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NORTHERN TERRITORY OF AUSTRALIA

LOCAL COURT

No: 22005556

WORK HEALTH AUTHORITY

and

HEWITT CATTLE AUSTRALIA PTY LTD

JUDGE BORCHERS

TRANSCRIPT OF PROCEEDINGS

AT ALICE SPRINGS ON 8 SEPTEMBER 2020

Transcribed by:
Epiq:

HIS HONOUR: The defendant, Hewitt Cattle Australia Proprietary Limited, referred to in these remarks as Hewitt Cattle, has pleaded guilty to contravening ss 32 and 19 of the *Work Health and Safety (National Uniform Legislation) Act, 2011*.

The actual offence committed on 8 February 2018 was that Hewitt Cattle, having a health and safety duty under s 19 of the legislation, failed to ensure, as far as reasonably practicable, the health and safety of two workers and that that failure exposed those two workers to a risk of serious injury or death.

A plea of guilty in this offence entered by Hewitt Cattle before this court on 19 August 2020 is an early plea which, pursuant to subs (2)(j) of s 5 of the *Sentencing Act* must be given consideration in determining the appropriate penalty which in respect of this offence carries a maximum pecuniary penalty of \$1.5m. The offence is one of strict liability.

The circumstances surrounding the offence have been read out on to the record and accepted by Hewitt Cattle. However, briefly, those facts are as follows:

Hewitt Cattle carries out business as a sheep and cattle producer owning a number of agricultural properties in New South Wales, Queensland and the Northern Territory, including the Ambalindum Perpetual Pastoral lease which it purchased in 2017. It has been in business for 30 years.

On or about July or August 2017 Hewitt Cattle agreed with Titanium Building Group to carry out works at Ambalindum. On 31 August 2017 that company was deregistered. However, Ryan Watts, who was working for Titanium, continued the works as a sole trader. Hewitt Cattle provided Ryan Watts with a work health and safety management system general contractor induction handbook, a contractor induction checklist and an induction form and contractor agreement and safety pack policy. Both Ryan Watts and his subcontractor, Reece Brookes(?), completed and signed the contractor agreement acknowledging they had received the general induction handbook and confirming that they would observe all matters set out in the contractor work health and safety policy while working at Ambalindum.

Hewitt Cattle provided a telescopic handler to Ryan Watts for his use while undertaking the works. The telescopic handler is a self-propelled, seated operator wield machine, featuring an extended boom capable of being lifted to a height of 9.5 metres, with a carriage mounted at the front of the boom that could be adapted for a number of different purposes including a man cage, which had been designed and constructed for Hewitt Cattle by a qualified boiler maker.

In the tele-handler cab was an operator manual which relevantly provided that attachments to the boom were to be checked before each use with specific mention given to the locking mechanisms. Hewitt Cattle permitted Ryan Watts and his subcontractor to use the tele-handler with the man cage attached and relied upon them to operate it in accordance with the instructions in the operator manual and in accordance with its work health and safety policies.

On 8 February 2018 at approximately 7 am Ryan Watts and Gary Clarke(?) were in the man cage fitting downpipes to a large open shed. Reece Brookes was operating the tele-handler, in particular, raising and lowering the boom as required. At approximately 7:30 while lowering the cage, while a third downpipe was being installed, a fork attachment to the man cage separated from the boom and it fell to the ground from a height of approximately 2.5 metres. Both Watts and Clarke were injured and were eventually evacuated by the Royal Flying Doctor Service from Ambalindum to the Alice Springs Hospital.

Hewitt Cattle's failure in respect of its duties towards the two injured workers in their use of the tele-handler pursuant to subs (3)(f) of s 19 which resulted in them being exposed to serious injury and/or death were as follows:

1. A failure to provide an induction briefing and training in the use of the equipment over and above access to the operator manual;
2. A failure to ascertain that the workers were appropriately trained in the use of the equipment;
3. A failure to ascertain that the workers had conducted a risk assessment in respect of the development works, in particular, the risk of using the tele-handler to elevate the workers; and
4. A failure to verify that the workers were using the appropriate protective equipment as necessary when undertaking the relevant works.

In effect, Hewitt Cattle had relied on its written processes regarding work health and safety but had not implemented them in a practical hands-on manner. It relied on its policies and processes without having regard to its duty in the practical implementation of those policies and processes.

There are two additional issues that arise out of this failure. Firstly, it is accepted that flipping the tele-handler was not of itself unsafe. It was not unfit for the purpose for which it was being used. Investigations did not reveal any failure in its design or maintenance.

Secondly, Ryan Watts owed a duty to his own subcontractors notwithstanding that Hewitt Cattle owned the tele-handler. He agreed to use that equipment in undertaking the works at Ambalindum and provided it to his subcontractors.

However, in noting Ryan Watts' duty this does not absolve Hewitt Cattle from its responsibilities under the relevant legislation as s 16 provides that although more than one person can concurrently have the same duty each must comply with that duty and not abrogate it. Section 272 also provides that any duty owed under the act cannot be excluded, modified or amended by agreement.

Ryan Watts and Gary Clarke were injured. The full extent of Ryan Watts' injuries were not detailed. However, it was agreed that he suffered serious injuries to both

knees. He had two knee reconstructions and continues to receive physiotherapy on both his legs and one ankle.

Gary Clarke suffered spinal injuries, fractures to his T9 sacrum. He remained in hospital for five days but has been unable to return to work. He has a permanent disability, cannot ride his motorbike, carry out daily activities without suffering pain and is suffering from depression. He is prescribed medication for depression and pain. He does not sleep properly and is particularly concerned about his future.

The gravity of the consequences of the accident that occurred on 8 February 2018 do not of themselves dictate the seriousness of the offence or the amount of the appropriate penalty. Of course, however, the occurrence of death or serious injury may be relevant in the consideration of deterrence and will be an issue as to whether the accident arose from systemic failure of practices or failures to have regard to foreseeable risk.

Southwood J in *Damday Pty Ltd v Work Health Authority* [2014] NTSC 7 considered the main factors which affect the level of objective seriousness of an offence against s 55 of the *Workplace Health and Safety*, Northern Territory. He identified nine separate matters of which the following appear to be relevant:

1. Foreseeability, that is, the likelihood of risk and harm occurring: in this matter once the locking mechanism to the main cage had not been secured, a matter that should have been dealt with, the accident was highly likely;
2. Prevalence of such accidents: it was put to this court and not objected to that it is not uncommon for workers to fall from heights and be injured and, in fact, 28 percent of serious injuries occur in this manner.
3. Whether a risk assessment had identified the breach of duty; and
4. Whether that breach was the result of inadvertence, oversight or deliberate. Here it was oversight in not forensically inspecting the locking mechanism.

Further, it is agreed that Hewitt Cattle easily have managed the risk by physically monitoring its policies and procedures when equipment was being used in a proactive manner.

All these matters have previously been acknowledged by the Federal Court in *Comcare v The Commonwealth of Australia* [2017] (inaudible). It is accepted by counsel for the Northern Territory Work Health Authority that Hewitt Cattle's culpability in its failure to undertake its duties to its workers at Ambalindum is at a lower level.

In determining the appropriate penalty this court must have regard to the principles of general deterrence. The penalty must be such as to compel attention to occupational health and safety generally to ensure that workers whilst at work will not be exposed to risks to their health and safety. The penalty imposed in relation to

this offences must provide for general deterrence. Employers must take their obligations imposed by the Act very seriously. The community is entitled to expect both small and large employers to comply with safety requirements. There is also a need for specific deterrence as Hewitt Cattle continues with its business and employs approximately 80 workers.

In mitigation this court notes that Hewitt Cattle has no prior convictions. It takes its corporate responsibilities seriously. The incident on 8 February 2018 has resulted in a reconsideration of its health and safety procedures:

1. It has replaced all man cages on all tele-handlers on all its properties with an enhanced design to facilitate greater safety;
2. It has altered its procedures regarding risk assessments in relation to equipment specifically required all tasks to be subject to a more rigorous risk assessment;
3. It has changed its assessment processes in respect of contractors and procurement which are now, amongst other matters, assessed against health and safety standards; and
4. It has employed a work and health safety manager who has appropriate professional qualifications and experience.

In addition to these matters it is submitted that Hewitt Cattle takes its responsibilities towards its workforce seriously. It provides employment pathways through a growth and opportunity program. It also addresses wider health and wellbeing issues through its confidential assistance program. It mandates GPS tracking on all employs located on remote properties.

Finally, it is accepted that Hewitt Cattle involves itself in the local community by sponsoring local sporting clubs and providing its company aircraft for medical purposes. It is submitted that for all these matters an inference should arise that there will be no repetition of its failure of duty towards its workforce. Finally, I note that Hewitt Cattle cooperated with NT WorkSafe in this matter.

I take into account therefore Hewitt Cattle's good character, no prior convictions, its remorse, good prospects of not reoffending, its plea of guilty and its cooperation with NT WorkSafe. And I have taken into account that the offence is at the lower end of the range of offending of this type.

A conviction is warranted. It is a punishment in itself and it reflects community disapproval for this type of offending. I have considered all the authorities I have been referred to. While many deal with falling injuries the circumstances differ particularly in respect of the issues of foreseeability and risk. However, they do provide some assistance to this court.

Accordingly, Hewitt Cattle will be convicted and fined \$30,000 with a victim's levy of \$1,000 and costs set at \$1,515.

Is there anything further, Mr Thomas?

MR THOMAS: Nothing further from me, thank you, your Honour.

HIS HONOUR: Mr Hardman?

MR HARDMAN: Nothing further, your Honour.

HIS HONOUR: Thank you both for your assistance. That completes this matter. I'll terminate the telephone with both of you. Thank you.

ADJOURNED