MAGISTRATES COURTS OF QUEENSLAND

CITATION:	*Guilfoyle v Culverthorpe Pty Ltd* [2019] QMC 17
PARTIES:	**Aaron John Guilfoyle** (Complainant) **v** **Culverthorpe Pty Ltd** (Defendant)
FILE NO/S:	MAG-00070115/19
DIVISION:	Magistrates Courts
PROCEEDING:	Criminal
ORIGINATING COURT:	Toowoomba
DELIVERED ON:	4 October 2019
DELIVERED AT:	Toowoomba
HEARING DATE:	13 September 2019
MAGISTRATE:	G Lee
ORDER:	**Convicted and fined $75,000 refer to SPER. I order the defendant to pay professional costs of $1,500 and $97.95.**
CATCHWORDS:	*Criminal Law – Work Health and Safety – defendant pleaded guilty to an offence of failing to comply with a health and safety duty under section 32 of the Work Health and Safety Act – excavation of 3.6 metre deep trench on a farm for laying of large pipes – high risk construction work – employee of defendant working in the trench – employee trapped from waist down as side of trench collapsed – suffered serious injuries – risk of workers suffering from serious injury as a result of collapse of trench walls – sentence* *Work Health and Safety Act 2011, ss 3, 17, 18, 19, 26A, 32, 275* *Penalties and Sentences Act 1992, ss 9, 11, 12, 13 & 48* *Work Health and Safety Regulations 2011, ss 289, 291, 297* *Code of Practice 2013, Excavation Work*

The following cases were cited:

Hitchcock v Simon Contractors Pty Ltd, (unreported), Magistrate decision 22 May 2017 (MAG00278248/16)

Nash v Silver City Drilling (NSW) Pty Ltd; Attorney General for New South Wales v Silver City Drilling (NSW) Pty Ltd [2017] NSWCCA 96

R v Goodwin; ex parte Attorney General [2014] QCA 345

Reynolds v Orara Packaging Australia Pty Ltd [2019] QDC 31

Reynolds v Tailored Adventures Pty Ltd [2019] QDC 150

Richardson v Ollis Construction Pty Ltd [2019] QMC 5

Safework NSW v Bustin Free Earthworks Pty Ltd [2017] NSWDC 9

Steward v Mac Plant Pty Ltd & Mac Farms Pty Ltd [2018] QDC 20

Williamson v APD Services, (unreported), Magistrate decision 12 January 2017 (MAG 00115079/16)

Williamson v VH & MG Imports Pty Ltd [2017] QDC 56.

COUNSEL: Ms R Lloyd for the complainant

Ms L Willson for the defendant

SOLICITORS: Office of the Work Health and Safety Prosecutor

McNamara & Associates, Solicitors for the defendant

[1] On 13 September 2019 Culverthorpe Pty Ltd (defendant) pleaded guilty to an offence under section 32 of the *Work Health and Safety Act 2011* (The Act) that

> On or about the fourth day of May 2017 at Pampas… [it] was conducting a business or undertaking and held a health and safety duty… pursuant to section 19(1) to ensure as far as was reasonably practicable the health and safety of workers engaged …by [it] while …at work in the business or undertaking and failed to comply with the said duty and the failure exposed an individual to a risk or death or serious injury…

[2] On 3 May 2017 three workers for the defendant commenced trenching work for the laying of irrigation pipes under a closed railway line on the Millmerran Branch line at Pampas. The trench was 3.6 metre deep and 1.8 to 2 metres wide. At about 4:00pm on 4 May 2017, while one of those workers (Mr Russell Ballard) was in the trench, the western wall of the trench collapsed so that he was trapped from the waist down with his hips pinned to the side of the trench. He suffered severe injuries.

[3] The particulars of the charge in the Complaint largely accepted by the defendant are relevantly:

1. Culverthorpe Pty Ltd (CAN 135 130 362) (defendant) was at all material times a company incorporated according to law.

2. The business or undertaking of the defendant is farm work, at a workplace located at 6453 Gore Highway, Pampas, Queensland.

3. At all material time[s], the defendant:

   (a) Engaged workers, including Russell John Ballard, Michael Shane McDonald and Andrew Zilm.

   (b) Was undertaking trenching work at the workplace beneath a closed railway line between Field 8 and Field 10.

   (c) Was laying concrete pipes, measuring approximately 2.44 metres long and weighing over 700kg (pipes) for irrigation.

   (d) Had use of, management and control of earthmoving machinery, namely a Caterpillar 322BL Hydraulic Excavator (plant) operated by Mr McDonald, to prepare a trench to receive the pipes.

4. The trench was approximately 3.6 metres deep and 1.8 metres wide and was "excavation work" and "high risk construction work" as those terms are defined in the *Work Health and Safety Regulation 2011*.

5. The defendant exposed its workers, including Mr McDonald, Mr Zilm and Mr Ballard, to risk.

6. The hazard giving rise to the risk was permitting a worker to enter the trench to work without stabilising its sides to prevent a collapse of the excavation or an object falling into the excavation.

7. On 4 May 2017, Mr McDonald was operating the plant at the workplace digging the trench and lowered pipes into it. Mr Zilm and Mr Ballard were working in the trench guiding pipes into position. Once a pipe was in its final position Mr McDonald turned the plant off and joined them in the trench to assist in connecting pipes.

8. On 4 May 2017 at about 3:00pm[1] Mr Ballard was working in the trench with Mr Zilm and Mr McDonald. The trench collapsed on Mr Ballard pinning his hips to the side of the trench.

9. The risk arising out of the hazard of which the defendant ought to have known is death or serious injury to workers, including the risk of multiple fracture injuries to the hips, spine and ribs of Mr Ballard, if a part of the excavation collapsed.

[1] Although Exhibit 3 (Statement of Agreed Facts) says 4:00pm.

10. The risk of injury materialised when part of the excavation fell and pinned Mr Ballard's lower body resulting in the injuries described in paragraph 9.

11. The defendant did not ensure, so far as is reasonably practicable, the health and safety of Mr Ballard in that it failed to:

    (a) adequately manage the risks to health and safety associated with the excavation work;

    (b) develop an adequate Safe Work Method Statement prior to commencement of the excavation work;

    (c) ensure that the sides of the trench were adequately shored, benched or battered, as described in the *Excavation Work Code of Practice 2013* parts 5 and 6[2];

    (d) ensure that any operating plant was located outside the 'zone of influence' as described in the *Excavation Work Code of Practice 2013* part 4.1; and

    (e) provide adequate information, training, instruction or supervision to workers to protect them from risks to their health and safety arising from the work.

12. Control measures the defendant could have implemented include:

    (a) managing the risk of the excavation and working in a trench in accordance with the *Excavation Work Code of Practice 2013*;

    (b) implementing an adequate Safe Work Method Statement for the excavation work;

    (c) implementing engineering controls necessary to minimise the risk to any person arising from the collapse of the trench, for example (1) benching the trench walls (2) adequately battering the trench walls (3) removing plant and other loads, including excavated material from the 'zone of influence' of the excavation;

    (d) prohibiting excavation work until the trench walls had been stabilised by shoring, benching or adequate battering; and

    (e) providing adequate information, training, instruction or supervision to workers in excavation work.

Background

[4] This summary is drawn from an agreed statement of facts tendered[3].

[5] The defendant, whose Directors are Mr Clive Brownlie and Ms Helen Brownlie, conducts a farm business and at all materials times employed Mr McDonald, Mr Zilm and Mr Ballard. Mr McDonald aged 49 had worked as a farm hand for the

[2] Exhibit 5.
[3] Exhibit 3.

defendant for about 12 years and for 7 years before that he worked for Mr Brownlie. Mr Zilm, aged 56 at the time was employed as a farm manager.

[6] Mr Ballard aged 48 had been employed as a farm hand by the defendant for about six weeks. He was originally employed to do welding repairs to a boom gate. He was not given a formal induction or documented training upon commencement. There were morning meetings to discuss work for the day and its progress. Mr Ballard was being supervised at all times by either Mr McDonald or Mr Zilm.

[7] As outlined in the particulars pleaded, the works involved the excavating and then laying of large pipes under a railway line to provide irrigation to a nearby cotton field. The defendant had applied to Queensland Rail and was granted a 'Wayleave Agreement' to allow it to undertake these works. One condition was that the trench had to be at least three metres deep. In support of that application the defendant prepared a two paged 'work method statement (track safety') which briefly described the work to be undertaken and included a cross section map of the proposed excavation indicating that the walls of the trench would be terraced to avoid the risk of collapse. The project manager was to ensure that shoring was sufficient. Those documents have not been tendered. It is not clear who the project manager was for the purposes of that application. It may well have been the defendant. As Mr McDonald was told to batter[4], it would follow that he was not the project manager.

[8] The defendant did not have a formal protocol for trenching and pipe laying. Emails dated 22 March 2017 and 3 May 2017 from Mr Brownlie to Mr Zilm described the process for excavation and pipe laying and Mr Zilm drew a basic cross sectional diagram of the proposed trenching work. Those emails have been tendered[5]. They predominantly explain the work to be done. There is no reference in those emails to the *Excavation Work Code of Practice* 2013 although there was a reference in the 3 May 2017 email to taking 60 cm of loose soil off the sides of the trench before digging each trench section.

[9] At interview Mr McDonald said that he did not appreciate the extent of battering or benching for this trench and he had not been provided with any formal information, training or instruction for undertaking this work although he had done some previously with the defendant.

[10] Further, no formal information, training and instruction was provided to Mr Ballard in relation to trenching work.

[11] The works commenced on 3 May 2017 at the instruction of the defendant. All three were working and Mr Zilm was Mr Ballard's supervisor. A Caterpillar 322BL Hydraulic Excavator (plant) was operated by Mr McDonald as outlined in the particulars pleaded. The trench was about 3.6 metres deep and 1.8 to 2 metres wide the sides of which were bended to a degree although not as required by the *Excavation Work Code of Practice* 2013.

[12] The agreed facts are that the work was undertaken as described in the particulars pleaded[6]. At about 4:00pm on 4 May 2017 Mr Zilm Mr Ballard were working on

---

[4] See para [16] Statement of Agreed Facts in Exhibit 3.
[5] Attached to the Statement of Agreed Facts in Exhibit 3.
[6] See para [22] Statement of Agreed Facts (Exhibit 3) and para 7 of the Particulars.

the trench floor. Mr Ballard was standing on the eastern side facing north and Mr Zilm was close facing north. The plant was one or two metres from the side of the trench. Mr McDonald was in the trench facing south assisting with a crow bar. Soil began to roll off the western side of the trench which was the same side where the plant was located. Mr McDonald and Mr Zilm managed to escape but Mr Ballard became trapped as described until he was freed after 10 to 15 minutes and flown to hospital. Photos of the plant and trench at the site taken on 5 May 2017 were tendered[7]. A further single photo of the trench showing attempts at benching was also tendered[8].

[13] An investigation took place and the defendant cooperated, provided documents and took part in an interview. Since the incident, the defendant has undertaken a range of safety initiatives including training, documenting processes and safe practices and Best Management Plans. A schedule entitled "Training" for three employees of the defendant including Mr Mc Donald shows training undertaken after the incident from December 2017 to February 2019[9]. This is also supported by the three references tendered in support of the defendant[10].

[14] The hospital discharge summary said to be dated 18 May 2017 (pages 1-7) revealed that Mr Ballard suffered several pelvic fractures including a comminuted fracture of the right acetabulum, right inferior and left superior and inferior pubic rami fractures, a vertical fracture through the left sacral ala (sacrum), and injuries to L5. He also received a urethral injury for which he was given an indwelling catheter. He had surgery to his pelvis and was in hospital for a month[11].

[15] At interview Mr Ballard said he was in extreme pain after the accident and he suffers radial nerve pain. While this has subsided, he experiences numbness from his waist down if standing for more than 10 or 15 minutes. He also suffered erectile dysfunction due to nerve damage. He said he was suffering from anxiety, has PTSD and is currently undertaking psychiatric treatment.

LEGISLATIVE SCHEME

[16] Section 3 of the Act sets out its objects. Relevantly it provides:

> *"**3 Object***
>
> *(1) The main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by –*
>
> *(a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from particular types of substances or plant;…*

[7] Exhibit 4.
[8] Exhibit 8.
[9] Exhibit 11.
[10] Exhibit 12.
[11] The incident occurred 4 May 2017 and the hospital discharge summary was stated in the Statement of Agreed Facts to be dated 18 May 2017. This is only 14 days after the incident. This may be a typographical error as there was no dispute that he was in hospital for a month. The actual discharge summary was not tendered.

(2) In furthering subsection (1) (a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from particular types of substances or plant as is reasonably practicable."

[17] Section 19 of the Act imposes a primary duty of care on certain persons:

*"**19 Primary duty of care***

(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of –

(a) workers engaged, or caused to be engaged by the person; and

(b) workers whose activities in carrying out work are influenced or directed by the person'…"

[18] Section 17 provides:

*"**17 Management of risks***

A duty imposed on a person to ensure health and safety requires the person –

(a) to eliminate risks to health and safety, so far as is reasonably practicable; and

(b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable"

[19] A range of matters to be taken into account as to what is "reasonably practicable" are in section 18:

*"**18 What is reasonably practicable in ensuring health and safety***

*In this Act, **reasonably practicable,** in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including –*

(a) the likelihood of the hazard or the risk concerning occurring;

(b) the degree of harm that might result from of harm that might result from the hazard or the risk; and

(c) what the person concerned knows, or ought reasonably to know, about –

(i) the hazard or the risk; and

(ii) ways of eliminating or minimising the risk; and

(d) the availability and suitability of ways to eliminate or minimised the risk; and

(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk."

[20] Relevantly, a further duty is imposed section 26A:

*"**26A Duty of persons conducting business or undertaking – codes of practice***

A person conducting a business or undertaking must, if the Minister approves a code of practice for the purposes of this Act-

(a) comply with the code; or

(b) manage hazards and risks arising from the work carried out as part of the conduct of the business or undertaking in a way that is different to the code but provides a standard of health and safety that is equivalent to or higher than the standard required under the code."

[21] Codes of practice are approved by the relevant Minister under section 274[12]. Then, section 275 provides:

*"**275 Use of codes of practice in proceedings***

(1) This section applies in a proceeding for an offence against this Act.

(2) An approved code of practice is admissible in the proceeding as evidence of whether or not a duty or obligation under this Act has been complied with.

(3) The court may –

(a) have regard to the code as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code relates; and

(b) rely on the code in determining what is reasonably practicable in the circumstances to which the code relates.

(4) Nothing in this section prevents a person from introducing evidence of compliance with this Act in a way that is different from the code but

[12] See Exhibit 4, *Excavation Work Code of Practice* 2013.

provides a standard of work health and safety that is equivalent to or higher than the standard required in the code."

[22] Relevantly, the Act provides for three levels of offences for failing to comply with a health and safety duty from the most serious (Category 1), to less serious (Category 2) and least serious (Category 3)[13]. For a Category 2 offence section 32 provides:

> *"**32 Failure to comply with health and safety duty – category 2***
>
> *A person commits a category 2 offence if –*
>
> *(a) the person has a health and safety duty; and*
>
> *(b) the person fails to comply with that duty; and*
>
> *(c) the failure exposes an individual to a risk of death or serious injury or illness.*
>
> Maximum penalty
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) For an offence committed by a body corporate – 15,000 penalty units."*[14]

[23] The trenching work in this case falls within the meaning of "high risk construction work" and "excavation work": see the *Work Health and Safety Regulation* 2011 (regulations), ss 289, 291[15], and Schedule 19 (Definitions). While those were pleaded in paragraph 4 of the particulars in the Complaint, they were not specifically referred to in written or oral submissions which relied on provisions of the Act only.

[24] Proceedings for a Category 2 offence are taken in a summary way under the *Justices Act* 1886[16]. The *Penalties and Sentences Act* 1992 (Q'ld) (PSA) applies.

EXCAVATION CODE OF PRACTICE 2013[17]

[25] Although the defendant has conceded noncompliance with the *Excavation Code of Practice* 2013 (the Code), it is convenient to highlight some of its provisions before addressing the submissions. Section 275 (3)(a) & (b) of the Act provides that the court may have regard to the Code as evidence of what is known about a hazard or risk, risk assessment or risk control, and in determining what is reasonably practicable in the circumstances.

---

[13] In Division 5 (Offences and Penalties) in Part 2 (Health and Safety Duties).
[14] A penalty unit is $100; see Section 5(1)(d) of the *Penalties and Sentences Act* 1992 (Qld).
[15] In Part 6.3 (Duties of person conducting business or undertaking).
[16] Section 230(1AA) of the Act.
[17] Approved by the Minister on 1 December 2013 under section 274 of the Act and varied on 1 July 2018. The parties agree that this Code applied in this case. Note that section 274(4C) provides that a Code of Practice expires after five years of approval by the Minister.

[26] The Code provides practical guidance for persons conducting a business or undertaking on how to manage health and safety risks for excavation work. The Code applies to all types of excavation work including trenches[18].

[27] Part 1 of the Code states that excavation failures are particularly dangerous because they may occur quickly limiting the ability of workers to escape. The speed of excavation collapse increases the risk, and consequences are significant which can result in suffocation or death[19]. Trenches are described as "higher risk excavations".

[28] Part 2 of the Code then describes the risk management process to follow in accordance with the duty to ensure the health and safety of workers. The person conducting the business or undertaking must manage risks to health and safety associated with the excavation before work commences. The excavation work should be carefully planned in identifying the hazards, assessing the risks and determining the appropriate control measures in consultation with all relevant persons: see Part 3. The first step in the management process is to identify the hazards, for example the fall or dislodgment of rock or being trapped by the collapse of an excavation. The next step is to assess the risk and to identify which workers are at risk, the cause of the risk, and what control measures should be implemented. The next step is to control the risks where the first aim is to eliminate the risk. If the risk cannot be entirely eliminated, then it must be minimized as much as reasonably practicable. Finally, the control measures put in place should be reviewed including workplace inspection, consultation and analysing records and data.

[29] If the excavation work involves high risk construction work such as digging trenches[20], the person conducting the business or undertaking must prepare a Safe Work Method Statement before the high risk construction work starts: see Part 3.3 of the Code.

[30] Part 4 of the Code lists common hazards associated with excavation work including "ground collapse" and an example of a measure to control the risk being the use of benching or shoring.

[31] For a trench at least 1.5 metres deep the person conducting a business or undertaking must minimize risk to any person arising from the collapse of the trench by ensuring that all sides of it are adequately supported by either shoring by shielding (boxing), benching, battering or a combination of those: see Part 5.1 "Trenching".

[32] When planning the work and selecting appropriate excavation methods and control measures, Part 6 of the Code (Preventing Ground Collapse) outlines a range of considerations including the planned height of the excavated face and if powered mobile plant will operate near the excavation.

[33] Three main types of ground collapse control measures are benching or battering, shoring and shielding (boxing). Benching is the creation of a series of steps in the vertical wall of the excavation to reduce the wall height of the trench. Battering is

---

[18] Scope and application at p. 4 of 47; readers are also referred to the *Work Health and Safety Risks Code of Practice* 2011 for guidance on the general risk management process at p. 6 of 47.
[19] Part 1 "Introduction" at 5 of 47; Part 6 "Preventing Ground Collapse" at 31 of 47.
[20] Section 289 & 291 of the *Work Health and Safety Regulation* 2011.

where the walls of an excavation are sloped back to a predetermined angle to ensure stability. These are the simplest methods of controlling the risk of ground collapse of the excavation walls: Part 6.1 "Benching and Battering". Shoring, commonly used where benching or battering is impracticable, is the use of a positive ground support system such as sheeting, struts and jacks. This is designed to prevent collapse: Part 6.2 "Shoring". Next, there are shields and boxes which are designed to protect workers if a collapse occurs: Part 6.4 "Shields and Boxes".

THE CASES REFERRED TO BY THE PARTIES[21]

[34] At the outset of submissions, there was discussion around reliance on interstate decisions on penalty having regard to *Reynolds v Orora Packaging Australia Pty Ltd* [2019] QDC 31 (Orora) where McGill DCJ heard an appeal by the Complainant against the quantum of fine imposed on the basis that it was inadequate. It concerned a less serious offence under section 47 of the Act with a maximum penalty of 200 penalty units.

[35] After observing that the Act is part of a national scheme of uniform legislation imposing duties in relation to safety and penal provisions for breach of those duties, Mc Gill DCJ said at [12] that although interstate court decisions may be relevant for certain purposes, they would not necessarily be "of much assistance to Queensland Courts" given that sentencing in Queensland is governed by the application of the *Penalties and Sentences Act* 1992 (Q'ld) which is not uniform with sentencing legislation in other states. At [12] & [13] His Honour disagreed with the approach taken in *Williamson v VH & MG Imports Pty Ltd* [2017] QDC 56[22] (Williamson) where the submission by the appellant/complainant in that case was accepted to the effect that in striving to achieve consistency in sentencing a Queensland court "should look to relevant decisions in harmonised interstate jurisdictions for guidance on the appropriate penalty"[23]. A number of New South Wales decisions and one South Australian decision involving section 32 breaches were then relied on in *Williamson* to arrive at a penalty range on appeal: [74] to [76][24].

[36] It seems that a "two stage" sentencing approach is adopted in New South Wales where a head penalty is arrived at and then a percentage discount is given. For example, in *SafeWork NSW v Carroll Springs* [2017] NSWDC 222[25] the court assessed the penalty at $100,000 on a plea of guilty for a section 32 breach and then in accordance with the New South Wales sentencing regime it was reduced to $75,000. Another example is *Boland v Big Mars Pty Ltd* [2016] SAIRC 11 (Boland), a section 32 case referred to in *Williamson*, where the Industrial Magistrate in South Australia determined a head fine of $300,000 being 20% of the maximum, and then reduced it by 20% to $240,000 because of the plea of guilty. Neither of those two cases are trench collapse cases.

---

[21] Complainant's written submissions (Exhibit 1) & the defendant's written submissions (Exhibit 2).

[22] This was apparently the first appeal in Queensland to address the issue of sentencing in the harmonised national work health and safety laws: see para [77]. It was a section 32 case; also noted in *Steward v Mac Plant Pty Ltd & Mac Farm Pty Ltd* [2018] QDC 20 at [116].

[23] *Williamson v VH & MG Imports Pty Ltd* [2017] QDC 56 at paras [68] to [73]; this was adopted in *Steward v Mac Plant Pty Ltd & Mac Farm Pty Ltd* [20] at [117] to [120].

[24] These cases were not cited in the Magistrates Court at first instance. Four Magistrate's Court decisions (not including *Boland*) were provided to the Magistrates Court: [49]; also noted in *Steward v Mac Plant Pty Ltd & Mac Farm Pty Ltd* at [115]. They appear to be Queensland decisions.

[25] Referred to in *Richardson v Ollis Construction Pty Ltd* [2019] QMC 5 at [12].

[37] A similar approach was taken in *SafeWork NSW v Bustin' Free Earthworks Pty Ltd* [2017] NSWDC 9 (Bustin) where a penalty of $120,000 was determined and then discounted 25% to $90,000. That was a section 32 breach in relation to a collapsed trench.

[38] These examples are contrary to the sentencing system in Queensland and contrary to statements made in cases such as *Wong v R* (2001) 207 CLR 584 at [74] & [75] in favour of "instinctive synthesis" sentencing rather than "two stage" sentencing or employing a mathematical approach[26].

[39] At [14] & [15] McGill DCJ said that while regard should be had to interstate decisions on issues that turn on general sentencing principles that equally apply in Queensland, it was "not appropriate to apply unquestionably decisions in other states …which are affected by the terms of the local sentencing statutes".

[40] The approach taken in *Orora* was applied recently in this court in *Richardson v Ollis Construction Pty Ltd* [2019] QMC 5 (Ollis) at [10] to [13] where the defendant pleaded guilty to a charge under section 32 of the Act and was fined $75,000. In that case the worker's left hand was badly injured when using a new circular saw.

[41] In adopting the view in *Orora* that interstate cases should be treated with caution as an indicator of penalty, I received from the prosecutor the published judgment in *Bustin* along with other Queensland decisions.

[42] The parties referred to a number of cases which vary considerably in that some are for different offences with different elements, different features of objective seriousness and differing mitigating circumstances.

[43] Noting the comments in *Orora,* the complainant nevertheless submitted that *Williamson* may assist in providing guidance on a penalty range in this case in support of a submission that an appropriate range is $80,000 to $110,000. The defendant submits that it is of no assistance in determining penalty range. *Williamson* was an appeal by the complainant on the ground that the penalty imposed was manifestly inadequate. In that case the worker sustained fatal injuries after a poorly designed and manufactured gas strut in a folding boat rack hit him in the head. After reviewing interstate cases referred to above in *Williamson*, and after determining a sentencing range of $200,000 to $400,000, a fine of $250,000 was considered appropriate discounted to $125,000. The defendant was a small company.

[44] In another case, the complainant in *Steward v Mac Plant Pty Ltd & Mac Farm Pty Ltd* [2017] QDC 20 (Mac Plant) appealed on the ground that the penalty was manifestly inadequate. That case was concerned with less serious charges under section 33 of the Act (a Category 3 offence) and section 215 of the *Work Health and Safety Regulation* 2011. In that case the supplier of a tractor failed to supply it with a seat belt. The worker, a seasonal backpacker, suffered minor injuries when he was thrown from the tractor he was driving when it ran into a drain off the road. While not cited for parity of penalty, it was submitted that it is useful as it considered relevant sentencing principles along the lines of those considered in *Nash v Silver City Drilling (NSW) Pty Ltd; Attorney General for New South Wales v Silver City*

[26] See also paras [27] & [28] Complainant's submissions and paras [16] & [17] defendant's submissions.

Drilling (NSW) Pty Ltd NSWCC 96 (Nash) which was a section 32 case (Category 2) where an incident on a drilling rig in a coal mine caused life threatening injuries including quadriplegia.

[45] In assessing the objective seriousness of an offence, the New South Wales Court of Appeal in *Nash* said that the risk to be assessed is not risk of the consequence of the incident ie the extent of actual injuries suffered, but the risk arising from the failure to take reasonably practicable steps to avoid the injury occurring. Objective seriousness of the conduct will also be affected by the ease with which mitigating steps could have been taken and the proportionality of the sentence should depend upon an assessment of the particular offence in the context of the penalties imposed by the Act.

[46] The complainant submitted that the decision in *Bustin* provides support for a penalty range of $80,000 to $110,000. A trench collapsed on two workers. One was completely buried. It took four hours to safely remove that worker from the trench. He suffered a dislocated shoulder, lacerations and injuries to his right leg and was absent from work for about six weeks. The other worker suffered fractured ribs, lacerations and a punctured lung and returned to work on restricted duties after two weeks. The risk of trench collapse was addressed in two tool box meetings that morning. These meetings were documented and signed by the workers. The two workers were laying sewerage pipes at each section at a time with some boxing that was not entirely adequate. They were to move the boxing to the next section before laying the pipe in that section. A laser used to indicate the level for the pipes became buried about 25 meters away. They left the section they were working in to locate the laser in a section of the trench that was not boxed when it collapsed.

[47] The defendant in *Bustin* had a Safe Work Method Statement which listed potential risks and control measures for excavation work. In considering the gravity of the offence, the court found that the foreseeability of risk of injury was plain given that the trench was four to five metres deep where it collapsed and that the foreseeability of the consequences was also plain including serious injury and or death. There were measures reasonably available including a failure to arrange a geotechnical report, a failure to ensure the trench was properly benched, battered or shored, and a failure to ensure the provision and proper use of appropriate shoring boxes. While the Safe Work Method Statement was generally adequate, it was overlooked when the workers searched for the buried laser. It was a "one off" type of neglect or oversight on the defendant's part. In applying a two stage sentencing exercise, the court determined the appropriate penalty for a section 32 breach to be $120,000 reduced by 25% for a plea of guilty.

[48] The complainant also relied on the case of *Hitchcock v Simon Contractors Pty Ltd*, a decision of a Queensland Magistrate on 22 May 2017 where a fine of $75,000 was imposed on a plea of guilty for an offence under section 32 of the Act. It was a first offence. At least one worker suffered significant injuries due to a 2.5 metre deep trench collapsing. There was no Safe Work Method Statement and no toolbox meetings were held to discuss the obvious risk of trench collapse. There was full co-operation and assistance given to the investigators; a psychologist was engaged to deal with other employees; there was a fund raising effort and other expenses were covered by the defendant. Significant delay in bringing the prosecution was taken into account in the defendant's favour as well as the fact that it placed the defendant at significant commercial disadvantage. A workplace health and safety

consultant had been engaged more readily and some further training had taken place post-accident.

[49] Interestingly, after referring to *Bustin*, the court in *Hitchcock,* noted there had not been many prosecutions for trench collapses as there were very few comparable decisions. Given the limited number of trench cases referred to in the current case, I tend to agree with that despite the Ms Lloyd's submissions from the bar table that trench collapse incidents are prevalent with 358 cases since 2012. The court in *Bustin* at para [42] noted that the prosecution only found one similar case at the time of that decision in February 2017 and, in relation to trenches, observed that "This may be because the processes are well established, the risks well known and the preventative measures well known and relatively simple".

[50] Regarding penalties imposed in harmonised work health and safety legislation Australia wide, consistent with the later decision in *Orora* discussed above, the court accepted the view that it does not necessarily follow that the same penalty should be imposed Australia wide for each individual State offence. This was after considering submissions about consistency in sentencing Australia wide under Commonwealth law. The court went on to observe that while there may be an expectation for similarity in penalties imposed, each case was to be judged primarily on its own merits. The court then proceeded to sentence having regard to the provisions of the *Penalties and Sentences Act* 1992 (Q'ld). It appears that similar submissions were made in *Hitchcock* that were subsequently made in *Orora*.

[51] The defendant submitted that *Reynolds v Tailored Adventures Pty Ltd* [2019] QDC 150 (Tailored), a section 32 case, is a good example of determining penalty as it postdates *Orora*. This was an appeal by the complainant on the ground that the sentence of a $40,000 fine was manifestly inadequate. The defendant operated zip line courses on Mt Tamborine. Essentially, a zip line consists of a pulley suspended on a cable mounted on a slope to convey persons downhill by the force of gravity. To allow riders to go fast in this case, a magnetic braking system with a reduction line was employed to stop them towards the end of this ride. The injured person was severely injured when the reduction line snapped. She suffered multiple pelvic fractures and a fracture of the sacrum, underwent surgery and released from hospital four days after the incident.

[52] The court in *Tailored* found it difficult to discern an appreciable range of penalties from comparable cases provided by the parties including *Orora* and *Mac Plant*. The court allowed the appeal and considered the appropriate penalty to be $60,000 reduced to $50,000 as it was an appeal by the complainant[27].

[53] The defendant submitted that the decision of *Williamson* and the New South Wales cases relied on are not useful to determine penalty as they pre date *Orora*. Reference was also made to *Williamson v APD Services* (APD), a decision of a Queensland Magistrate on 12 January 2017 and three Queensland Magistrate Court decisions cited a [111] in *Mac Plant* where it was submitted that they may be of "marginal assistance". After citing three Queensland Magistrate Court decisions in APD, a fine of $40,000 was imposed for a section 32 offence where a trench collapsed on a 15 year old who had started an apprenticeship three months before

[27] For the approach taken by an appeal court on complainant appeals see *Orora* at para [7] and the cases cited therein and *Mac Plant* at para [17].

the incident. At first the worker worked in a 30 to 40 cm deep trench to expose cables so that a digger would not damage them. The risk in this trench was minimal. However, that trench joined another trench about two metres deep which the employer had identified as being unsafe to work in. The apprentice was told not to go in it. However, he went in the deep trench to keep out of the way of the digger. The deeper trench collapsed and he sustained injuries. The fact that he was told not to enter the deep trench was a strong mitigating factor balanced against his young age.

SUBMISSIONS

[54] The complainant then made submissions with reference to the sentencing principles under the *Penalties and Sentences Act* 1992 (Q'ld) (PSA) as follows:

[55] This breach requires a significant penalty to denounce the conduct of the defendant in exposing the worker to a hazardous situation and to adequately punish the defendant that is just in all the circumstances: section 9 (1) (a) & (d) PSA.

[56] The penalty should be significant to reflect a need for general deterrence and to address the gravity of the offending in circumstances where there were "no or low cost methods … available to eliminate the risk". Trench cases are prevalent and in this case it was in respect of an inexperienced worker: section 9(1) (c) PSA.

[57] The maximum penalty for a Category 2 offence is $1.5 million. This is to ensure the highest level of protection given to workers: section 9(2) (b) PSA.

[58] The offence was very serious given the significant impact the injuries had on Mr Ballard's life: section 9(2) (c) PSA. The risk of collapse was obvious and identified by the defendant.

[59] The defendant was solely to blame for this offence: section 9(2) (d) PSA.

[60] The mitigating factors identified are (1) a timely plea was entered: section 13 PSA (2) co-operation with the investigation and (3) work health and safety procedures were improved after this incident: section 9(2) (g) & (i) PSA.

[61] The aggravating factors identified are (1) the hazard was the risk of ground collapse (2) the risk was obvious and foreseeable (3) the defendant should have implemented benching and battering in accordance with the *Excavation Work Code of Practice* 2013 (4) the cost of minimizing the risk by using the excavator already on site to batter effectively was nil with a cost of about $300 per day for boxing hire. The cost was minimal compared to the risk. (5) Mr Ballard was inexperienced in trenching work and trusted his colleagues: section 9(2) (g) PSA.

[62] Having regard to those matters the complainant submitted that an appropriate penalty range is $80,000 to $110,000.

[63] At the outset, it was conceded on behalf of the defendant that there was no compliance with the *Excavation Code of Practice 2013* except that some effort was made to bench or batter the trench: see the photograph in exhibit 8 depicting some benching. While the breach was not minor, it was not the most serious.

[64] Trenching work was not a regular activity for the defendant and there may have been a lack of knowledge in that respect. The defendant operates a cotton farm and is a small business. There are two Directors - Clive Brownlie aged 62 and Helen Brownlie aged 53. Three other staff are employed.

[65] The factors in mitigation identified by the complainant were re-iterated on the defendant's behalf: see para [60] above. There is no previous history and the defendant is otherwise a good corporate citizen. In addition, it was submitted that some credit should be given for an attempt at benching of the trench although it fell short of the requirements in the *Excavation Code of Practice* 2013.

[66] The three referees (exhibit 12) speak highly of Mr Brownlie who is very remorseful for this incident which is out of character. Over the years he had been very attentive to safe work practices with extensive protocols on farm operations including holding regular safety meetings. Mr McDonald, one of the referees, has known Mr Brownlie for many years and considers him to be not only his employer but also his mentor. Mr Brownlie also contributes to the community as a volunteer in the Men's Shed including teaching older people exercise routines suitable for activities in the Men's Shed.

[67] It was submitted that Mr Burrows is being looked after with his Workers Compensation Claim. Although there was no information as to Mr Burrow's current health, the injuries sustained are accepted. It was submitted that weight should be given to actions taken after the incident in improving health and safety procedures. Employees have had further training in various respects: see the schedule of training in exhibit 11 and the three letters in support of the defendant in exhibit 12.

[68] An email dated 16 July 2015 was tendered by consent: exhibit 10. The sender and recipient of that email are persons that don't immediately identify with the defendant although it was accepted at the hearing that it had been sent to the defendant around that time. It was an invitation to attend a work health and wellbeing professional development workshop on 21 July 2015. My understanding of the submission is that this supports the view that the defendant had generally not disregarded work health and safety issues.

[69] It was submitted for the defendant that the most helpful case for determining a penalty range is *Reynolds v Tailored Adventure Pty Ltd* [2019] QDC 150 as it postdates *Orora* in which the "two stage" sentencing approach was rejected. It was submitted that an appropriate penalty range is $45,000 to $60,000.

DISCUSSION

[70] There is no dispute that the defendant did not comply with the *Excavation Work Code of Practice* 2013 in various respects and therefore failed to ensure as far as reasonably practicable Mr Ballard's work health and safety as required by section 19(1) of the Act.

[71] No Safe Work Method Statement dealing with Mr Ballard's work health and safety was prepared prior to this work commencing. Any "work method statement" supporting an application to Queensland Rail for the 'Wayleave Agreement' has not been tendered in these proceedings. Assuming that it was in line with how the

excavation work was actually carried out, it falls far short of what is required for work health and safety purposes under the Act. Further, the two emails to Mr Zilm dated 22 March 2017 and 3 May 2017 (exhibit 3) simply deal with instructions on carrying out the work and its specifications. Apart from a reference to removing 60 cm of top soil and to pump out a distribution chamber so as not to wet the excavation area, there is no reference to the dangers of trench excavation work.

[72] While some effort was made to bench or batter the sides of the trench as depicted in exhibit 8, this fell far short of what was required to either eliminate or minimize as far as reasonably practicable the risk of the trench walls collapsing on Mr Ballard working in the 3.6 metre deep trench. Further, there was no shoring. This should have been adequately addressed before Mr Ballard entered the trench.

[73] Mr Ballard was not given any formal instruction or documented training when he commenced his employment with the defendant six weeks prior to the incident. It is clear that he was not experienced in trench excavations. While he was supervised at all times by either Mr McDonald or Mr Zilm[28], I note that Mr McDonald had not been provided with any formal information, training or instruction on trench excavations either. His lack of expertise in trench excavations is evident when Mr Mc Donald said at interview he was told to batter but did not appreciate the extent of battering or benching required. There is no mention in the Statement of Agreed facts whether or not Mr Zilm, a farm manager, had received training on trench excavations. Given the way the trench work was undertaken with Mr Mc Donald, and the lack of any reference in the two emails sent to him about the risk of trench collapse, I would infer that he received no formal information, training or instruction on trench excavations.

[74] Morning toolbox meetings took place where the three workers discussed the work for the day. These meetings were not documented and the Statement of Agreed Facts does not refer to any work health and safety issues being discussed unlike *Bustin* for example, where toolbox meetings held on the morning of the incident specifically discussed the dangers of trench collapse and were documented and then signed off by the workers[29].

[75] It is apparent that the defendant has failed to manage the risks to health and safety of Mr Ballard as outlined in paragraph [28] above. At best for the defendant, insufficient thought was given to identifying the hazard, namely a collapse of the trench wall. Secondly, it has failed to adequately assess the risk, identify which workers are at risk, the cause of the risk and then determine appropriate control measures that should be implemented. Thirdly, there was no control of any risks with the aim of eliminating them. The attempt at some benching or battering did not come close to complying with the process above.

[76] The control measures the defendant could have implemented are those pleaded at para [12] of the particulars at [3] herein.

[77] In assessing the objective gravity of the offence, the New South Wales Court of Criminal Appeal in *Nash v Silver City Drilling (NSW) Pty Ltd; Attorney General for*

---

[28] Para [7] Statement of Agreed Facts (exhibit 3). Para [17] states that Mr Ballard's supervisor was Mr Zilm on 3 May 2017.

[29] See paras [18] & [25] of the judgement.

New South Wales v Silver City (NSW) Pty Ltd [201] NSWCCA 96 (Nash)[30] noted that there is greater culpability for an event that is probable than one which is unlikely. In assessing culpability, other considerations are potential consequences of the risk, the availability of steps to remove or minimize the risk having regard to what is "reasonably and practicable" in section 18 of the Act and whether those steps are complex, burdensome or only inconvenient[31].

[78] It was further emphasized in *Nash* that "the risk to be assessed is not the risk of the consequence, to the extent that a worker is in fact injured, but is the risk arising from the failure to take reasonably practicable steps to avoid the injury occurring"[32].

[79] I note that the approach taken in *Bustin,* a section 32 trench collapse case in New South Wales[33], seems to be consistent with the approach taken in *Nash*.

[80] These observations have been adopted in Queensland: see *Mac Plant* at [68] - [69]. In *Orora*, although not fully argued, while highlighting the different sentencing regimes between Queensland and New South Wales, McGill DCJ considered that the approach in assessing culpability as outlined above in *Nash* was "at most an approach relevant to the assessment of the objective seriousness of an offence under that or an analogous provision in Queensland". Noting that *Nash* was a section 32 case, *Orora* was concerned with a far less serious offence that was not analogous to the more serious charge under section 32[34].

[81] I agree with submissions for the complainant that the hazard was the risk of ground collapse and the risk was obvious and foreseeable. The defendant should have implemented benching, battering or shoring as required by the *Excavation Work Code of Practice* 2013. The cost of using the plant on site to bench or batter as required was nil and the cost of boxing would be about $300 per day to hire. This cost is minimal compared to the risk involved. Further, Mr Ballard was inexperienced with trenching and he trusted his colleagues, who I find, had also not received appropriate training in trench excavations. These aggravating factors are to be balanced with mitigating factors including entering a timely plea, co-operation with the investigation and improved work health and safety procedures post incident.

[82] In respect of post incident conduct, it was submitted for the defendant that this should be taken into account as a mitigating factor. As noted in *Mac Plant*, care must be taken giving credit for remedying things post incident which should have been done in the first place. The Act is directed to preventative measures and not ex post facto measures and requires positive steps to ensure workers have safe working environments[35]. Accordingly, only limited weight may be attributed in mitigation.

[83] In assessing penalty in this case, I adopt the approach taken in *Mac Plant*[36]:

---

[30] Decision date was 16 May 2017.
[31] At paras [34], [41] & [42] per Basten JA (with whom Hoeben CJ and Walton J agreed).
[32] At para [53] per Basten JA.
[33] Decision date was 2 February 2017 before the decision in *Nash* on 16 May 2017.
[34] Para [22] to [23] in *Orora* where the charge concerned with was under section 47 of the Act (Duty to Consult Workers) with a maximum penalty of only 200 penalty units..
[35] Para [92].
[36] At para [105].

> *"The assessment of the objective seriousness of the offence is to be carried out in accordance with [section] 9 of the PSA, in particular, having regard to any aggravating and mitigating circumstances, and having regard to the principles enunciated in [Nash] under the equivalent Work Health and Safety legislation."*

[84] The cases referred to by the parties do not establish a clear sentencing pattern in Queensland. I note that Fraser JA in *R v Goodwin; ex parte Attorney General* [2014] QCA 345 at [5] said:

> *"…Comparable sentences assist in understanding how those factors should be treated, but they are not determinative of the outcome and they do not set a "range" of permissible sentences. Whether or not a sentence is manifestly inadequate or manifestly excessive is not to be decided by reference to a predetermined range of available sentences but by reference to all of the factors relevant to sentence. Because sentencing involves a case – by – case synthesis in which past sentences may be used only as guidelines and are not determinative, there can be no underlying range of available sentences for a particular case which may be narrowed or broadened over time by subsequent sentencing decisions …"*

[85] It was submitted for the defendant that this court should completely disregard Queensland cases that predate *Orora* because it disapproved of the approach taken in *Williamson* to the effect that a sentencing court "should look at …decisions in harmonised interstate jurisdictions for guidance on appropriate penalty". I do not agree that cases prior to *Orora* should be entirely excluded from consideration. McGill DCJ in *Orora* did not say that. Rather, he said that they should not be applied "unquestionably" in relation to the local equivalent of the Act affected by "local sentencing statutes"[37]. Further he said that regard can be had to interstate decisions to the extent that they turn on general sentencing principles that equally apply in Queensland[38].

[86] It was submitted for the defendant that case summaries regarding other prosecution outcomes ought not to be admitted in these proceedings on the basis that they are not transcripts of full sentencing remarks and that the only proper way for a court to truly consider the circumstances of previous cases is to look at the full transcripts. On that basis I rejected a schedule summary of cases tendered by the prosecution. Despite that submission, it was then submitted that the case summaries given to the Magistrate at first instance referred to in *Mac Plant* at [111] may provide marginal assistance. For the same reason I find them of no assistance. For the same reason I also find *APD* of no assistance[39]. It seems that those cases, along with *Tailored* form the basis for the defendant's range of $45,000 to $60,000.

[87] In determining the penalty in this case, I do not find *Tailored* to be of great assistance. It is entirely different. As noted earlier, a reduction line snapped resulting in the person riding a zip line colliding at the end of the ride in a theme type park. The operator had taken a number of steps to ensure safety and it was

---

[37] At para [15].
[38] At para [14].
[39] Another transcript of *Heath v Boland Cranes Pty Ltd*, delivered 13 February 2019, was mentioned in the defendant's written submissions but it was not handed up at the hearing.

noted that 786 customers had completed that course without incident[40]. The court found that there were "considerable mitigating features"[41].

[88] The decision of *Hitchcock* referred to at [48] to [50] herein delivered on 22 May 2017, is a section 32 trench collapse case. A fine of $75,000 was imposed. Contrary to submissions for the defendant[42], in my view it provides assistance in circumstances where, after referring to *Bustin*, the Queensland Magistrate heard submissions about sentencing practices by State courts in respect of Commonwealth offences compared with sentencing practices of State courts in respect of harmonised Australia wide State based legislation. While he said there was an expectation for a similarity in penalties imposed, each case was to be determined on its own facts. The Magistrate then proceeded to sentence having regard to section 9 of the *Penalties and Sentences Act* 1992 (Q'ld) and he was cognisant of the differences in sentencing in New South Wales where he said that section 48 of the PSA does not apply in New South Wales. In my view, it is not correct to say that *Hitchcock* relied purely on a two stage sentencing process.

[89] That case has some features similar to the current case. The injured worker, aged 51 years, sustained significant injuries when a 2.5 metre deep trench collapsed on him. There was noncompliance with the Code of Practice, no Safe Work Method Statement prior to the work starting, and inadequate benching with no shoring. There was full co-operation and assistance in the investigation, post incident fund raising efforts, engaging a psychologist to help other employees, and further training as well engaging a work place health and safety consultant. No toolbox meetings were held in that case. In the current case there were morning tool box meetings about the work for the day but it appears there was no discussion specifically directed to the dangers of working in a 3.6 metre deep trench. There was significant delay in bringing the prosecution in *Hitchcock* and this was found to have a significant financial impact on the defendant in that it affected its business. Unlike the present case, information was provided about the defendant's capacity to pay a fine to address section 48 of the PSA. These were mitigating factors taken into account. Delay as a mitigating factor was not advanced in the current case and there was no financial evidence or submissions to support a conclusion that the defendant's business was impacted significantly as a result of the prosecution.

[90] While *Bustin* should be treated with caution regarding the fine imposed under the New South Wales sentencing regime, it illustrates the differences as to what the employer did in that case as opposed to the present case. In *Bustin* the employer had in place an adequate Safe Work Method Statement prior to commencement of the works and tool box meetings held were documented and dealt specifically with the dangers of trench collapse. In this case, there was no Safe Work Method Statement in accordance with the Act and while there were tool box meetings, these were not documented. While the work was discussed, there is nothing to suggest in the Statement of Agreed Facts to indicate that dangers of trench collapse were specifically discussed. In *Bustin*, the court found that the site manager, who was partially trapped by the trench collapse and who was fully aware of the dangers, overlooked the dangers in the moment to recover a buried laser that affected his current work in that part of the trench that was shored. It was found that this was

---

[40] Noted at para [93] in *Tailored*.
[41] At para [110] in *Tailored*.
[42] At para [11] of those submissions.

not a systemic failure. In the current case, apart from some attempt at benching or battering, nothing else was done and it is apparent that all three workers were not fully trained for trench work. There was no formal protocol for trenching and pipe laying[43]. In short, it would appear that the employer's culpability in *Bustin* is less than that of the defendant in this case.

[91] Sentences imposed in Queensland are governed by section 9 of the PSA entitled 'Sentencing Guidelines". In particular section 9 (1) provides that the purposes of sentencing are to punish the offender to the extent it is just, to help rehabilitation, to deter the offender and others, denunciation, and to protect the community. This is a first offence so that rehabilitation is not considered to be at the forefront. To an extent personal deterrence is tempered here given the acceptance of responsibility and expressions of remorse. Also, further steps to enhance work health and safety post incident have been taken. General deterrence and denunciation are most important and must play a significant part in assessing penalty. There was no Safe Work Method Statement as required under the Act and the risk was not identified let alone assessed as required by the Act prior to the work commencing.

[92] Regard must be had to the factors in section 9(2) of the PSA some of which have been referred to including the maximum penalty prescribed ($1.5 million), the seriousness of the offence, the extent to which the defendant is to blame, any injury caused by the defendant, the defendant's character, any aggravating or mitigating circumstances, the prevalence of the offence and co-operation. For reasons expressed earlier, I do not accept that trench collapse cases are as prevalent as was suggested at the hearing. As to character, a court may consider previous convictions, significant contributions to the community and other relevant matters: section 11 of the PSA. The defendant has no previous convictions, has contributed to the community and I find is of good character.

[93] It is clear that this offence was serious in terms of section 9 (2) (c) PSA. The risk of trench collapse was foreseeable and the risk of serious injury or death as a result was also foreseeable. The measures available to avoid that risk referred to above were readily available but were not employed. Mr Ballard, inexperienced in trench excavations, sustained serious injuries requiring surgery and hospitalisation for a month. He was supervised by persons who had received no specific training in trench excavations.

[94] In considering a fine, section 48 of the PSA provides that the court must, as far as practicable, take into account the financial circumstances of the defendant and the nature of the burden that payment of a fine would be on the defendant. Unlike in other cases such as *Hitchcock*, *Bustin* and *Ollis*, but like *MacPlant*[44], no evidence by affidavit or otherwise has been provided as to the defendant's financial circumstances. There is also no evidence as to nature of any burden that the defendant would suffer by payment of a fine. Therefore, these matters are not an issue.

[95] Taking into account all of the matters above including the mitigating and aggravating factors, the defendant is fined $75,000.

---

[43] Para 12 Statement of Agreed Facts.
[44] At para [143] in *Mac Plant*.

RECORDING OF A CONVICTION

[96] It was submitted for the defendant that it consents to the recording of a conviction. As I understand the submission, this demonstrates remorse to some degree. It also contributes to addressing denouncement and general deterrence[45]. This is despite the fact that this is a first offence. Although it was submitted for the complainant that this was a serious offence, the issue was not seriously agitated at the hearing. Section 12 of the PSA governs the matters to be taken into account as to whether or not a conviction is recorded. No authorities have been provided on this point. My view is that the recording of a conviction is entirely within the discretion of the court and not a matter of consent. In this case, while the offence is serious, it is not so serious as to warrant the recording of a conviction for a first offence committed by the defendant who is a good corporate citizen and otherwise of good character.

ORDERS

[97] The defendant is fined $75,000 which is referred to the State Penalties Enforcement Registry (SPER). I order the defendant pay professional costs of $1,500 and a filing fee of $97.95. No conviction is recorded.

Graham C. Lee

Magistrate

[45] At Para [21] defendant's submissions.