2004, Evans commenced his shift at 7am due to finish at 7pm. Fortuitously, due to circumstances which don't need recitation, the opportunity arose for maintenance tasks to be undertaken by him, which included replacing the lip seals on the feed chute of the Rod Mill and Ball Mill 2. The maintenance supervisor requested Evans and another to attend to this task. Evans had not done a lip seal replacement before, but he had previously removed the feed chute on the Rod Mill, the feed chute in that mill, having a one piece support beam, unlike the articulated support beam in respect of the feed chute at Ball Mill 2. There are two methods of replacing the lip seal as set-out before and Evans chose to adopt one of those specific practices and obtained the supervisor's sanction to do so. He then commenced work on the feed chute at the Rod Mill, but was requested to leave the Rod Mill and attend to replacement of the lip seal on the feed chute at Ball Mill 2 instead, by virtue of the latter having a higher priority.

7. The defendant had in place, a requirement that, before any work was undertaken by an employee, the employee was required to complete a job safety and envirionmental (sic) analysis work sheet ("JSEA"). The relevant

JSEA is Exhibit P4 in the proceeding. The nature of the job, the hazards and how to manage them are all required to be duly identified in the manner demonstrated on the form. On the left hand side of the JSEA, in the third to last window, certain hazards are "ticked" and in answer to the question, "before you start the task, have you checked these hazards?" the word yes is circled. What is significant is that the following hazards are not ticked;

"Can you or others:

_ Be struck by or contacted by anything? _ Strain or over exert

_ Strike against or make injurious contact with anything? _ Fall in anyway?

_ Be caught in, or in between anything? _ Slip on oil, water etc.

_ Inflict injury on a fellow employee? _ Trip on anything

_ Be exposed to any harmful conditions such as gas, heat, flames etc?"

8. The failure by Evans to identify these hazards, is accepted as being due to neither the supervisor or anyone else, pointing out to Evans that the task on Ball Mill 2, was a task in relation to which there was at that mill an articulated support beam, secured in place. It was secured in place, as set-out before, with two pins, the top pin of which was not to be removed, unless or until the warning previously set-out had been heeded and those steps put in place. That necessitated Evans insuring that the feed chute trolley was secured in place with slings and lifting equipment prior to removal of the top pin on the articulated beam. It is significant though, to point out that the method chosen by Evans to replace the lip seal and sanctioned by the supervisor, would not have entailed, removal of the pins and the collapse of the articulated beam in any event. There is no suggestion that the supervisor or anyone else was aware, as was accepted by all parties, that the upper pin was not in place and had probably not been in place since independent contractors had attended to certain work. The contractors who were engaged to perform the relevant work in May 2004 are

described as being highly skilled contractors. It is generally accepted that it was they who had not properly put back the top pin, the exact means of it normally being secured in place not being identified to the Court. It is without question that the work that they did was not thereafter checked by the defendant.

9. As Evans and his assistant had on the Rod Mill, and in accordance with their chosen methodology, they removed certain nuts which held the feed chute to the rest of the structure. "They" attached a hand winch to the trolley so it could be winched back and away from the mill to get to the seal. Evans was operating the winch, but as the trolley did not move, he asked his trade assistant to tap the feed chute with a hammer below the flange where the nuts had been removed, because he thought the silicon seal might be sticking. Whilst that was occurring, Evans operated the winch again. The trolley suddenly collapsed and the feed chute fell towards him, hitting the floor, where it landed on the winch and crushed it into the steel gate flooring. It struck Evans and pinned him to the back wall. A medical report (by Doctor Keith Forrest) reflecting the injuries sustained by Evans, and dated the 22 July 2005, was Exhibit P5 in the proceeding. He suffered the following injuries;

> "Closed fracture of the right radius
>
> Comminuted fracture of the left tibia
>
> Laceration to the forehead
>
> Fractured nose
>
> Fracture of the fifth and fourth metatarsal bones of the left foot
>
> Two fractured ribs in the left anterior chest"

10. The necessary surgery to Evans and other remedial medical steps were taken expeditiously. As at the date of the report, he had attended and been treated

by an ear, nose and throat surgeon and a plastic surgeon. He had also undergone extensive physiotherapy and entered a graduated return to work program. As at 18 July 2005, he was certified as fit for work. He then complained of an inability to run, aching under the left knee cap and episodic stiffness of the left ankle. To some degree each of those problems remain.

11. A victim impact statement by Evans was filed in the proceeding. His counsel, Mr Anderson, informed the Court there were still on going problems with irritating pain behind his left knee cap and ankle and he was still unable to run at the time the matter was in Court.

12. In the Victim Impact Statement, he recounts that he did not inspect the frame for defects, assuming it was safe and it would hold the feed spout when it was unbolted.

LEGISLATION

13. The relevant legislation is the *Mining Management Act 2001*.

14. Section 16 defines the **"Obligations of operator"** and relevantly provides in sub-Section 1(b) "so far as is practicable, operate and maintain the site to minimise risk to the safety and health of the workers on site".

15. Section 23 styled **"Safety and health offences"** provides;

(4) "A person must not do an act or fail to do an act that –

(a) is in breach of an obligation imposed by Division 1;

(b) cause serious injury to a person; and

(c) the person knows, or ought reasonable be expected to know, will or might cause the death of or serious injury to a person.

Penalty: In the case of a natural person – not less than 50 penalty units and not more than 500 penalty units.

In the case of a body corporate – not less than 250 penalty units and not more than 2500 penalty units.

(6) In this section, "serious injury" means an injury of a nature that -

(a) endangers or is likely to endanger life; or

(b) causes or is likely to cause permanent injury to health".

THE DEFENDANT

16. The defendant is a listed public company which has been in operation for some 25 years. It has 340 employees. All senior management are located in Darwin. Counsel stated that the defendant took safety issues extremely seriously. The prosecution tendered a summary of the defendants' profits, commencing in the 1999/2000 financial year, all of which were substantial and in the most recent calendar year, the defendant posted an after tax profit of $38.6 million. Prior to the incident, there was in place, a code of conduct, Exhibit D1 in the proceeding. At appendix 3 is set-out the defendant's Occupational Health and Safety Policy. The Court sees no benefit in reciting verbatim that policy save to say that it has as its object, recognising the operation concerned is hazardous and containing exemplary philosophies and objectives, amongst which is an object of instilling in every employee and every contractor an abhorrence of unsafe working. In addition it developed the "ERA Cardinal Safety Rules", put in place 7 November 2002. The rules apply to contractors and employees. A breach of any of the specified "behaviours" could include "summary dismissal for an ERA employee or removal from site of a contractor or visitor".

17. In January 2004, the defendant engaged "expert assistance" for the purposes of carrying out a safety audit, which it did during the months of February

and March 2004. Mr Evans and all other employees, upon engagement, had to go through induction procedures, health and safety being amongst those, and were specifically the subject of training generally and on specific safety related matters. There is in place a training system, "TRAXS", which requires competence at successive levels before promotion to the next. Counsel for ERA recorded the fact that the defendant sincerely regretted the incident and specifically the injuries to Mr Evans. Counsel accepted that the defendant's responsible employees and / or management did not, as with the benefit of hindsight they ought to have, check to see that all of the work in May, although it may have been attended to by skilled engineering contractors, did not reveal any problems. Counsel further accepted that the relevant articulated beam, being distinctly different from the support, with which Evans was familiar at the Rod Mill, should have entailed the distinction being pointed out to Evans.

18. Insofar as the injuries to Evans were concerned, Counsel for ERA observed that an appropriate emergency response was in place so as to ensure the best emergency medical attention was available for Mr Evans.

19. The following additional matters, put into operation subsequent to the incident on 12 July 2004, were articulated by Counsel for ERA, Mr Henwood:-

(1) It was now a requirement that no employee could remove either of the two relevant pins from the articulated beam without express authority from the supervisor.

(2) A work order for any work on site was now required to be obtained from the supervisor containing formal operating instructions.

(3) The JSEA continued to be of application but now had to be signed off by a supervisor after completion.

(4) A written permit was required for isolation work.

(5) Where independent contractors had carried out any work on site, a formal explanation was required of them upon their handing over on completion as to what they had carried out. The work was thereafter checked by ERA employees.

(6) A "buddy system" was now in place where anyone new to a task would be accompanied by some person who was experienced in that task.

20. Mr Harry Kenyon-Slaney, on 20 July 2004, issued a brief after the incident on 12 July, exhorting the defendant's employees more intensively and with greater dedication, to observe the safety procedures which the defendant had in place and identifying an additional step in relation to the JSEA procedure which required a supervisor to sign off after completion. Ideas and suggestions in relation to health and safety were invited from all employees and the brief concluded with an expression of avoiding a similar incident ever occurring again. No prior offences of this kind were alleged by the prosecution and this Court assumes that this therefore, is the first such contravention of this legislation alleged against ERA.

21. Mr Henwood also recorded that there had been full cooperation by ERA management in relation to the investigation into the incident and that every assistance had been rendered to those who were looking into the incident.

22. Finally, and without going into great detail, both Mr Anderson and Mr Henwood, ventilated technical issues in respect of the charges laid against the defendant, which arguably would have enabled the defendant to raise a "black letter argument", possibly resulting in the dismissal of the charge on that basis. In fact the initial ventilation of the argument alleging defective charges had been addressed by introducing a fresh charge, which may or may not have cured the identified problem. In the event, the defendant had elected not to pursue any prospective avenue of avoiding any finding of guilt on those technical grounds.

23. In August 2004, the defendant evolved a new safety and health policy identified in Exhibit D4, in the Court's perception, to set all of the provisions of that policy out in this decision, will not add anything of value to it, but it is a clear statement of policy to endeavour to prevent, and indeed eliminate, risk from the defendant's workplace and ensure no harm comes to any of its employees. Perhaps most importantly, it is a specific provision of the policy that it is subject to annual revision.

PENALTY

24. As already quoted above, Section 23 (4) *Mining Management Act* provides, in the case of this corporate defendant, a minimum penalty of $27,500 and a maximum penalty of $275,000. Counsel for the complainant urged upon the Court, that of all the general principles in relation to sentencing guidelines in Section 5 of the *NT Sentencing Act*, it should have particular regard to the injuries to the victim (Section 5(2)(b) and (d)). The Grounds 3 and 4 were asserted by the prosecution as comprising especially culpable acts or omissions. Had the notice, he said, and the hazard warning in photographs 5 and 6 of Exhibit P2, been there at the time, Evans "would have banged his head on them", but that he in fact had no knowledge of this hazard, as a consequence of the omissions of the defendant.

25. Proportionality and general deterrence, urged Counsel, were particularly important in determining the penalty. For instance where somebody who had been rendered quadriplegic by an industrial incident of this kind, the level of the fine, he urged, should be greater than half the maximum. The principles are set-out in a decision below, although it did not comprise an industrial incident involving injury, but careless handling of radioactive water. The decision was number 20503488 and 20422222, between the Department of Business, Industry and Resources and Energy Resources of Australia and handed down 1 June 2005 ("Mr Luppino's decision") to specific deterrence, he urged the Court to do "the best you can".

26. In Mr Luppino's decision above, a phrase, namely "social utility", is used by His Honour. It apparently derived from a decision in, *Lactos Pty Ltd v Kent* [2003] TASSC82. In that case a supervisor responsible for halting a moving conveyer belt had failed to attend to his duty and an employee, as a consequence, had injured his leg causing a substantial crush injury to his lower right leg. At Annexure A to the decision, His Honour recorded a variety of penalties for contravention of similar or like offences, but as His Honour Mr Justice Bailey has said in a case which this Court can no longer recall the citation of, a table of penalties without a full and comprehensive recitation of the relevant facts, is not of any great use.

27. In that case, the fine represented 20% of the maximum. It seems to have been, from paragraph 12 of this decision, that "social utility" referred to by Luppino SM is derived. Whatever it in fact means, or is understood to mean, doesn't warrant any further dwelling on the issue. His Honour, after analysing those matters referred to in the Annexure set-out above, said that he was unable to find that the 20% ratio was a demonstration of error, the range actually being between 10% and 32% and the number of matters was 41.

28. The Court was referred to *Hartnell v Sharp Corporation of Australia Pty Ltd* (1975) 5 ALR 493, a decision of the full Court of the Australian Industrial Court 5ALR, which is a case involving a contravention of the *Trade Practices Act* 1974 (COM). The judgement of Joske, J concerned a radically unsafe piece of electrical goods, the extent of the deception being described by His Honour as "a gross and wicked attempt to swindle the public of Australia ….." The fine for a body corporate, found guilty of the relevant offence, had a maximum level of $50,000 and His Honour imposed a penalty of $10,000 in relation to each of the relevant informations, this decision is of little assistance to this Court.

29. The Court was referred to a decision, *The Queen v Mattrim Marine Inc* (unreported decision of Forde J of the District Court of Queensland handed down 2 June 2005), which was related to an oil spill at sea. It is a strict liability offence, consequently the corporation pleaded guilty, although it was believed that the release of the oil was an act of sabotage by an employee. The maximum fine capable of being levied was $275,000 and His Honour referred to three comparative cases. His Honour ultimately, imposed a penalty of $180,000, but regrettably does not provide any explanation as to precisely how that is computed, and consequently this Court finds little assistance from that decision.

30. Finally, the Court was referred to the decision *R v F Howe and Son (Engineers) LTD* [1999] 2 All ER 249, a decision of the English Court of Appeal Criminal Division, ("RF Howe"). The defendant company was a private company, objectively had almost no liquid assets and the appeal was an appeal from a total fine of $48,000, imposed after conviction, when an employee was electrocuted, but pertinently, Scott Baker, J says "accordingly it is difficult for Judges and Magistrates, who only rarely deal with these cases to have an instinctive feel for the appropriate level of penalty". This Court shares that view.

31. His Honour then went on to outline some of the relevant factors, but it is most important to bear in mind his next utterance, "in doing so, we emphasise that it is impossible to lay down any tariff or to say that the fine should bear any specific relationship to the turn over or net profit of the defendant. Each case must be dealt with according to its own particular circumstances". To then summarise the relevant factors they are;

    (1) how far short of the appropriate standard was the act or omission,

    (2) death should reflect public disquiet at unnecessary loss of life,

(3) a deliberate exercise in cost cutting involving a breach of health and safety legislation with a view to profit, aggravates the offence,

(4) the degree of risk and extent of the danger created by the offence,

(5) whether it was an isolated incident or continued over a period,

(6) the defendants resources and the effect of the fine on its business,

(7) aggravating features, in particular, enumerated as;

(1) a failure to heed warnings,

(2) deliberate financial profit derived from a failure to take the requisite steps or the running of a risk to save money.

32. The judgement described the classification of the matter before the Court as being "a bad case" and referred to the decision of the Judge below as being correct in referring to the electrical state of the equipment as "appalling". There was a flagrant disregard, so found the Court, for the safety of the Company's employees and corners were cut, no real attention being paid to electrical safety. Interestingly having made those observations, the Court found that an appropriate fine was a fine of £15,000 in respect of the first count with no penalty being separately visited on the remainder. Apparently, in the Crown Court, the level of the fine to be imposed was unlimited. In the Magistrate's Court jurisdiction, half of the fines imposed for like offences were less than 25% of the Court's maximum level of fine namely, £20,000, and despite the unlimited jurisdiction in the Crown Court, the average fine per offence was £17,768.

33. After all is said and done, the authorities are very interesting, but in the final analysis, there is no guidance, as far as this Court is concerned, to be gleaned from those authorities.

34. Counsel for the defendant urged on the Court, that the annual turn over of the defendant (in relation to the level of fine was not relevant). With this submission, this Court unhesitatingly concurs. Succinctly he stated that proportionality and general deterrence were the predominant sentencing philosophies. He urged that specific deterrence played no part in the formulation of an appropriate penalty and did not mention, but didn't cavill with the proposition, that the injury to Evans was a factor to take into account. With those submissions the Court also agrees.

35. This Court has referred to Victorian Sentencing Manual 2nd edition compiled by His Honour, Judge Paul R Mullaly QC, published in 1999 "Sentencing Manual" and to Sentencing State and Federal Law in Victoria 2nd edition, Richard Fox and Arie Freiberg, also published in 1999, together with others, but will not canvas all such references. At tab 16.5 of the Sentencing Manual "Harm to Victim", which is of course required to be heeded by the *Sentencing Act NT,* as set-out before, it is stated that the impact upon the victim must be taken into account. Interestingly, it is recounted at page 262, that the victim's attitude to sentence is completely irrelevant. In respect of deterrence, again, both specific and general deterrence being matters set-out in Section 5 of the *Sentencing Act NT*, at tab 21.2 of the Sentencing Manual, it is recounted that, general deterrence is aimed at those minded to commit similar offences, that is potential offenders, whilst specific deterrence relies on the experience of actual punishment upon the offender. Specific deterrence, at page 455 of the Sentencing Manual propounds it, should only be engaged to deter the offender from criminal conduct in the future. This Court is satisfied there is no place for the application of such a latter philosophy in the matter before it, because of the steps in particular, which the defendant has taken to prevent the recurrence of a similar situation, already set-out in this decision.

36. At tab 23.1 of the Sentencing Manual, under, "Parsimony", relevantly and caught by the NT Sentencing guidelines as ("any other relevant circumstance"), the author states:-

> "it is propounded that the principle of parsimony requires the selection of the least severe sentencing option open to a sentencer which achieves the purpose or purposes of punishment in the instant case, and so achieves the ultimate aim of protecting society"

37. The authorities supporting the proposition, are enumerated, and it is a philosophy which this Court engages in imposing the sentence which it will ultimately specify. Both parties agree that proportionality is to be observed and in paragraph 28.8 of the Safety Manual there is an exposition of the law applicable to similar kinds of industrial arenas with similar stated purposes to those relating to the current prosecution, the purpose in the Northern Territory Legislation, providing that it is an act

> "to provide for the authorisation of mining activities, the management of mining sites and the protection of the safety and health of persons and of the environment on mining sites, and for related purposes".

38. At paragraph 28.803 of the Sentencing Manual, in dealing with the gravity of the offence, the same philosophy as was expressed by the Court during the ventilation of the current matter is set-out namely:-

> "in assessing penalty it is necessary to have regard to the nature of the breach rather than the consequences of that breach. Offences under the Act are not defined in terms of consequential injury or death, but rather in terms of a failure to fulfil a positive duty under the Act. Thus, the seriousness of the an offence under the Act is not determined by the result of the offence, but by the seriousness of the failure to take measures that might reduce or eliminate the risk of accidents occurring and the injuries that flow there from"

39. However at page 696 of the text it is stated that where no injury or death is caused a reduction in sentence is called for and that regard maybe had "in assessing the seriousness of the failure under the Act to the consequences of the offence where death or injury result". That is the injury in this case may

be taken into account properly as indicating the gravity of the breach and expressly at page 697, the authors state that victim impact statements may be taken into account. At tab 39.1 of the Sentencing Manual the issue of fines is addressed, although the only aspect of the treatment by the author which this Court seeks to highlight, in essence, upholding Mr Henwood's submission is the statement "it is wrong to increase the appropriate fine merely because the offender is affluent or because the offender is likely to receive a capital sum in the near future". Sections 16 and 17 of the *Sentencing Act NT* are also relevant.

THE COURT'S DECISION

40. The Court repeats, that on the 12 July 2004, there were two discrete methods by which the replacement of the seals on the Rod Mill and Ball Mill 2 chute could by achieved. After consulting with his supervisor, Evans elected to perform the method of unbolting the nuts connecting the feed chute to the rest of the structure with a view to moving the trolley back from the mill. That method was approved by the supervisor. In performing the task by utilising that method, there was no need to concern himself with the removal of the pins from the articulated frame. Indeed, the beam in question, in relation to both the relevant feed chutes, did not call for a focussing of attention on it, and in particular, the articulated beam in relation to Ball Mill 2. It is, in this Courts finding, not surprising in the circumstances that the supervisor did not direct Evans's attention to the articulated frame in respect of Ball Mill 2, since it would not have entered his mind, any more than it did Evans', that there was a need to undo the pins to achieve what had to be achieved, given the choice that Evans had made.

41. Whilst it is a matter of sterile intellectual exercise, if the supervisor had done that which this court finds he or anyone else in his position would have been most unlikely to do, it must be conceded that it is at least possible that Evans might have focused on the joint at the point of the articulation of the

beam before he unloosened the relevant nuts. There is however, no fact before this Court indicative of the position of the beam at the time Evans started work at Ball Mill 2. At one stage Mr Henwood made a comment that there was a belief that it might have been as shown in photo three of Exhibit P2, which shows in essence, that the top pin was not securing the beam in position and the beam had already "broken" and stood at the angle of approximately 30 degrees. That photograph bears the legend "position of articulated beam with both pins in position as they would have been prior to time of accident". This Court does not make a finding, as it cannot, as to the position of the beam as postulated, and in any event in such a position it would seem inconceivable that neither Evans or his assistant would have noticed the beam in that position. To make a finding that it was in that position would perhaps be, to cast some blame on Evans and that, in the circumstances of the extreme uncertainty, would be unfair.

42. The question of adequate lighting at the site is not an issue and the Court repeats the criterion of conduct is governed by Section 16 (1)(b) of the *Mining Management Act 2001* which requires the defendant "so far as is practicable, operate and maintain the site to minimise risk to the safety and health of the workers on the site". In the circumstances as commented by the Court during the ventilation of this matter, the second two of the Grounds alleged, namely 3 and 4, play very little or no part in categorising the conduct of the defendant through its appropriate employees.

43. Conversely, the Grounds 1 and 2, are in the Court's finding, those omissions which essentially constitute the breach of the obligation set-out in Section 16 (1)(b) referred to above, which led to the serious injuries to Evans and which the corporation, through its officers, ought reasonably be expected to know, at least might cause serious injury to the person, which it did, to Evans.

44. Having made that finding, and in the light of defendant's counsel's concession, there was on the part of the defendant, an omission to inspect, that is, an acknowledgement that Ground 2, constitutes the relevant breach. It is also necessary to highlight the fact that the work in May 2004, during which, undoubtedly the "skilled contractors" responsible failed to either put the two relevant pins, especially the top pin in properly, or in any event to secure it as it ought to have been secured, is the essence of the culpability in relation to injury to Evans. It is not in the category of the culpability of the company referred to in the English Court of Appeal decision "R v F Howe", previously set-out. It is not such categorisation as would justify the label of being a "bad case", the equipment "being appalling", "a flagrant disregard for the safety of the employees with corners cut and no attention being paid to electrical safety". There was no fatality in that case.

45. The Court recites that in relation to that matter the English Court of Appeal was faced with there being no limitation on the potential fine to be visited upon the transgressor although, of course the impecunious state of the transgressor was clearly a major consideration. The fine on appeal was reduced from a total of $48,000 to a single fine of $15,000. There is no prospect of quoting a ratio in the circumstances where the fine was unlimited.

46. The Court finds that ERA was and remains seriously focused on the eradication of unsafe practices in its workplace. It had extensive safety procedures in place and a risk appreciation procedure to be observed by its employees. That extensive and far reaching range of policies has been expanded as set-out above. In terms of any injury, an appropriate and adequate emergency medical response to any injury was in place.

47. The methodology of fixing, in relation to the offending pins in the articulated beam at Ball Mill 2, has been specifically addressed and "in so far as practicable" the company has done everything it can to ensure that

that articulation of the beam will no longer, in future, constitute a danger to an employee.

48. Whilst the categorisation of its activities is as set-out above, it must obviously be appreciated, that does not guarantee a recalcitrant tradesman or one driven by impatience or perversity being injured by a flagrant disregard of such procedures. It is an inherently dangerous workplace.

49. Applying the principles of proportionality, it is probably trite to say, that the maximum penalty would apply to an injury caused by a bad case with appalling equipment involving a flagrant disregard for the safety of employees with corners cut and no attention being paid to electrical safety which resulted in injuries causing quadriplegia in the workplace. Conversely, extensive focus and practice aimed at eradicating dangers from a workplace resulting in a worker losing the tip of his or her little finger would be at the other end of the scale. In relation to the injuries to Evans, without any pretence at being able to achieve mathematical precision, this Court adopts a mid range starting point, which would mean that a fine prior to application of reductive philosophies would be pitched at $137,500. The Supreme Court requires an indication to be given as to the reduction to be attributed to a guilty plea, particularly in the case of a fine, and a guilty plea universally is regarded as one which would attract a discount of 30%, which is an amount of $41,250, resulting in a quotient of $96,250.

50. Bearing in mind the application of all those philosophies outlined and bearing in mind, in addition, in mitigation, an operation for 25 years without any similar incident, the existence of an extensive system to try and ensure safety of workers, the extensive improvement of the existing system, the admitted cooperation of the defendant with the investigators and all other persons involved, an early plea of guilty and a plea of guilty in circumstances where a less moral organisation might have sought to take

advantage of a black letter escape, this Court concludes that the appropriate level of penalty is a sum of $82,500.

51. In the circumstances, in relation to the offending, the defendant is found guilty of the charge of contravening Section 23(4) of the *Mining Management Act 2001* and is fined the sum of $82,500.

52. The Court concludes that it must also impose a victim levy, the imposition of which disproves the maxim, de minimis non curat lex (for the young who are denied Shakespeare, other classics and the use of Latin and for the average laymen, "the law does not concern itself with trivialities"). $40 victim levy.

53. There remains the question of costs. In that respect, the Court records the uncontested statement of counsel for the complainant, that costs are agreed in the sum of $5,712. Accepting that to be the case, in addition the Court orders, that the defendant pay to the complainant's costs agreed in the sum $5,712.

Dated: 28 October 2005

DAVID LOADMAN

STIPENDIARY MAGISTRATE