INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*McDonald v Bell* [2020] ICQ 007
PARTIES:	**WILLIAM JAMES McDONALD** (appellant) **v** **STEWART LYNN BELL** (respondent)
FILE NOS:	C/2019/6 C/2019/13
PROCEEDING:	Appeal
DELIVERED ON:	15 June 2020
HEARING DATE:	13 June 2019
MEMBER:	Martin J, President
ORDERS:	**1. Appeal against conviction allowed in part.** **2. The verdict of guilty in respect of Charge 3 is set aside and a verdict of not guilty is entered.** **3. The convictions in respect of Charges 1, 2 and 4 stand.** **4. The sentence imposed by the Industrial Magistrate on 24 May 2019 is set aside.** **5. On each of Charges 1, 2 and 4 the appellant is sentenced to a term of imprisonment of 12 months. The whole term of imprisonment is suspended forthwith, and the appellant must not commit another offence punishable by imprisonment within a period of 3 years if he is to avoid being dealt with for the suspended term of imprisonment.**
CATCHWORDS:	INDUSTRIAL LAW – QUEENSLAND – APPEALS – APPEAL TO INDUSTRIAL COURT – OTHER MATTERS – where the appellant appealed a decision of the Industrial Magistrate – where the appellant contended that error is not required to be established in order to justify appellate intervention by the court – whether the appellant must show relevant error INDUSTRIAL LAW – QUEENSLAND – OFFENCES – PROCEDURE AND EVIDENCE – PROOF – where the appellant was convicted of 4 charges under the *Mining and Quarrying Safety and Health Act* 1999 – where the Industrial Magistrate found a circumstance of aggravation was made out – whether the prosecution proved each charge and

circumstance of aggravation beyond reasonable doubt

INDUSTRIAL LAW – QUEENSLAND – OFFENCES – DEFENCES – where the Industrial Magistrate found that no defence under the *Mining and Quarrying Safety and Health Act* 1999 was made out – whether the Industrial Magistrate erred in holding that the defences were not made out

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – FAILURE TO GIVE REASONS FOR DECISION – ADEQUACY OF REASONS – where the Industrial Magistrate adopted part of the prosecution's written submissions – where the Industrial Magistrate did not deal with some of the defence contentions except in a cursory way and did not deal at all with other contentions – where the appellant argued that the Industrial Magistrate erred in failing to give adequate reasons for the decision that was reached – whether the Industrial Magistrate failed to give reasons sufficient to identify the principles of law applied by the Industrial Magistrate and the main factual findings on which the Industrial Magistrate relied

CRIMINAL LAW – SENTENCE – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – where the appellant was wrongly convicted on one charge – where that is sufficient to show error in the sentencing process – whether the sentence should be varied in the new circumstances

Industrial Relations Act 1999
Industrial Relations Act 2016
Justices Act 1886, s 222, s 223(1)
Mining and Quarrying Safety and Health Act 1999
Mining and Quarrying Safety and Health Regulation 2001
Occupational Health and Safety Act 2004 (Vic)
Penalties and Sentences Act 1992, s 12(2)
Supreme Court Act 1970 (NSW), s 75A
Workers' Compensation and Rehabilitation Act 2003

CASES:

Allesch v Maunz (2000) 203 CLR 172, cited
Baiada Poultry Pty Ltd v The Queen, (2012) 246 CLR 92, considered
Davidson v Blackwood [2014] ICQ 8, cited
Director of Public Prosecutions v Vibro-Pile (Aust) Pty Ltd (2016) 49 VR 676, cited
DL v The Queen [2018] HCA 26, cited
Fox v Percy (2003) 214 CLR 118, applied
Krakouer v Western Australia (2006) 161 A Crim R 347, cited
Li v Attorney General for New South Wales (2019) 99 NSWLR 630, cited
Roads and Traffic Authority v Royal (2008) 245 ALR 653,

cited
Royall v The Queen (1991) 172 CLR 378, cited
Sherman v Nymboida Collieries Pty Ltd (1963) 109 CLR 580, cited
Storry v Commissioner of Police [2018] QCA 291
Teelow v Commissioner of Police [2009] 2 Qd R 489

APPEARANCES: A J Glynn QC with A Scott for the appellants instructed by Mills Oakley
G R Rice QC for the respondent directly instructed by the Department of Natural Resources Mines and Energy

[1] On the evening of 5 June 2012, Sean Scovell was working at the Moranbah South Quarry when he heard a noise coming from Conveyor 2. Another employee saw him take a grease gun and walk onto the conveyor walkway and up to the gravity loop pulley system on the conveyor. As a result of some action he took, he became caught in a nip point[1] between the underside of the conveyor and a large metal roller which had a knife-like edge. He was fatally injured and died on site.

[2] The operations at the quarry were governed by the *Mining and Quarrying Safety and Health Act* 1999 (the Act) and its regulations, *Mining and Quarrying Safety and Health Regulation* 2001, (MQSH regs). MCG Quarries Pty Ltd (MCG), the operator of the quarry, Mr McDonald, a director and executive officer of MCG, and Mr Addinsall, a site senior executive at the quarry, were each prosecuted for breaching various health and safety obligations imposed by the Act. Each was convicted. MCG went into liquidation and has taken no further action. On 24 May 2019, Mr McDonald was sentenced to 18 months imprisonment with a parole release date of 23 November 2019. He has been on bail since being sentenced. Mr McDonald has appealed against his conviction and the sentence imposed. Mr Addinsall commenced, but later discontinued, an appeal.

The complaint

[3] MCG was charged with three offences under s 31 of the Act.

[4] The complaint against Mr McDonald contained four charges. The first three charges each alleged offences against s 241(2) of the Act by failing to ensure that MCG complied with its obligations. The particulars of the obligations of MCG and their alleged contravention in the first three charges against Mr McDonald corresponded with the three charges in the complaint against MCG.

[5] The fourth charge against Mr McDonald alleged an offence against s 31 that he, in his own right, failed to comply with an obligation imposed on him. For each of the charges multiple acts or omissions were alleged to constitute the contravention of the relevant obligation.

[6] For each charge it is alleged that the contravention caused the death of Mr Scovell.

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[1] A nip point is any point where there is the potential for a person to be caught up in a mechanism.

The structure of the charges

[7] Generally speaking, the Act imposes "safety and health obligations" upon defined categories of persons. Then, by s 31, it creates an offence of failing to discharge those obligations.

[8] Three of the charges against Mr McDonald allege a breach of the obligation to ensure that MCG complied with the Act. That obligation arises under s 241(1). Section 241(2) provides that, if a corporation commits an offence under the Act, then each of the officers covered by the section commit the offence of failing to ensure that the corporation complied with the Act. Section 241(4) also provides that it is a defence if the officer (being in a position to influence the corporation) exercised reasonable diligence to ensure such compliance or if the officer was not in a position to influence the corporation in relation to the offence.

The circumstances of Mr Scovell's death

[9] The Industrial Magistrate made the following findings with respect to the circumstances of the death:

> "[8] Put simply Mr Scovell was caught in a nip point between the underside of the conveyor and a large metal roller [at the first change of direction pulley] which had a knife-like edge. There was no guard covering the nip point. The nip point was adjacent to a narrow walkway. The walkway rose from ground level on a rising angle to a point suspended well above ground level. Persons walking along the walkway had to walk past the nip point. Persons servicing of the grease nipples at the change of directions pulleys had to do so whilst standing in the vicinity of the unguarded nip point. The prosecution argues that the failure to have a guard covering the pinch point gives rise to the offences. The defence argue that it is open on the evidence to find, on balance, that the incident was not reasonably foreseeable and/or, in any event, the presence of a guard would not have prevented the incident from occurring.
>
> …
>
> [28] I find that Mr Scovell's precise actions immediately prior to him becoming caught by the nip point at the first change of direction pulley remain unknown. The witnesses to the incident were not only some distance away from him, but they were below him on ground level, looking up through, or at least partially through, the mesh walkway on which he had been standing and subsequently kneeling. Their view of his precise arm and hand movements was, at least partially, obscured by both distance and Mr Scovell's own body. Their recollections were also affected by both passage of time and, no doubt, the trauma of the incident.
>
> [29] I accept that it is open on the evidence to infer, as the defendants submit, that in an effort to dislodge mud stuck on the first change of direction roller, Mr Scovell may have reached in under the first change of direction pulley with his left arm, hit the roller with his left

> hand and become caught in the nip point. It is equally open on the evidence to infer that his action of hitting the roller with his hand may have been an attempt at freeing himself once already caught in the nip point. On the evidence I find that another way in which a person might become caught in the nip point would be by an item of clothing or hair (although hard hats are worn).
>
> [30] The prosecution concedes '*... an act which led to the death was no doubt Mr Scovell placing his hand near or in the conveyor*.' It is not possible, on the evidence, to reach any concluded opinion about how Mr Scovell became caught in the nip point between the conveyor belt and the first change of direction pulley. However, I find that I do not need to do so in order to determine the charges.
>
> [31] I am satisfied that the prosecution has proven, beyond reasonable doubt, that Mr Scovell was caught in the unguarded nip point at the first change of direction pulley on conveyor 2, which conveyor was operating at the time." (citations omitted, emphasis in original)

[10] The respondent, in his submissions on this appeal, accurately summarised some of the other circumstances surrounding the incident:

(a) the conveyor was designed and fabricated for MCG in the second half of 2011,

(b) it was installed and began operation in January 2012,

(c) it was put into operation before its assembly was complete,

(d) section 8 of the MQSH regs required the use of guards on conveyors as an "engineering control",

(e) section 105 of the MQSH regs required that any plant be commissioned in its operating environment before use,

(f) the absence of guards was contrary to MCG's own Safety and Health Management System (SMMS) (the Quarry Safety, Health & Environmental Management Plan, the Equipment Guarding Procedure, and the MCG Group Training Manual),

(g) workers had been performing maintenance on conveyors at the quarry while those conveyors were in operation,

(h) the unguarded nip point was adjacent to a grease nipple used for maintenance of the conveyor,

(i) build-up of mud on the conveyor rollers was a regular problem, it affected performance on the conveyor, and photographs showed there was such a built-up on the day of the incident, and

(j) the absence of guards at the change of direction pulley provided an access point for any worker to attempt to deal with the build-up of mud on the roller.

The arguments before the Industrial Magistrate

[11] Before the Industrial Magistrate, and on this appeal, it was submitted for the prosecution that the change of direction pulley on the conveyor was the "hazard" with the "risk" being low but the consequence was severe or fatal. The defendant contested this contention but accepted that there was a hazard and that the hazard "relates to the first change of direction pulley". The argument mounted for the defendant below was that the hazard was not a thing, but rather a situation. That situation was "involving persons coming into such proximity of the nip point at the first change of direction pulley, while it is operating, that there is the potential for those persons to be injured." The defendant conceded that the risk of injury to a person arising out of that hazard was a risk as defined under the Act.

[12] The defendant's contention before the Industrial Magistrate was that the relevant risk was "a risk of a person intentionally doing an act which is obviously dangerous to a reasonable person which is not a part of any worker's job and is contrary to the instructions of their employer". This argument, which was repeated in different terms on the appeal, sought to confine the risk to this set of circumstances, namely, where a person walks up the walkway, while the plant is operating, and intentionally puts part of their body or clothing in a place where it should be obviously dangerous to a reasonable person.

[13] The appellant relied, in part, on the following for that submission:

(a) the location of the first change of direction pulley was well above ground level and could only be accessed by walking up a walkway,

(b) there was no danger if the conveyor was not running,

(c) the first change of direction pulley was below knee level,

(d) the distance between a worker standing on the walkway and the first change of direction pulley was over eight inches.

The grounds of appeal

[14] The grounds of appeal (the particulars have not been included) were:

> "1. The prosecution did not prove the charge, and the circumstance of aggravation, against the Appellant beyond reasonable doubt (and the Learned Industrial Magistrate erred in not so holding).
>
> 2. The defences provided by ss. ss. [sic] 45(1)(c), 45(2) and 241 of the Act were made out (and the Learned Industrial Magistrate erred in not so holding).
>
> 3. The Learned Industrial Magistrate erred in finding that:
>
> a. Mr Scovell did not recognise the obvious risk of injury or death to himself by:
>
> i. reaching in under the Conveyor's first change of direction pulley and hitting the roller with his hand (while it was operating); and

ii. thereby becoming entangled in the conveyor mechanism;

b. Had the defendants complied with their statutory obligations, '*it is very likely that nothing Mr Scovell did on that day would have resulted in the traumatic death he suffered*'.

c. It was agreed at a meeting in July 2012 between MCG and others that Glen Banks would commission the plant.

d. Had the commissioning process been completed by Banks the lack of guarding at the first change of direction pulley would have been detected.

4. The Learned Industrial Magistrate erred in failing to give adequate reasons for finding that a lower risk would have been reasonably achievable by the installation of a guard over the first change of direction pulley, as alleged by the prosecution.

…

5. The Learned Industrial Magistrate erred in failing to give adequate reasons for finding that 'all of the charges' against the Appellant were proven beyond reasonable doubt.

…

5A The Learned Industrial Magistrate erred in failing to give adequate reasons for finding that the circumstance of aggravation was proven beyond reasonable doubt.

6. The Learned Industrial Magistrate erred in failing to give adequate reasons for finding that the defences provided by ss. 45(1)(c) and 45(2) of the Act ("the defences") were not made out.

…

7. The Learned Industrial Magistrate erred in failing to give adequate reasons for finding that the defence provided by s. 241 of the Act ("the s. 241 defence") was not made out.

…"

The legislative framework

[15] The provisions of the Act which are relevant to this appeal are:

"**19 Meaning of risk**

(1) ***Risk*** means the risk of injury or illness to a person arising out of a hazard.

(2) Risk is measured in terms of consequences and likelihood.

20 Meaning of hazard

Hazard means a thing or a situation with potential to cause injury or illness to a person.

…

26 What is an acceptable level of risk

(1) For risk to a person from operations to be at an ***acceptable level***, the operations must be carried out so that the level of risk from the operations is—

(a) within acceptable limits; and

(b) as low as reasonably achievable.

(2) To decide whether risk is within acceptable limits and as low as reasonably achievable regard must be had to—

(a) the likelihood of injury or illness to a person arising out of the risk; and

(b) the severity of the injury or illness.

27 Risk management

(1) Risk is effectively managed when all persons individually and as part of their respective workgroups and organisations, take action to keep risk at an acceptable level.

(2) In particular, effective risk management is achieved when persons apply risk management procedures and practices that are appropriate for the nature of the risk, operation or task being performed.

(3) Risk management is the systematic application of policies, procedures and practices to—

(a) identify, analyse, and assess risk; and

(b) avoid or remove unacceptable risk; and

(c) monitor levels of risk and the adverse consequences of retained residual risk; and

(d) investigate and analyse the causes of serious accidents and high potential incidents with a view to preventing their recurrence; and

(e) review the effectiveness of risk control measures, and take appropriate corrective and preventive action; and

(f) mitigate the potential adverse effects arising from retained residual risk.

…

31 Discharge of obligations

A person on whom a safety and health obligation is imposed must discharge the obligation.

Maximum penalty—

(a) if the contravention caused multiple deaths — 2000 penalty units or 3 years imprisonment; or

(b) if the contravention caused death or grievous bodily harm — 1000 penalty units or 2 years imprisonment; or

(c) if the contravention caused bodily harm — 750 penalty units or 1 year's imprisonment; or

(d) if the contravention involved exposure to a substance that is likely to cause death or grievous bodily harm — 750 penalty units or 1 year's imprisonment; or

(e) otherwise — 500 penalty units or 6 months imprisonment.

32 Person may owe obligations in more than 1 capacity

A person on whom a safety and health obligation is imposed may be subject to more than 1 safety and health obligation.

Example—

A person may be an operator, contractor and supplier of plant at the same time for a single mine and be subject to obligations in each of the capacities.

…

34 How obligation can be discharged if regulation or guideline made

(1) If a regulation prescribes a way of achieving an acceptable level of risk, a person may discharge the person's safety and health obligation in relation to the risk only by following the prescribed way.

(2) If a regulation prohibits exposure to a risk, a person may discharge the person's safety and health obligation in relation to the risk only by ensuring that the prohibition is not contravened.

(3) Subject to subsections (1) and (2), if a guideline states a way or ways of achieving an acceptable level of risk, a person discharges the person's safety and health obligation in relation to the risk only by—

(a) adopting and following a stated way; or

(b) adopting and following another way that achieves a level of risk that is equal to or better than the acceptable level.

Editor's note—

For this section and the following section, see defences provided for under division 4 (Defences).

35 How obligations can be discharged if no regulation or guideline made

(1) This section applies if there is no regulation or guideline prescribing or stating a way to discharge the person's safety and health obligation in relation to a risk.

(2) The person may choose an appropriate way to discharge the person's safety and health obligation in relation to the risk.

(3) However, the person discharges the person's safety and health obligation in relation to the risk only if the person takes reasonable precautions, and exercises proper diligence, to ensure the obligation is discharged.

38 Obligations of operators

(1) An operator for a mine has the following obligations—

(a) to ensure the risk to workers while at the operator's mine is at an acceptable level, including, for example, by—

(i) providing a safe place of work and safe plant; and

(ii) maintaining plant in a safe state;

(b) to ensure the operator's own safety and health and the safety and health of others is not affected by the way the operator conducts operations;

(c) to appoint a site senior executive for the mine;

(d) to ensure the site senior executive for the mine—

(i) develops and implements a safety and health management system for the mine; and

(ii) develops, implements and maintains a management structure for the mine that helps ensure the safety and health of persons at the mine;

(e) to audit and review the effectiveness and implementation of the safety and health management system to ensure the risk to persons from operations is at an acceptable level;

(f) to provide adequate resources to ensure the effectiveness and implementation of the safety and health management system.

(2) Without limiting subsection (1), an operator has an obligation not to operate a mine without a safety and health management system for the mine.

…"

[16] Section 241 has been repealed, but it then provided:

"**241 Executive officers must ensure corporation complies with Act**

(1) The executive officers of a corporation must ensure that the corporation complies with this Act.

(2) If a corporation commits an offence against a provision of this Act, each of the corporation's executive officers also commits an offence, namely, the offence of failing to ensure that the corporation complies with the provision.

Maximum penalty—the penalty for the contravention of the provision by an individual.

(3) Evidence that the corporation has been convicted of an offence against a provision of this Act is evidence that each of the executive officers committed the offence of failing to ensure that the corporation complies with the provision.

(4) However, it is a defence for an executive officer to prove—

(a) if the officer was in a position to influence the conduct of the corporation in relation to the offence—the officer exercised reasonable diligence to ensure the corporation complied with the provision; or

(b) the officer was not in a position to influence the conduct of the corporation in relation to the offence."

[17] The provisions of the MQSH regs which are relevant to this appeal are:

"**8 Risk reduction**

(1) A person who has an obligation under the Act to manage risk at a mine must, as far as reasonably practicable, apply hazard controls in the following order—

(a) elimination of the hazard;

(b) substitution with a lesser hazard;

(c) separation of persons from the hazard;

(d) engineering controls;

Examples of engineering controls—

1 using fans and ducting to remove dust

2 using guards on conveyors

(e) administrative controls;

Examples of administrative controls—

1 a restriction on the time a worker is exposed to a hazard

2 a procedure or standard work instruction

(f) personal protective equipment.

(2) The site senior executive must ensure hazard controls used to reduce risk in the mine's work and local environments are appropriate having regard to the following—

(a) the interaction of hazards present in the environments;

(b) the effectiveness and reliability of the controls;

(c) other reasonably available relevant information and data from, and practices in, other industries and mining operations.

9 Risk monitoring

(1) A person who has an obligation under the Act to manage risk at a mine must monitor risk in the person's own work and activities at the mine.

(2) The site senior executive must ensure risk in the mine's work and local environments caused by the mine's operations is monitored—

(a) when the operations start; and

(b) at appropriate intervals or stages during operations at the mine; and

(c) when the mine's risk management practices or procedures change significantly.

(3) Monitoring must include the following things—

(a) the occurrence of incidents, injuries and ill health;

(b) the level of hazards present in the mine's work environment;

(c) for monitoring under subsection (2)—the level of hazards from the mine's operations present in the mine's local environment.

(4) If it is appropriate, having regard to the nature and level of a hazard present in the work environment, the monitoring must include 1 or more of the following things—

(a) personal monitoring to decide a worker's level of exposure to the hazard;

Example of personal monitoring—

monitoring a worker using a dosimeter or other instrument to measure the worker's level of exposure to noise

(b) self-monitoring to detect effects of the hazard;

Example of self-monitoring—

self-recognition of physical symptoms of heat stress or fatigue

(c) biological monitoring to decide a worker's level of exposure to the hazard;

Example of biological monitoring—

testing a blood sample for lead

(d) health surveillance under section 138.

…

100 Selection and design

(1) A person who has an obligation under the Act to manage risk at a mine in relation to the selection and design of plant must ensure—

(a) the plant—

(i) is fit for its intended use and use in its intended work environment, including, for example, a hazardous area; and

(ii) is ergonomically compatible with persons operating or maintaining it; and

(iii) has appropriate provision for safe access, egress and maintenance; and

(b) if it is necessary for managing risk from the plant and it is reasonably practicable, the plant—

(i) fails to safety; and

(ii) does not fail catastrophically or by common mode or cascade failure; and

(iii) incorporates appropriate engineering controls to protect the plant operator and other persons; and

Example of engineering controls—

guards on moving parts, rollover protection, falling object protection, noise insulation or seatbelts

(iv) incorporates appropriate backup systems to ensure plant remains under control if its primary system fails; and

Example of a backup system—

a vehicle's parking brake to backup its service brake

(v) is designed so its condition and performance can be monitored and incipient failures detected.

(2) In this section—

hazardous area means an area in which an explosive atmosphere is present, or is likely to be present, in quantities requiring special precautions for the construction, installation and use of potential ignition sources.

Examples of potential ignition sources—

electrical equipment, naked flames, sparks from grinding and welding operations, and hot surfaces

…

105 Commissioning

(1) The operator or site senior executive must ensure plant is commissioned in its operating environment at the mine before it is used to ensure the following—

(a) its integration into the operating environment and associated systems;

(b) it performs within its specifications, if any, held at the mine under section 112;

(c) hazard controls for the plant are adequate and operating within the specifications mentioned in paragraph (b);

(d) mine workers who are required to operate the plant are competent to operate it safely.

(2) The operator or site senior executive must ensure—

(a) the commissioning is carried out in accordance with the manufacturer's instructions; and

(b) adequate precautions are taken to protect the safety and health of persons if—

(i) the plant fails during commissioning; or

(ii) it is necessary to commission the plant without all hazard controls for the plant operating effectively."

[18] Apart from the defence available under s 241(4), s 45 is also relied upon by the appellant:

"**45 Defences for div 2 or 3**

(1) It is a defence in a proceeding against a person for a contravention of an obligation imposed on the person under division 2 or 3 in relation to a risk for the person to prove—

(a) if a regulation has been made about the way to achieve an acceptable level of risk—the person followed the way prescribed in the regulation to prevent the contravention; or

(b) subject to paragraph (a), if a guideline has been made stating a way or ways to achieve an acceptable level of a risk—

(i) that the person adopted and followed a stated way to prevent the contravention; or

(ii) that the person adopted and followed another way that achieved a level of risk that is equal to or better than the acceptable level to prevent the contravention; or

(c) if no regulation prescribes or no guideline states a way to discharge the person's safety and health obligation in relation to the risk—that the person took reasonable precautions and exercised proper diligence to prevent the contravention.

(2) Also, it is a defence in a proceeding against a person for an offence against section 31 for the person to prove that the commission of the offence was due to causes over which the person had no control.

…"

A preliminary point – what type of appeal is this?

[19] The appellant contends that "having regard to the nature of the appeal provided by the relevant legislative provisions, error is not required to be established in order to justify appellate intervention by this court." In other words, the appellant argues that this is an appeal de novo. That contention relates to ground 1. The other grounds are advanced in the alternative and error is asserted.

[20] Section 348[2] of the *Industrial Relations Act* 1999[3] (the IR Act) provided:

"(1) An appeal to an industrial tribunal is by way of re-hearing on the record.

(2) However, the industrial tribunal may hear evidence afresh, or hear additional evidence, if the industrial tribunal considers it appropriate to effectively dispose of the appeal."

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2 This section has been repeated as s 567 in the *Industrial Relations Act* 2016.

3 The *Industrial Relations Act* 1999 applies because these proceedings commenced before the *Industrial Relations Act* 2016 came into effect.

[21] It was submitted by the respondent that "evidence afresh" is simply a type of supplementary evidence which the court is empowered to admit in its discretion. That is not correct. To "hear evidence afresh" is to have the evidence which was put before the primary court presented again. In other words, the same witnesses would be called and examined and cross-examined. It is to be distinguished from "fresh evidence" or "additional evidence" which is evidence which was not presented in the primary court.

[22] Section 348 bears some similarity to s 561 of the *Workers' Compensation and Rehabilitation Act* 2003:

> "(3) The appeal is by way of rehearing on the evidence and proceedings before the industrial magistrate or the industrial commission, unless the court orders additional evidence be heard."

[23] That section was held, in *Davidson v Blackwood*,[4] to mean that the appeal in that case was an appeal by way of rehearing and that error had to be shown. The same reasoning applies here.

[24] In *Allesch v Maunz*,[5] the following exposition of the law was laid out:

> "[23] … the critical difference between an appeal by way of rehearing and a hearing de novo is that, in the former case, the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some **legal, factual or discretionary error**, whereas, in the latter case, those powers may be exercised regardless of error. At least that is so unless, in the case of an appeal by way of rehearing, there is **some statutory provision which indicates that the powers may be exercised whether or not there was error at first instance**."[6] (citations omitted, emphasis added)

[25] That was followed by Muir JA in *Teelow v Commissioner of Police*,[7] where his Honour said that it was "a normal attribute of an appeal by way of rehearing".[8] The capacity to hear the evidence again (if it is considered that it is appropriate to do so in order to effectively dispose of the appeal) is not a statutory provision of the kind referred to in *Allesch v Maunz*.

[26] Section 348 of the IR Act does allow this court to hear evidence afresh or additional evidence, but only if the court considers it appropriate to effectively dispose of the appeal. Such evidence, then, will not be heard in the absence of a finding that it is appropriate. It does not indicate that the powers on appeal may be exercised in the absence of error. The ability to hear such evidence does not control the nature of the appeal – that is provided for by the description of the appeal in s 348(1).

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4 [2014] ICQ 8.
5 (2000) 203 CLR 172.
6 Per Gaudron, McHugh, Gummow and Hayne JJ.
7 [2009] 2 Qd R 489.
8 [2009] 2 Qd R 489 at 493 [4].

[27] *Allesch v Maunz* was considered in *Fox v Percy*.[9] The relevant features of the appeal provision[10] were:

> "(5) Where the decision or other matter under appeal has been given a hearing, the appeal shall be by way of rehearing.
>
> (6) The Court shall have the powers and duties of the court … from whom the appeal is brought, including powers and duties concerning:
>
> …
>
> (b) the drawing of inferences and the making of findings of fact, and
>
> (c) the assessment of damages and other money sums.
>
> (7) The Court may receive further evidence.
>
> (8) Notwithstanding subsection (7), where the appeal is from a judgment after a trial or hearing on the merits, the Court shall not receive further evidence except on special grounds."

[28] In considering the powers and functions of the Court of Appeal, Gleeson CJ, Gummow and Kirby JJ said:[11]

> "[20] Appeal is not, as such, a common law procedure. It is a creature of statute. In *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd*, Mason J distinguished between (i) an appeal stricto sensu, where the issue is whether the judgment below was right on the material before the trial court; (ii) an appeal by rehearing on the evidence before the trial court; (iii) **an appeal by way of rehearing on that evidence supplemented by such further evidence as the appellate court admits under a statutory power to do so**; and (iv) an appeal by way of a hearing de novo. There are different meanings to be attached to the word "rehearing". The distinction between an appeal by way of rehearing and a hearing de novo was further considered in *Allesch v Maunz*. Which of the meanings is that borne by the term "appeal", or whether there is some other meaning, is, in the absence of an express statement in the particular provision, a matter of statutory construction in each case." (emphasis added, citations omitted)

[29] The appeal provided for in s 348 of the IR Act falls within the description which appears after (iii) in the paragraph above. The plurality went on to describe the nature of the appellate function in this way:[12]

> "[27] … Such courts must conduct the appeal by way of rehearing. If, making proper allowance for the advantages of the trial judge,

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9 (2003) 214 CLR 118.
10 *Supreme Court Act* 1970 (NSW), s 75A.
11 (2003) 214 CLR 118 at 124.
12 (2003) 214 CLR 118 at 127-128.

> **they conclude that an error has been shown**, they are authorised, and obliged, to discharge their appellate duties in accordance with the statute." (emphasis added)

[30] The appellant sought support from an ex tempore judgement in *Forrest v Commissioner of Police*[13] in which Sofronoff P[14] said, with respect to an appeal to the District Court under s 222 of the *Justices Act* 1886:

> "… it is not the function of a court hearing such an appeal merely to consider whether or not the tribunal at first instance has made an error of fact or law. Nor is there an onus upon an appellant to demonstrate the existence of an error of fact or law, although such a demonstration will go a long way towards winning an appeal."

[31] Section 223(1) of the *Justices Act* provides:

> "An appeal under section 222 is by way of rehearing on the evidence (***original evidence***) given in the proceedings before the justices."

[32] That statement in *Forrest v Commissioner of Police* does not, with respect, accurately reflect the law. It is, in my opinion, correctly stated in *Storry v Commissioner of Police*[15] in which the Court of Appeal was dealing with an application for leave to appeal from a decision of the District Court dismissing an appeal to that court under s 222 of the *Justices Act*. Bond J[16] said:

> "[14] The learned District Court judge then recorded, correctly, that on the appeal he was required to conduct a real review of the trial, and the learned magistrate's reasons, and make his own determination of relevant facts in issue from the evidence, giving due deference and attaching a good deal of weight to the learned magistrate's view, but that, nevertheless, in order to succeed on such an appeal, **the appellant must establish some legal, factual or discretionary error**." (emphasis added)

[33] It follows that, in order to succeed in this appeal, the appellant must show relevant error. Each of grounds 1 and 2 make a broad assertion of error. The parties proceeded on the basis that, in large part, they relied upon the submissions made below to either demonstrate error or the absence of error.

[34] Before I turn to the grounds of appeal, the context in which the charges were laid should be considered.

The context of the charges

[35] In order to assess whether there was any error in the determination that the respondent had proved the charges beyond reasonable doubt or that the appellant had not established a defence, it is necessary to understand the basis of the obligations placed upon MCG.

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13 [2017] QCA 132.
14 With whom Gotterson and Morrison JJA agreed.
15 [2018] QCA 291.
16 With whom Sofronoff P and McMurdo JA agreed.

[36] First, it should be noted that the objects of the Act are:

> "**6 Object of the Act**
>
> The objects of this Act are—
>
> (a) to protect the safety and health of persons at mines and persons who may be affected by operations; and
>
> (b) to require that the risk of injury or illness to any person resulting from operations is at an acceptable level."

[37] The manner in which those objects are to be achieved is set out in s 7 and one of the methods is by - "(a) imposing safety and health obligations on persons who operate mines or who may affect the safety or health of others at mines; …".

[38] In a general sense, the Act seeks to achieve its objects by imposing health and safety obligations upon various persons with those obligations applying simultaneously. That scheme is then enforced by criminal sanctions for breach of the obligations. For example, s 36 imposes obligations upon any person "who may affect safety and health of persons at a mine".

[39] The Act, in various sections, creates obligations, defines the persons who are required to fulfil those obligations and sets standards for the achievement of those obligations.

[40] An important part of the operation of the Act and the prosecution of action alleged to be a breach of the Act, requires consideration of:

(a) risk,

(b) hazard,

(c) acceptable level of risk, and

(d) risk reduction.

[41] Risk is defined in s 19 of the Act to mean the risk of injury or illness to a person arising out of a hazard and such risk is measured in terms of consequences and likelihood. The term "hazard" is defined in s 20 to mean a thing or a situation with potential to cause injury or illness to a person. It should be observed that both of those concepts are defined in objective terms.

[42] The same applies to the definition of "an acceptable level of risk". Section 26 says that for a risk to be at an acceptable level the operation must be carried out so that the level of risk from the operations is within acceptable limits and as low as reasonably achievable. It goes on to say that when deciding whether risk is within acceptable limits and as low as reasonably achievable, regard must be had to the likelihood of injury or illness to a person arising out of the risk, and the severity of the injury or illness.

The basis of the appellant's case

[43] The case for the appellant with respect to both the charges and the defences is premised on unstable contentions.

[44] A major part of the appellant's case is that the guards which the respondent said were required would have been of little or no use because they could be removed with little effort. That assumes, and there was little consideration of the alternative, that where the Australian Standard says that a guard may be of a lift-off design, that that is what would have been installed. But that is not the point on which this turns. The argument that a guard could be easily removed is not conclusive. A guard has at least two functions - one of which is to cause reconsideration or reassessment of the task. It is a palpable warning. It is not like a sign which can be ignored or which, having been passed dozens of times, is no longer "seen" by a worker.

[45] This argument by the appellant that a guard would not have stopped Mr Scovell is inconsistent with the argument advanced by the appellant that MCG had eliminated the hazard by preventing operators from being on the gantry when the conveyor was running. This was done, it was said,[17] by erecting a metal chain across the bottom of the gantry, providing an isolation switch at the bottom of the gantry and using appropriate warning signs. None of those controls require any positive action by a worker to avoid them. A worker can step over the chain, not engage the isolation switch and ignore the signs. But the worker must take a positive step to remove a guard.

[46] That misconstruction of the requirements of the Act spills over into the argument raised about the reasonable practicability of installing guards. The argument advanced by the appellant was that s 8(1) of the MQSH regs only requires engineering controls to the extent that they are reasonably practicable. The guards, it was argued, were not reasonably practicable because:

(a) any guard would need to be removable in order that maintenance could be performed on the conveyor,

(b) guards that were not removable would not be reasonably practicable,

(c) therefore guards would not eliminate or even minimise the hazard because it would still be possible for a worker to remove the guards and thereby deliberately position are part of their body in the area of the conveyor where they would be at risk of becoming and trapped and seriously injured or killed.

[47] That analysis contains fallacies. It overlooks the word which conditions "practicable", that is, "reasonably". Of course it would not be reasonable to install something which would prevent maintenance. But the argument here for the appellant appears to be based on the notion that if a safety feature can be rendered inoperative in any way then it is not reasonably practicable to install such a feature. The appellant did not explain how this argument served to exclude a guard on a conveyor as an engineering control when that is the precise example given in the MQSH regs.

[48] This leads to another matter which permeates the appellant's submissions, both with respect to breach and the circumstance of aggravation: the appellant frequently refers to the actions of Mr Scovell and appears to engage with what is said to have been his negligence or recklessness in the actions he took. For example, the appellant contends that s 8(1)(d) of the MQSH regs is limited to the application of guards to areas where a person might "inadvertently or accidentally" come into contact with the hazard. That

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17 Defendant's closing submissions in the Industrial Magistrates Court at [86].

construction is not open on any reading of that section. And the argument is pursued by reference to Mr Scovell's actions. They are not relevant to the question of breach. The Act is not structured in that way. A breach of obligations can be proved without any injury having occurred.

[49] The law on this is well settled and I adopt, with respect, the statement of Windeyer J in *Sherman v Nymboida Collieries Pty Ltd*:[18]

> "Breach of a statutory duty to provide means for ensuring the safety of workmen must, contributory negligence having been excluded by statute as a defence, be regarded as a duty that is owed to the careless just as much as to the careful. All safety requirements enacted by statute are obviously meant to meet conditions in which, if they were not insisted upon, the careless, the inattentive, the tired, the clumsy and unskilful, and **any workers ready to take risks**, might come to harm." (emphasis added)

[50] The actions of Mr Scovell, though, are relevant to the issue to causation which is dealt with later in these reasons.

Ground 1 – The prosecution did not prove the charge, and the circumstance of aggravation, against the appellant beyond reasonable doubt (and the Learned Industrial Magistrate erred in not so holding).

[51] The error identified by the appellant seems to be that the Industrial Magistrate should have found that the absence of a guard did not cause the risk to be at an unacceptable level. If such a finding had been made then the prosecution would have failed.

[52] The prosecution case at trial was that the guard to be installed at the first change of direction pulley was a guard that complied with Australian Standard AS1755-2000. Those standards provided that, in quarrying applications, a guard may be of a lift-off design which does not incorporate an interlock device. There was evidence that such a guard could be removed by turning a clip by hand and sliding it off without the use of tools.

[53] The appellant submitted that the presence of a guard which complied with the Australian Standard would not reduce the risk in any material way. That submission, though, was subject to a condition that "such guarding would not reduce in any material way the risk to a worker engaging in deliberate risky conduct involving placing a part of their body in a position where they might get caught in the mechanism of a conveyor."

[54] At this hearing, Mr McDonald submitted that a guard of that type is a low order risk control – it is at most a deterrent or an "administrative control".

[55] The Industrial Magistrate found:

> "[31] I am satisfied that the prosecution has proven, beyond reasonable doubt, that Mr Scovell was caught in the undoubted nip point at

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[18] (1963) 109 CLR 580 at 589.

the first change of direction pulley on conveyor 2, which conveyor was operating at the time.

[32] In so concluding I accept the prosecution's contention that '... *the defence pitches their submissions by emphasising the specific circumstances of the accident where Mr Scovell came into contact ... But, in our submission, that approach has a tendency to divert the court to a consideration of how Mr Scovell came into contact with the whirling, sharp drum which is the change of direction pulley. But the real concentration should be on the potential of the thing to cause the injury. The evidence on that as to the dangerous nature of the poorly exposed without guarding can be found in Mr Clough's evidence*.'

[33] I conclude that the standard to be applied is an objective one i.e. regardless of whether a person has become entangled or caught by a nip point, the first change of direction pulley was a 'hazard', the 'risk' posed by the hazard was one of catastrophic injury or death. The likelihood of the risk was low, because the conveyor should not be operated when someone is on the walkway, but the level of risk was severe because the hazard could cause serious injury or death due to size, and knife-like sharpness of the edge, of the roller and people's ability to use the walkway while the plant was operating.

[34] Having regard to the available controls I find that the level of risk was not as low as reasonably achievable and was, therefore, contrary to s. 26 of the MQSH Act. I find that the level risk could have been reduced to an 'acceptable level' by the placement of a guard over the first change of direction pulley. I accept the prosecution's submissions and find that it was 'reasonably practicable' for the defendants to have done so. The ease with which this could have been done is demonstrated by what had been previously done by the second defendant's brother and his brother's associated company at the Fortress [sic Fortrus] quarry." (citations omitted, emphasis in original)

[56] The appellant contended that it would be an error to ignore the circumstances of this incident. It was put this way:

"(a) Whilst the question of whether or not the risk was at 'an acceptable level' is an objective one, it would be an error to ignore the circumstances of the incident, as those circumstances inform the issues of:

(i) the existence of the risk;

(ii) the likelihood of the risk eventuating;

(iii) the gravity of the consequences should the risk eventuate; and

(iv) hence, whether the risk was at the relevant time acceptable."

[57] Reliance for that proposition was placed upon two paragraphs in the decision of the Court of Appeal of Victoria in *Director of Public Prosecutions v Vibro-Pile (Aust) Pty Ltd*[19] where the following was said:

> "88 The issue was whether there was a risk to health and safety in relation to the erection of the Fundex machine and whether there were reasonably practicable steps which the employer could have taken, which would have eliminated or reduced that risk. Once the issue is formulated in this way, it can be seen that there is no occasion to consider whether the employer's omissions were causally 'significant' or 'substantial'.
>
> …
>
> 91 Of course, the circumstances of the accident will often be of evidentiary significance, as they may shed light on:
>
> - the existence of the risk;
> - the likelihood of the risk eventuating;
> - the gravity of the consequences should the risk eventuate; and
> - hence, whether all reasonably practicable steps had been taken to eliminate or reduce the risk."

[58] Those paragraphs are in a section of the reasons which dealt with whether it was necessary to establish a causal link between the employer's omission to give a warning and the failure to insert some essential bolts in the relevant structure. Causation is not relevant to the question of whether there was a breach of the Act. It is relevant to the issue of penalty.

[59] The decision in *Vibro-Pile* concerned the *Occupational Health and Safety Act* 2004 (Vic). It differs in a number of respects from the Act but it has similar purposes and establishes a similar regime for achieving those purposes. While acknowledging that the language used in the two Acts differs in some respects, the decision in *Vibro-Pile* is useful in that it analyses and provides a summary of the appropriate approach to be taken to the consideration of this type of prosecution. A useful summary of the task for a prosecutor and, therefore the case to be considered by the court, can be found in the headnote to the decision:[20]

(a) These offences are risk-based, not outcome-based. The breach consists in the failure to eliminate or reduce risk, not in causing the accident to occur.

(b) The occurrence of death or injury is not an element of the offence and is of evidentiary significance only. The language of causation is best avoided in this context.

(c) When the alleged breach consists of an omission rather than a positive act, proof of the breach requires the prosecution to establish that there was a risk to

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19 (2016) 49 VR 676.

20 *Director of Public Prosecutions v Vibro-Pile (Aust) Pty Ltd* (2016) 49 VR 676 at 677-678.

employee health and safety; that the measures identified as necessary would have eliminated or reduced the risk; and that it was reasonably practicable in the circumstances for the employer to have taken those measures.

[60] The approach promoted by the appellant would lead a court into error. The approach taken by the Industrial Magistrate was correct. Consideration was given to causation when the sentence had to be determined.

[61] The appellant submitted that the findings of the Industrial Magistrate did not engage with the submissions made on behalf of the defendant below that:

(a) whilst the relevant standard to be applied is an "objective one", the circumstances of the incident, in the context of the whole of the evidence, showed that the only circumstances in which a worker could be in any danger is if they deliberately engage in obviously risky conduct;

(b) guarding installed in accordance with the Australian Standard could not materially lower that risk;

(c) such guarding could not materially lower that risk because any such guarding could be removed in seconds without tools;

(d) such guarding therefore could not materially lower the risk of a worker deliberately engaging in obviously risky conduct.

[62] I will deal with the issue of the adequacy of the reasons given by the Industrial Magistrate later but it is appropriate to deal with these submissions made on appeal now. The appellant's argument conflates the risk-based approach of the legislation with an outcome-based standard which might apply under different circumstances. The Act does not require that an employer act in a way which will materially lower the risk if a worker deliberately engages in obviously risky conduct. As s 19 provides, risk is measured in terms of consequences and likelihood. Section 26 defines what an acceptable level of risk is and speaks in terms such as "reasonably achievable". The appellant criticises the approach taken by the Industrial Magistrate because had a guard been present then, on the basis of speculation as to the likely conduct of an employee, such a guard could not completely eliminate risk. The Act does not require that. To take the appellant's argument to its logical end would mean that there would be little point in installing any safety measures because a "rogue" employee could, if determined to do so, evade almost any safety scheme. Again, that is not the test required under the Act.

[63] The appellant has failed to demonstrate any error in the reasoning which led the Industrial Magistrate to find that the offence had been proved.

Ground 2 – The defences provided for by ss 45(1)(c), 45(2) and 241 of the Act were made out (and the learned Industrial Magistrate erred in not so holding)

[64] The Industrial Magistrate made these findings on the question of whether the defences had been made out:

> "[48] As the prosecution correctly submits, in view of the interrelatedness of ss. 34, 35 and 45(1)(a) and (b), being satisfied

as I am that the prosecution has proven its case against the defendants under s. 31 of the MQSH Act, unless further evidence is adduced that undermines the prosecution, any defence argued under this provision must fail. No such further evidence has been adduced. In any event the defendants do not rely upon s. 45(1)(a) or (b) of the MQSH Act.

[49] The defendants raise defences under ss. 45(l)(c), 42 and, in the case of Mr McDonald, s. 241 of the MQSH Act. The defence provision in s. 241(4) of the MQSH Act pertains to the 'reasonable diligence test' and whether Mr McDonald was in a position to influence the conduct of MCG in relation to the alleged offence.

[50] To avoid case splitting, the prosecution sought to adduce evidence to "*defend the defence* ...". In that regard I note that the statutory significance of the mine record is found at s. 59 of the MQSH Act. The prosecution submits that:

> "*... the mine record is relevant to the case ... admissible against the company, because it's a company record, so it goes to the knowledge to the company, which is then relevant to the defence under 45. It's relevant in the case against Mr McDonald, because Mr McDonald's liability is dependent upon proof of the case against the company, so any evidence which is admissible against the company in this context would be admissible against Mr McDonald.*
>
> ...

[51] I accept the prosecution's submissions concerning the relevance of the mine record and the weight to be attributed to it when considering the defences raised by the defendants.

[52] The defendants point to the commissioning report dated 25 June 2012, to support their contention that they had done all things necessary to ensure that conveyor 2 was appropriately constructed, installed and commissioned before it commenced operation. The report post-dates the fatal incident. Page 3 of the report sets out the 7 items of equipment commissioned by Global Crushers and Spares. Despite these items not including the conveyors at the quarry, the report goes on to state "*GCS noted that all conveyors were guarded at the time of commissioning and take [sic] no responsibility for the assembly of bearings, motors and pulleys that were fitted by others. All conveyors were checked and all conveyor componentry was in the correct position*."

[53] There are four relevant factors that undermine the defendants' arguments concerning this report, namely:

1. The second defendant wrote to the person who was to commission the plant to expressly state that the first defendant would be responsible for all commissioning 'internally';

2. The plant had already been put into operation before a 'partial' commissioning inspection occurred in January 2012;

3. The commissioning report did not list conveyor 2 in the schedule of equipment that was the subject of the report;

4. The commissioning report was not created until after the date of incident and then only for the purported purpose of the sale of the quarry:

So, for the relevant period, I find that there was no reliance by the defendants upon either the partial commissioning undertaken in January 2012 or the statement pertaining guarding in the port incident commissioning report for the purpose of discharging their statutory obligations under the MQSH Act.

[54] I accept the prosecution's submissions and find that the defendants have failed to establish, on the balance of probabilities, a defence under either ss. 41(1)(c) or 41(2) of the MQSH Act and, in the case of Mr Donald, a defence under s. 241 of the MQSH Act."

[65] The appellant argues that the Industrial Magistrate's findings were inadequate – I deal with that later in these reasons.

[66] The appellant relied upon the defence is available under s 45(1)(c) and s 45(2). Before the Industrial Magistrate each of the defendants argued that that those defences were established on the following bases:

(a) the training provided to Mr Scovell,

(b) the defendants were not experts in the design and construction of conveyors,

(c) the defendants reasonably relied upon recognised experts for the design and construction of the conveyors to design, construct and commission the conveyor in accordance with Australian Standards,

(d) it was a specific term of the contract with Global Crushers and Spares Pty Ltd (GCS) that the conveyor would be constructed in accordance with Australian Standards,

(e) if the conveyor was defective due to the absence of guarding at the first change of direction pulley, then that defect was not obvious to non-experts in the design and construction of conveyors,

(f) although the report for the commissioning of the conveyor was only completed after the incident:

(i) the commissioning process itself took place and was completed before the incident,

(ii) the person who undertook the commissioning understood that he was required to communicate any issues that he had identified to MCG before leaving the site,

(iii) that person did not communicate that he had identified any defect due to the absence of guarding,

(g) three risk assessments were undertaken by MCG in relation to the conveyor,

(h) the risk of a person becoming entrapped in the first change of direction pulley was remote in circumstances where obviously deliberate risky conduct was needed for the incident to occur,

(i) Mr Scovell was appropriately warned of the risk of coming into contact with moving machinery and steps which did not involve guarding were put in place, namely:

(i) the isolation switch in the control box,

(ii) the chain at the bottom of the gangway,

(iii) the isolation switch at the bottom of the gangway, and

(iv) the emergency stop lanyard running along the walkway side of the conveyor.

[67] Under the separate defence available to the appellant (s 241 of the Act) it was argued that he was not required to personally ensure that MCG complied with its obligations in order to establish the defence. He only needed to exercise reasonable diligence, which he did by ensuring that appropriate systems were in place, competent persons were employed and appropriate experts were engaged.

[68] The Industrial Magistrate dealt with these arguments by simply accepting the prosecution's written submissions on these issues. Where there are competing submissions between which a judicial officer is required to choose, it will usually be the case that merely adopting one set of submissions without reference to the other and without explanation as to why the choice had been made will reveal error.[21]

[69] In this case, while the Industrial Magistrate did accept the submissions by the prosecution, it was after the Industrial Magistrate did give some consideration to some of the arguments put before her Honour by the defendants. So much can be seen in paragraphs [50]-[54] of her Honour's reasons.

[70] It is difficult, in some cases, to adequately convey the consideration given to the case mounted by one or other party without going into considerable detail and, where appropriate, accepting the detailed submissions presented by one of the parties. That was the case here.

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[21] *Li v Attorney General for New South Wales* (2019) 99 NSWLR 630 at 641-644 [44]-[54] per Basten JA (White JA agreeing on this point).

[71] The argument mounted on behalf of the prosecution before the Industrial Magistrate dealt with the provisions of MCG's SHMS and how the appellant should have been on notice with respect to conducting an audit or, as the SHMS provides, that MCG was required to ensure that there was guarding on the conveyor which complied with the Australian Standard. The appellant should have been in no doubt as to the requirements of the SHMS and the necessity to comply with the procedures for identifying hazards. But he did not.

[72] The risk assessments required by the SHMS were overlooked by the appellant by operating the conveyor before it had been fully assembled and before it could have been commissioned. Had it been properly commissioned, the evidence was that the non-compliance with the Australian Standard would have been discovered.

[73] The SHMS contained requirements concerning the guarding of equipment. One of the purposes of that procedure was to "identify areas requiring guarding and ensure controls are in place to eliminate the likelihood of injury to persons working on or around machinery and equipment". The procedures also required:

(a) "Guards should be designed to Australian Standards and codes of practice with consideration for easy removal and replacement; Guards must restrict the ability to access live shafts, belts and pinch points."

(b) "No guarding should be modified or altered in any way, except through the application of the change of management process, which includes a detailed risk assessment.
NB. **No plant or equipment will be used including test running without guards in place or adequate controls in place to eliminate entry into any danger zone**." (emphasis added)

[74] MCG (and others) created a risk assessment instrument which specifically identified that risk assessment the pinch points and an examination for guards and barriers was necessary. Mr McDonald was aware of that.

[75] The appellant was also involved in acquiring the fixed plant to be used at the quarry. He was aware that there was a problem with the fabrication of guards by the manufacturer. He had been put on notice to pay particular regard to the requirements of the Australian standard with respect to the need for guarding. Emails which were contained in Exhibit 12 demonstrate that: he knew there was an issue with the quality of the guarding being manufactured, that something needed to be done quickly about the installation of mesh guards, and he knew in December 2011 that guards had not been fitted and that they had not arrived at the quarry.

[76] There was compelling evidence that the crushing plant began operation before it had been completely assembled and before hazard controls in the form of guarding has been installed. This was one of the appellant's responsibilities. He failed to ensure that the plant was completed before it began operation.

[77] The appellant argues that there was no agreement with Mr Banks to commission the plant. There is material which suggests that he offered to do so but was declined. There was evidence that there was a meeting in July 2011 at which this was discussed and,

whether he was to commission the plant or not, there was not a commissioning undertaken before operations commenced.

[78] One of the arguments advanced by the appellant to demonstrate that the defence was available to him was the training provided to employees including Mr Scovell. There was unchallenged evidence to the effect that workers could not have received adequate training because they commenced work before the plant had been completed and the absence of guarding meant that they could not be trained with respect to the manner in which guards should have been treated.

[79] The appellant relies upon s 241(4) on the basis that he had exercised reasonable diligence to ensure that MCG complied with the relevant provisions. An immediate example of that not occurring is the report by an Inspector of Mines who conducted an unannounced inspection on 29 September 2011. He spoke to the then Site Senior Executive and, amongst other things, told him to ensure that he developed a commissioning sheet and "as a minimum should reference A/S 1755 for guarding of conveyors".

[80] There was evidence upon which the Industrial Magistrate was entitled to rely that demonstrated that:

(a) the appellant failed to ensure that guards were placed on the first change of direction pulley point on the conveyor,

(b) that Mr Scovell could not have been adequately trained because of the state of the conveyor, and

(c) the plant was operated before it had been fully assembled.

[81] The appellant was, at all material times, a director of MCG. He was deeply involved in all important matters concerning the construction of the quarry and the equipment. He did not discharge the onus to demonstrate that he had a defence to any of the charges.

Particular issues concerning the charges

Charge 1

[82] This charge alleged that Mr McDonald had failed to ensure that MCG had complied with its obligation under s 38(1)(a)(i) and it had done so by contravening s 8(1) and s 100(b)(iii) of the MQSH regs.

[83] The appellant's argument with respect to s 8(1) of the MQSH regs misconstrues the meaning of the words "elimination of the hazard". The word "elimination" in this context means, not the covering up of a hazard or the creation of a warning system, but the removal of the thing or situation which has the potential to cause injury or illness. Thus, for example, if a process resulted in the accumulation of poisonous substances, then the elimination of that hazard is not achieved by putting up warning signs but by ensuring that the substance does not accumulate. That this is the correct construction can be seen by the balance of s 8(1) which talks about substitution with a lesser hazard or separation of persons from the hazard. The controls are to be applied in the order set out in s 8(1) but only as far as reasonably practicable. If it is not reasonably practicable,

in the example I have used, to prevent the accumulation of poisonous substances, then the next items in the list would need to be considered.

[84] The particulars in this charge are attacked by the appellant. Particular 12(i) alleges that MCG failed to ensure that engineering controls in the form of guarding on the conveyor structure of the plan were applied to eliminate the hazard which was posed by the absence of guarding on the plant. On this subject, the appellant employs the argument I have referred to above which misconceives the meaning of "eliminate" and the purpose of a guard. Nevertheless, the terms of the particular given are inconsistent with the regulation.

[85] Where a breach of s 8(1)(d) is alleged, non-compliance is complete upon proof that the particularised engineering control (namely a "form of guarding") was not applied and that it was reasonably practicable to do so. The breach occurs at that point. Whether the engineering control would or could eliminate the hazard is not relevant.

[86] The appellant submits that s 8(1)(d) is limited to the application of guards to those areas or parts of machinery where inadvertent or accidental contact with the hazard might occur. There is no such requirement in this section.

[87] The appellant also relied upon the use by MCG of independent contractors to install the conveyor and other machinery. It is argued that the independent contractors were familiar with Australian Standards and had been involved in the design, installation and commissioning of similar equipment at the Fortrus[22] undertaking. The appellant says that it could not reasonably be suggested that MCG had to specifically request that the drawings used for Fortrus had to be updated so that any necessary modifications identified in the installation and commissioning be incorporated into the design for MCG's plant. MCG, it was submitted, was entitled to expect that reasonable care would be taken in the work done to install the conveyor at MCG.

[88] Reliance was placed on what Heydon J said in *Baiada Poultry Pty Ltd v The Queen*:[23]

> "[65] In some circumstances, the employment of independent contractors may be the only reasonably practicable way of ensuring and maintaining a safe working environment. Assume that two householders want an electrician to lay an electrical wire underground going into their house. Assume that they also want a plumber to repair pipes near that wire. Assume that the householders are wholly inexperienced in electrical and plumbing work. Assume that the electrician and the plumber are expert and experienced in their fields. Assume that they know where the pipes are in relation to the wire. Any attempt by the householders to deliver a speech about safety would be likely to prompt aggressive responses from the contractors. The criteria of reason suggest that it would be more practicable for the householders to rely on the contractors to ensure safety. To hold otherwise would demonstrate an extreme harshness in the legislation. Very often those who engage independent contractors know much less about safety than the independent contractors do."

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22 Another quarry of which Mr McDonald had knowledge.

23 (2012) 246 CLR 92.

[89] A number of matters arise when reliance is sought to be placed upon that analysis. First, it was not adopted by the plurality in that case. Secondly, the reasoning engaged was not necessary for the decision of the court. Thirdly, it is premised with the caveat "in some circumstances". Fourthly, it refers to an entirely different situation where the householders do not bear the burden of complying with safety regimes but the electricians and plumbers, through various statutes and licensing regimes, do. Finally, the Act specifically identifies the persons who bear the burden of complying with the Act, it does not allow for blame to be shifted in the manner advanced by the appellant.

Charge 2

[90] Mr McDonald was charged with having failed to ensure that MCG complied with its duty under s 38(1)(b) of the Act. That section requires an operator to ensure the operator's own safety and health and in the safety and health of others is not affected by the way the operator conducts operations. This charge involved allegations of breach by a failure to comply with various parts of the MQSH regs. Those concerned with s 8(1) and s 100(b)(iii) have been dealt with. Section 105 of the MQSH regs requires an operator or site senior executive to ensure that plant is commissioned before it is used to ensure, among other things, that hazard controls are adequate and operating. The section also requires that the operator to ensure that the commissioning is carried out in accordance with the manufacturer's instructions.

[91] The manufacturer's instructions were not in evidence. Thus, the appellant argues that this particular of the charge has not been proved. The respondent's argument is that there was no commissioning undertaken at all and, therefore, it is unnecessary for the manufacturer's instructions to be an evidence because, no matter what they were, they were not followed. Other arguments were raised with respect to whether or not there needed to be a "guarding audit" and whether, if there had been something of that nature, the alleged missing guard would have been detected.

[92] The Act does not define "commissioning" but it was the subject of evidence. A number of witnesses (Wieland, Smith, Banks and Kastelin) spoke about the purpose and the need for commissioning. In examination-in-chief, Mr Banks was asked:

> "Right. Now, when you are installing or commissioning, are there particular audits that you conduct? --- Most definitely. One of them's the – you're doing – you're checking all the gearboxes for oil, you're checking guards to make sure all the guards are on and they're adequate. In a 2D drawing, sometimes you can't actually see that you've got openings in guards. It might look good in 2D but there's – there's openings there, so you've got to do a guard audit.
>
> When you say there's openings, what do you mean by that? --- The legislation requires that you've got a certain gap between – you can't have more than a certain gap giving access to a pinch point on a conveyor. So you physically go around and check all that – or, as in the case of conveyor 2, that there is a guard missing."

[93] In an email, dated 24 December 2011, from Mr Banks to, among others, Mr McDonald he proposed a number of options including:

> "I could organize the project construction and commissioning as initially offered, however this will depend on what commitments I will need to cover with the Austcane project.
>
> …
>
> If MCG request and I am able to get the time to undertake [the option above], I would work on a scenario to bring into operation, sections of the fixed plant when they are safe to do so.
>
> This will be in line with the shortest possible time line for full plant operational capacity." (emphasis in original)

[94] Mr McDonald replied to that email in the following way:

> "We will arrange commissioning internally ourselves.
>
> Therefore we will not be requiring assistance."

[95] No commissioning was undertaken. It must follow that an absence of commissioning entails a failure to carry out commissioning in accordance with a manufacturer's instructions and, similarly, that none of the purposes specified in s 105 of the MQSH regs could be satisfied.

[96] The respondent had proved beyond reasonable doubt those parts of the particulars to which reference has been made. That is sufficient to establish the charge. It is not necessary to consider the other aspects argued by the appellant concerning training for the completion of other risk assessments.

Charge 3

[97] Under this charge it was alleged that Mr McDonald committed an offence against s 241 of the Act by failing to ensure that MCG complied with its obligations under s 38(1)(e) of the Act.

[98] That section requires an operator to audit and review the effectiveness and implementation of the safety and health management system to ensure the risk to persons from operations is at an acceptable level.

[99] Item 28 of the SHMS required compliance with Australian Standards in respect of "inspection", "use", and "maintenance" of plant.

[100] The prosecution had argued that the company was required to comply with the Australian Standard with respect to the conveyors on site. Any audit or review of the effectiveness of the SHMS ought to have involved an inspection of the fixed crushing plant and of the conveyor. That audit would have revealed the absence of guarding.

[101] Before the Industrial Magistrate, the defendant argued that there was insufficient evidence to prove this allegation. Further, it was argued that the prosecutor had relied on an inference that there had been a failure to audit simply because the requirement to do so had not been complied with. Such an inference was not established beyond reasonable doubt, it was argued, because other reasonable hypotheses were open including that no audit and review was scheduled until after the incident or any audit or review that did occur before the incident failed to identify the non-compliance.

[102] On the question of inference, the prosecutor submitted that an inference that no audit or review had occurred was supported by the period of five months over which the defect existed. It was argued that any audit or review would have revealed non-compliance and that there was no evidence suggesting that any audit or review had occurred. This part of the case was not one on which the onus fell on the defendant. It was for the prosecutor to prove its case and in order to succeed in proving the charge by inference it needed to show that it was the only reasonable inference that could be drawn. It was not. The possibilities suggested by the defendant were inferences which could also be drawn and so the failure by the prosecutor on this issue meant that the conclusion of the Industrial Magistrate that this charge had been proved was in error.

Charge 4

[103] This was the only charge in which direct responsibility for failure on the part of Mr McDonald was alleged. The charge was that he did not take the "reasonable and necessary" action referred to in the particulars namely that he: failed to ensure that guarding was fitted to the conveyor belt before it commenced operation; failed to ensure any, or any appropriate, risk assessment of the safety of operators was undertaken before the plant was commissioned for use; failed to ensure that operators of the plant were adequately trained; and failed to ensure that procedures and standard work instructions about carrying out maintenance work created and made available.

[104] With respect to the alleged failure to have guards fitted it was submitted for the prosecution that:

(a) the failure had been to ensure that, before operations commenced, that appropriate guards were fitted to the conveyor and that those guards met the minimum Australian Standard AS1755-2000,

(b) he had failed to ensure that any, or any appropriate, risk assessment of the safety of operators was undertaken and that such an assessment should have been of a kind to ensure that the guards met the minimum Australian Standard,

(c) he failed to take reasonable and necessary action to ensure adequate training for those who operated the plant,

(d) Mr Scovell had not received adequate training with respect to the specific task that he was purporting to undertake when he walked up the walkway,

(e) Mr Scovell could not have been adequately trained to appreciate the risk he was exposed to as a result of there being no guard on the relevant nip point or why maintenance could not be performed while the plant was in operation,

(f) the training provided to Mr Scovell was haphazard,

(g) the lack of a guard was not detected during Mr Scovell's training and so he would not have received training to allow him to understand the risk,

(h) he could have reduced the level of risk by ensuring that Mr Scovell was properly trained.

[105] The respondent argued that the training Mr Scovell had received must have been inadequate given his own actions. And that the evidence about who had trained and who was responsible for training Mr Scovell was "vague and unsatisfactory". This part of the prosecution's claim was based almost entirely on inference.

[106] The appellant argued that there was no requirement in the legislation for compliance with Australian Standards. Rather, he was obliged to take any reasonable course of action to ensure that a person was not exposed to an unacceptable level of risk. This was met by the prosecution with a response which adequately answered that argument, namely, that the MCG Safety Health & Environment Management Plan – which had either been written by or reviewed by Mr McDonald – adopted Australian Standards as the minimum applicable for plant and equipment. That standard requires guarding at nip points. The particulars in (a) and (g) proved to the requisite standard.

[107] The balance of the argument about training relied on inferences which were not open to be drawn. The argument for the prosecutor was, in effect, had Mr Scovell been properly trained he would not have engaged in this conduct. He engaged in this conduct, therefore he was not properly trained. Once again, that is an inference which is available but which is not the only rational and reasonable inference open to be drawn. Just as an employer is required to take into account those categories of employee referred to by Windeyer J in *Nymboida*,[24] so must it be the case that the best form of training will sometimes not be rewarded with an employee who complies with that training. In other words, it was not open for the Industrial Magistrate to draw the necessary inference to find that these particulars have been established beyond reasonable doubt.

[108] The final particular of this charge concerns the failure to ensure that standard work instructions as to carrying out maintenance work were created and made available to operators of the plant. The prosecution argued that "procedures and standard work instructions as to carrying out of maintenance of the plant were created by the company, however they were not made available to operators of the plant." This alleged failure to make them available is based upon the evidence that Mr Clough[25] did not locate copies of those documents in the control box after the incident. The prosecutor argued that, assuming that there was a general rule that the operator was not to leave the control box while the plant was in operation, then those particular procedures ought to have been readily available to an operator in the position of Mr Scovell in the control box. It would not have been of any assistance if they were to be kept anywhere else. This does not demonstrate, to the requisite standard, that these documents were not otherwise available to operators. It was incumbent upon the prosecutor to prove the "unavailability" of these documents and the mere absence of them on one or two days does not suffice.

Grounds 4, 5, 5A, 6 and 7

[109] Each of these grounds asserts that the Industrial Magistrate erred in failing to give adequate reasons for the decision that was reached.

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24 *Sherman v Nymboida Collieries Pty Ltd* (1963) 109 CLR 580 at 589.

25 An Inspector of Mines, Department of Natural Resources and Mines.

[110] The degree to which reasons, in a trial without a jury, must allude to or deal with the facts found and the arguments raised was considered in *DL v The Queen*,[26] in which Kiefel CJ, Keane and Edelman JJ said:

> "[32] The content and detail of reasons "will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision". In the absence of an express statutory provision, "a judge returning a verdict following a trial without a jury is obliged to give reasons sufficient to identify the principles of law applied by the judge and the main factual findings on which the judge relied". One reason for this obligation is the need for adequate reasons in order for an appellate court to discharge its statutory duty on an appeal from the decision and, correspondingly, for the parties to understand the basis for the decision for purposes including the exercise of any rights to appeal.
>
> [33] The appellant submitted that the inadequacy of the reasons to identify two or more acts of sexual exploitation and the basis upon which they were found to be proved lay in the trial judge's failure to resolve a number of factual and evidential contests at trial. Not every failure to resolve a dispute will render reasons for decision inadequate to justify a verdict. At one extreme, reasons for decision will not be inadequate merely because they fail to address an irrelevant dispute or one which is peripheral to the real issues. Nor will they be inadequate merely because they fail to undertake "a minute explanation of every step in the reasoning process that leads to the judge's conclusion". At the other extreme, reasons will often be inadequate if the trial judge fails to explain his or her conclusion on a significant factual or evidential dispute that is a necessary step to the final conclusion. In between these extremes, the adequacy of reasons will depend upon an assessment of the issues in the case, including the extent to which they were relied upon by counsel, their bearing upon the elements of the offence, and their significance to the course of the trial. In particular:
>
> > 'Ordinarily it would be necessary for a trial judge to summarise the crucial arguments of the parties, to formulate the issues for decision, to resolve any issues of law and fact which needed to be determined before the verdict could be arrived at, in the course of that resolution to explain how competing arguments of the parties were to be dealt with and why the resolution arrived at was arrived at, to apply the law found to the facts found, and to explain how the verdict followed.'" (citations omitted)

[111] The reasons of the Industrial Magistrate were inadequate in a number of respects. They failed "to give reasons sufficient to identify the principles of law applied by the judge and the main factual findings on which the judge relied". For example, the Industrial Magistrate adopted the submissions of the prosecutor in Part B of the written

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[26] [2018] HCA 26.

submissions, but did not deal with some of the defence contentions except in a very cursory way and did not deal at all with others.

[112] Had these been the only grounds of appeal than I might have been persuaded to remit the matter for retrial. There is no need, though, for that given the findings I have made on the other grounds of appeal. The arguments advanced by the appellant which, in some cases, were not dealt with in the reasons of the Industrial Magistrate have been dealt with on appeal.

Causation

[113] Section 31 of the Act provides for the punishments available, at the relevant time, for a failure to discharge the obligations under the Act:

> "A person on whom a safety and health obligation is imposed must discharge the obligation.
>
> Maximum penalty—
>
> (a) if the contravention caused multiple deaths—2000 penalty units or 3 years imprisonment; or
>
> (b) if the contravention caused death or grievous bodily harm—1000 penalty units or 2 years imprisonment; or
>
> (c) if the contravention caused bodily harm—750 penalty units or 1 year's imprisonment; or
>
> (d) if the contravention involved exposure to a substance that is likely to cause death or grievous bodily harm—750 penalty units or 1 year's imprisonment; or
>
> (e) otherwise—500 penalty units or 6 months imprisonment."

[114] The Industrial Magistrate proceeded on the basis that s 31(b) was engaged and that the prosecution had established beyond reasonable doubt that Mr McDonald's contravention had "caused death". Should that finding have been made in error then a conviction on Charges 1, 2 and 4 should have been entered without the circumstance of aggravation.

[115] In order to establish a circumstance of aggravation, the offending conduct in question need only be a "substantial cause" not the only cause. The prosecution has the onus of establishing beyond reasonable doubt that the conduct which constituted the failure to discharge the obligation was a "substantial" cause of Mr Scovell's death. It is not sufficient to show that there was a possibility or likelihood that the conduct caused the death.

[116] The Industrial Magistrate made the following findings:

> "[42] I find that Mr Scovell's actions of:
>
> 1 walking up conveyor 2 whilst it was operating;
>
> 2 attempting to undertake maintenance work at the change of direction pulleys, whilst conveyor 2 was operating;

> 3 placing his hand near or in the conveyor, whilst is [sic] was operating;
>
> were all relevant factors that gave rise to his death.
>
> [43] However, having regard to the statutory obligations, both the hazard and the risk should have been identified before the plant became operational. Further, the risk should have reduced to an 'acceptable level' by the use of a guard, which was industry standard for nip points where the risk was one of serious injury or death. I accept the prosecution's submissions concerning the relevance and applicability of the Australian Standard to this prosecution. It was, I conclude, the defendants' respective failures to comply with the safety and health obligations as alleged in the complaints that caused the death of Mr Scovell. Had those obligations been met before the plant became operational, or even before he went to work on 5 June 2012, it is very likely that nothing that Mr Scovell did on that day would have resulted in the traumatic death he suffered." (citations omitted)

[117] Mr McDonald argues that it is not enough merely to show that an act or omission resulted in an increased risk of injury – what must be shown by the prosecution is that the defendant's acts and omissions increased the risk of the accident in this case. He relies on *Roads and Traffic Authority v Royal*[27] to support that proposition. That case concerned an accident at an intersection which had been defectively designed in that there was a risk of obscured visibility for drivers at the intersection. While a defect increased the risk of accidents at the intersection, causation was not established because it was found that, in fact, the drivers involved in the accident had good visibility and the defect thereby did not contribute to the accident. Gummow, Hayne and Heydon JJ said:

> "[25] The problem - the danger, the risk - thus discussed, however, had nothing to do with the collision in question. The problem or danger or risk was that where two vehicles were approaching in adjoining lanes, one might obscure the other. That did not happen in this case. It was clear from the evidence of the defendant, the evidence of Mr Relf (driving behind the defendant) and the evidence of Mr Hubbard (driving behind the plaintiff), that the defendant's vehicle was not obscured from the plaintiff's view by another vehicle. In short, even if it could be said that the appellant's breach of duty "did materially contribute" to the occurrence of *an* accident, "by creating a heightened risk of such an accident" due to the obscuring effect of one vehicle on another in an adjoining lane, it made no contribution to the occurrence of *this* accident." (citations omitted, emphasis in original)

[118] There is no precise test which may be applied in cases of this kind. If a jury were to be considering it they would be instructed that to find the circumstance of aggravation proved they would need to be satisfied that the omission was a substantial cause in a common sense and practical way.

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27 (2008) 245 ALR 653.

[119] It must also be remembered that there may be more than one "substantial cause" and that this is not a situation where, as in a civil case, liability may be apportioned on a percentage basis. Mr Scovell's actions could be seen as having contributed more to his death than the omission of Mr McDonald but that does not mean that Mr McDonald's omission cannot be a substantial cause. The cause of death must be sufficiently substantial to enable responsibility for the crime to be attributed to the accused. "Substantial" means "not de minimis".[28]

[120] The presence of a guard would have prevented Mr Scovell putting his arm close to the nip point. I do not accept the appellant's submission that the prosecution has to prove beyond reasonable doubt that, had a guard been present, Mr Scovell would have removed it. That is neither an element of the offence nor a defence which must be disproved. What might have occurred if a guard had been in place is total conjecture.

[121] Causation was established.

Conclusion on convictions

[122] The Industrial Magistrate erred in convicting the appellant on the third charge. The appeal succeeds to that extent but is otherwise dismissed.

[123] The conviction on Charge 3 is set aside and a verdict of not guilty is entered.

Appeal against sentence

[124] As I have found that the appellant was wrongly convicted of one of the charges, that is sufficient to show an error in the sentencing process and thus an assessment has to be made of the appropriate sentence in the new circumstances.

[125] The consequence of the incident was particularly severe. A man lost his life in dreadful circumstances. The legislation is designed to alleviate the risks to workers as much as is practicably possible. The maximum sentence is two years imprisonment.

[126] Other people were convicted and sentenced with respect to this tragedy. GCS was engaged by MCG to construct the plant. GCS and two of its executive officers were prosecuted. They pleaded guilty. GCS was fined $30,000 at end of the two executive officers were each fined $15,000.

[127] Mr Addinsall was fined $35,000. No conviction was recorded.

[128] MCG was convicted and fined $400,000. By that time, MCG was insolvent.

[129] I have taken into account the submissions made in writing and orally with respect to an appropriate sentence. Those submissions were made on the assumption that all convictions would stand. I did not recall the parties to deal with this because both of them had made such comprehensive submissions that there could not have been anything more to take into account apart from the obvious factor that only three of the four charges had been established.

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[28] *Royall v The Queen* (1991) 172 CLR 378 per McHugh J at 449; *Krakouer v Western Australia* (2006) 161 A Crim R 347 at 357.

[130] This is a difficult case. Mr McDonald's culpability was clear. He failed to exercise the required diligence and undertake appropriate precautions. He was required to ensure that the company had appropriate systems in place and he failed to do that.

[131] On the other hand, Mr McDonald has no criminal history. As the Industrial Magistrate put it: he has a long and unblemished record in the industry. He is well regarded in the community and performs public works for the community. He is a family man with four children. His remorse was tangible. The company (MCG) has been wound up and his marriage broke down. He co-operated completely with the authorities and he took substantial and meaningful steps to remedy what he could after the death of Mr Scovell. Counselling was provided to Mr Scovell's family and co-workers. All the costs of the funeral were covered by MCG. Employees were given the opportunity to attend the funeral on full pay and transport was organised and paid for by the company from anyone who wanted to attend. He caused a memorial to be built to Mr Scovell as a reminder of what was lost.

[132] The Industrial Magistrate accepted that the safety of his employees had always been a matter that Mr McDonald had considered of paramount importance and that, had he known that the guard was missing, he would have replaced it within the hour. Her Honour said that there was no suggestion that he was aware that the guard was not in place. That finding is not consistent with other findings made by the Industrial Magistrate about Mr McDonald's knowledge.

[133] Mr McDonald is 48 years old. He was 40 years old at the time of the death of Mr Scovell. These offences occurred over eight years ago, and Mr McDonald has lived with them since then.

[134] The matters that need to be taken into account include, of course, the consequences of the breaches and there must be a sentence which recognises the need for general deterrence. There is also a need for parity to be observed. The appellant argued that the sentences imposed on the GCS defendants were relevant. They may be of limited relevance but as the sentencing Magistrate found that those defendants were the "least culpable" of the defendants charged the sentences imposed on them do not play a large part.

[135] The sentence which is of closest relevance is that of Mr Addinsall. He was an employee of MCG whereas the appellant was, to all intents and purposes, the controller of MCG. While Mr Addinsall was not responsible for the project in the way that the appellant was he still bore similar responsibilities. The differences between the two are sufficient to conclude that this is not a case in which the requirement that like should be treated alike means that they should receive similar sentences. The fine imposed on Mr Addinsall informs the consideration given to the sentence for Mr McDonald but does not determine it.

[136] Other sentences were relied upon by the prosecution and they are outlined in the written submissions. In each case a fine was imposed. But the circumstances of each was so different that they are of little assistance.

[137] On behalf of Mr McDonald it was submitted that the appropriate penalty is a fine with no term of imprisonment involving any actual time in custody and that no conviction should be recorded.

[138] Section 12(2) of the *Penalties and Sentences Act* 1992 provides that in considering whether or not to record a conviction regard must be had to all the circumstances including the nature of the offence, the offender's character and age, and the impact that it will have on the offender.

[139] I have taken into account all that has been put by the parties about the appropriate sentence. I am not satisfied that this is a case in which a conviction should not be recorded. I am satisfied that a term of actual imprisonment is inappropriate given the circumstances of the appellant and that the purposes of general deterrence can be met by the imposition of a sentence the operation of which is suspended.

[140] The convictions on Charges 1, 2 and 4 stand. On each of those charges the appellant is sentenced to a term of imprisonment of 12 months. I order that the whole term of the imprisonment be suspended forthwith. He must not commit another offence punishable by imprisonment within a period of three years if he is to avoid being dealt with for the suspended term of imprisonment.