CITATION: Gelding v Gibbo's Tyres Pty Ltd [2018] NTLC 012

PARTIES:	Stephen GELDING v GIBBO's TYRES Pty Ltd
TITLE OF COURT:	Local Court
JURISDICTION:	Criminal
FILE NO:	21719670
DELIVERED ON:	30 April 2018
DELIVERED AT:	Darwin
HEARING DATE(s):	5 October 2017 & 19 March 2018
JUDGMENT OF:	Greg Macdonald

CATCHWORDS:

Work Health and Safety (National Uniform Legislation) Act – sections 32 and 38 – Sentencing.

REPRESENTATION:

Counsel:

Complainant:	Mr Mark Thomas
Defendant:	Mr Michael Whelan

Solicitors:

Complainant:	Direct brief
Defendant:	Michael Whelan & Associates

Judgment category classification:	A
Judgment ID number:	[2018] NTLC 012
Number of paragraphs:	29

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

No. 21719670

BETWEEN:

Stephen GELDING

Complainant

AND:

GIBBO's TYRES Pty Ltd

Defendant

REASONS FOR JUDGMENT

(Delivered 27 April 2018)

Judge Macdonald:

Background

1. On 19 March 2018 I gave extempore reasons on sentence in lieu of written decision, due to disruptions through cyclone Marcus, with reasons to be published. These are those reasons.

2. On 5 October 2017 Defendant Gibbo's Tyres Proprietary Limited pleaded guilty to contravening sections 32 and 38 the Northern Territory's *Work Health and Safety (National Uniform Legislation) Act* (the Act). Namely, failure to comply with a "*health and safety duty*" and failure to immediately notify the regulator after becoming aware of a "*notifiable incident*", respectively.

3. The two counts to which the defendant pleaded guilty arose out of a tragic and fatal incident which occurred at the defendant's business premises in Katherine, Stuart Highway Tyres, on 19 November 2015.

4. It is uncontroversial that the defendant was "*a person conducting a business or undertaking*" (PCBU) within the meaning of the Act. Section 30 of the Act defines "*health and safety duty*", incorporating the extensive "*primary duty of care*" imposed on PCBUs by s 19 of the Act.

5. The essence of the contraventions alleged were, firstly, that the defendant as a PCBU failed to comply with a health and safety duty owed to "*other persons*" in the conduct of its business or undertaking, in contravention of s 32 of the Act. Second, that the defendant failed to ensure that the Regulator, being the Work Health Authority, was notified immediately following the incident of 19 November 2015, in contravention of s 38 of the Act.

6. The Complaint filed 13 April 2017 by the Regulator[1] set out sufficient particulars, consistent with the requirements of *Kirk & Anor v Industrial Court of NSW & Anor* (2010) 239 CLR 531.

Facts and Evidence

7. Agreed facts were put to the court for the purpose of the plea, which became exhibit P1. Essentially, the risk which ultimately materialised in tragic consequences for a two-year-old child was eight tyres leaning at an angle against an exterior rear wall of the workshop shed. Due to the 'drive-through' configuration of the premises, together with an absence of demarcation or barriers between the workspace and customer service area, there was no effective prevention of customers and others from the work area.[2] The defendant's premises did include seating inside the air-

[1] See section 4 of the Act and Part 2 of the *Work Health Administration Act*.
[2] An exhaustive list of the matters said by the Complainant to constitute deficiencies are set out at paragraph 18 of the Agreed Facts.

conditioned office for customers, including Foxtel, however the deceased and his family were waiting outside close to the operational area of the premises on the day.

8. The prosecution tendered a range of photographs depicting the premises, including the location at which the truck tyre which tipped and caused the death was placed.[3] Exhibit P2 included an image of the seven remaining truck tyres leaning against an exterior wall of Stuart Highway Tyres.

9. The defendant also tendered financial statements for the year ending 30 June 2016, exhibit D1, setting out the parlous financial position of the company.

10. Lastly, counsel for the parties elaborated on the factual aspects of significance, including by way of submission, without objection on either part.

The Act

11. Section 3 provides that "*The main object of the Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces*". This is, most relevantly through s 3(1)(a) and (e), by "*protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant*" and "*securing compliance with* [the] *Act through effective and appropriate compliance and enforcement measures*". It is those (and other) objects on which the primary duty of care prescribed by s19 of the Act is based.

12. The statutory duty of care prescribed by s19 of the Act is directed to the protection of the health and safety of both "*workers*" and "*other persons*" from "*risk*". In this case, for reasons elaborated on below, the failure to comply with the health and safety duty contemplated by s 32 was in relation to "*other persons*" rather than "*workers*", most relevantly children.

13. Section 19(3) of the Act prescribes a range of operational matters in which a PCBU is obliged, so far as reasonably practicable, to ensure that the health and safety of other persons is not put at risk. The subject complaint particularised breaches of paragraphs (a), (c), (d) and (f) of s 19(3). What is "*reasonably practicable*" reduces to what is or was "*reasonably able to be done in relation to ensuring health and safety*" having regard to the six criteria prescribed by s 18 of the Act.

14. It should be noted that the first and most serious count alleged against the defendant was a Category 2 offence, with the result that the strict liability provided by s 12B of the Act applies to each physical element. The more serious Category 1 charge of "*reckless conduct*" was not alleged, so the principle stated in *R v Di Simoni* applies[4]. The maximum penalty prescribed by s 32 in relation to corporations is $1 500 000.

The Authorities

15. At hearing the court was referred to two authorities by counsel. Namely, *Damday Pty Ltd v Work Health Authority* [2014] NTSC 7 and *Director of Public Prosecutions v Frewstal Pty Ltd* [2015] VSCA 266, under the *Work Health and Safety Act (NT)* and the *Occupational Health & Safety act 2004 (Vic)*, respectively. Each of those schemes were precdecesors to the national scheme now in place, which the Act is a part of. I have also had regard to other decisions concerning breaches of occupational health and safety legislation.[5]

16. Prior to the national scheme some occupational health and safety contraventions attracted civil rather than criminal penalties, which characterisation led to debate concerning whether general and specific deterrence were to adopt a lesser significance in penalty. However, the

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[3] Exhibit P2.
[4] (1981) 147 CLR 383 at 389.
[5] Including *Comcare v John Holland Pty Ltd* [2012] FCA 499 and *Comcare v Air Services Australia* [2016] FCA 418.

relevant provisions of Parts 2 and 3 of the Act are clearly criminal in character.[6] The distinction in character, and the transition to the national scheme, were discussed by the Full Federal Court in *Comcare v Post Logistics Australasia Pty Ltd* and High Court in *Commonwealth of Australia* v *Director Fair Work Building Industry Inspectorate & Ors.*[7]

17. In relation to sentencing, including deterrence, and despite being distilled from decisions of the Industrial Court of New South Wales, the considerations referred to as the 'Madwick factors'[8] are instructive, but noting the subsequent observations of their Honours Justices Flick and North.[9] I also note the simplified approach in relation to deterrence articulated by his Honour French J (as he then was) in *Trade Practices Commission v CSR Ltd*, albeit that approach concerned civil penalties, was not in relation to occupational health and safety, and very much predated other more relevant authorities.[10]

18. It may also be noted that the Act does not abrogate civil claims, either in negligence or by legislated cause of action, or provide any defence to such claims.[11] To that extent the potential deterrent effect which the possibility of civil proceedings may have to PCBUs generally, as alluded to in *Damday Pty Ltd*, is unaffected.[12]

The Offence and the Defendant

19. The tyre which killed the two-year-old infant was one of a group of eight leaning against an exterior wall. Each of the tyres weighed approximately 90kg. Prior to being placed against the wall they had been stored against a

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[6] See *Commonwealth of Australia* v *Director Fair Work Building Industry Inspectorate & Ors* [2015] HCA 46 Cf sections 254 to 266 of the Act, expressly providing civil penalties for certain contraventions.
[7] [2012] FCAFC 168 at [32] - [33], [46] - [57], and pages 5 to 8, respectively.
[8] *Comcare v The Commonwealth* [2007] FCA 662 at [116] – [120].
[9] *Comcare V Post Logistics Australasia Pty Ltd* [2008] FCA 1987 at [38] and *Comcare v Commonwealth of Australia* [2009] FCA 700 at [104].
[10] (1991) ATPR 41- 076 at 52,152.
[11] Section 267(b) of the Act makes clear that no defence to civil proceedings, or removal of any right of action, may arise through the Act.

trailer, but were moved for ease of handling, to await customer collection. Paragraph 17 of Exhibit P1 sets out how precariously balanced the tyres were, which ultimately produced the catastrophic outcome. Introduction of various risk minimising measures, including safe and effective storage of tyres, would also not be expected to incur significant cost.[13]

20. Nonetheless, it is the risk presented rather than the outcome of the materialised risk which the court must focus on. I consider the risk presented to workers was minimal and, in relation to "*other persons*" who were adult, the risk was probably low. The risk was to children of customers of the defendant but was not immediately apparent and obvious, such as for example with the moving parts of machinery, mobile plant, unrestrained passengers, or unfenced swimming pools. Despite the tragic outcome, the contravention appears in the lower to mid-range of offending.

21. The defendant has operated as a business for approximately 25 years, until now without blemish. It is uncommon for a PBCU to set out to create an unsafe workplace, or to deliberately to breach occupational health and safety obligations, and so it is here.

22. It may be noted that there had been no earlier 'close calls', and that the defendant had not previously been served with any improvement notice in relation to any apparent risk. No relevant Australian Standard or Code of Practice was tendered at hearing, and there was no audit or other pre-emptive indicators pointing to the defendant being aware of the particular risk. Nonetheless, PBCUs are expected to be proactive and direct their mind to the objects of the Act, and risk to both employees and other persons.

23. In addition to the considerations prescribed by s 5(2) of the *Sentencing Act* relevant to the subject offences, each of the criteria prescribed by s 5(1) must be given appropriate recognition in the sentencing process. Namely,

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[12] Paragraph [36] of *Damday Pty Ltd* (supra).

punishment, rehabilitation, general and specific deterrence, denunciation and protection of the community. What prominence each of those criteria should adopt in the overall sentence imposed on any particular offender must obviously vary depending on the facts and circumstances of the offending and the offender.

24. The defendant is a small family business, and not a national or multinational corporation. Despite the importance and prominence which the objects and purposes of the Act are clearly intended to serve and secure, it cannot have been Parliament's intention that a first time failure by such a PBCU should result in financial ruin.[14] As was noted by his Honour Justice Southwood; "*even in the case of regulatory offences … 'deterrence must give way to proportion. Deterring unknown future offenders from committing like offences is not a sufficient reason for imposing a disproportionately higher sentence than the particular offence requires*'".[15] Section 17(1) of the *Sentencing Act* is also particularly relevant in this regard.

25. The objective seriousness of each offence to which the defendant pleaded guilty is manifest by the maximum penalties prescribed[16] and having contextual regard to the outcomes, but noting that category 2 offences are constituted by failure rather than recklessness.[17] However, the unusual and less than obvious nature of the risk presented by the defendant's failure must also be taken into account.

26. Due to the objects and nature of the Act, general deterrence is a particularly important component in the sentencing process. Without a plea of guilty, and regardless of the objective and subjective mitigating factors of the breach, a fine exceeding $200 000 in respect of count 1 would not have been

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[13] The defendant implemented temporary remedial measures almost immediately, then followed through with more permanent measures.
[14] Noting the content and effect of Exhibit D1.
[15] *Damday Pty Ltd* (supra) at [36], citing Fox and Freiberg (2nd Edn).
[16] $1 500 000 and $50 000 respectively in relation to ss 32 and 38.
[17] Count 1 is clearly objectively most serious, and the failure in relation to count 2 was tempered by reporting to NT Police, so effectively remedied relatively quickly.

excessive. However, I consider the defendant pleaded guilty at an early opportunity,[18] and is truly remorseful for the incident. Bearing the weight of the fatal outcome has been a heavy burden for the defendant's directors. The defendant spared the family any need to give evidence in the proceeding, and is entitled to the substantial discount and leniency ordinarily accorded for an early plea and remorse.

27. In addition, I consider that specific deterrence in this case requires only minimal attention. That includes due to confidence that the rehabilitation of the defendant is probably already assured, and because the defendant is convicted of each count. A conviction in the circumstances of the incident being first offending is, in my view, a significant component of the overall penalty required to be imposed through the criteria of s 5(1) of the *Sentencing Act*.

28. Counts 1 and 2 are found proven and the defendant is convicted on each count. A fine of $135000 is imposed on count 1 and $7000 on count 2, together with 2 corporate victims levy totalling $2000. The defendant is also to pay costs to the complainant in the sum of $770.

Dated this 30 April 2018

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Greg Macdonald
Local Court Judge

[18] The defendant's counsel explained the delays in reaching the guilty plea, including through earlier legal advice from previous counsel and, in some respects, that the Act was 'new ground' in terms of PCBU liabilities.