_____

NORTHERN TERRITORY OF AUSTRALIA

LOCAL COURT

No: 21246982

WORK HEALTH AUTHORITY

and

ARAFURA PLUMBING PTY LTD

(Sentencing Remarks)

MR P.MALEY, SM

TRANSCRIPT OF PROCEEDINGS

AT DARWIN 9 OCTOBER 2013

Transcribed by:
DTI

HIS HONOUR: The defendant, Arafura Plumbing Proprietary Limited was originally charged with three offences, one of which was withdrawn – count 1. A hearing commenced yesterday primarily in respect of count 2, and ultimately a plea of guilty was entered in respect of count 3 but a hearing of the facts in relation to some mitigatory matters then commenced.

The preliminary point in relation to count 2 was ultimately determined by the court, and a finding of guilt was entered in respect of count 2 also. Submissions were made, and now after having received some comparatives from counsel and read that, the matter is ready to proceed to sentence this afternoon.

The facts are highly unusual, and I can say from the outset I've read carefully all of that material that was provided and really, to be perfectly frank, it is of only marginal relevance given the highly unusual factual circumstances here.

Without trawling through each and every one of the cases I read, in a general way they usually involved situations of ongoing significant breaches involving many employees, and sometimes involving, in fact, explosions where people were hurt – and in some situations – killed.

There were some matters of principle touched upon, but matters which really are common sense and contained in s 5 of the Sentencing Act and in regard to the usual Common Law principles.

Both counts 2 and 3 really flow from the same factual matrix, and whilst technically, of course, they stand as separate counts – and I think quite properly the prosecution chose to proceed on both, and there was no quibble from counsel for the defendant that there was some sort of requirement for an election or double jeopardy, but they are closely linked.

One is effectively the failure to comply with a prohibition notice between the 16th and 18 June, and of course the third count is the count of – for want of a better phrase – of more substance than being a person conducting a business or undertaking that had a health and safety duty, namely contrary to s 19, did fail to comply with that Act.

A number of particulars which were provided, and in any event, the particulars are largely subsumed by the fact we heard evidence. Witnesses were called, they were cross-examined, and ultimately and quite sensibly – given it's the onus of proof upon the prosecution to prove these disputed facts beyond reasonable doubt - the number of concessions (inaudible) and quite the significant concession of which have changed the perplexion and the level of moral culpability significantly.

In a very general summary, the defendant operates a plumbing service in the Northern Territory. It's a business which was incorporated in 1996. It is described as a business employing 13 people (inaudible) six plumbers, with a turnover of approximately one million dollars per annum utilising and servicing one client, and by all accounts is a profitable business, one which is currently on a month to month

retainer with that client - subject to the negotiation of an ongoing contractual arrangement to provide those services.

There's no dispute that on 22 May 2012 a verbal direction was given and subsequently a prohibition notice number 2012PBN0049 served on the employer's place of business. There was a bit of an exchange between the respective parties, but really nothing turns on that.

We've got a small business operator feeling the pinch and I suspect of the day to day operations of business, feeling that the government bureaucracy and the regulatory services are putting pressure on his business. But there's absolutely no doubt that the regulatory service in this particular situation has an important job to do, and they have behaved properly.

There should be no criticism at all on the way that they have conducted themselves, quite the contrary. An observation was made, appropriate enquiries were made, and by all accounts there are no findings in terms of the findings of that which I'm going to make, which are critical of the way they have conducted themselves during the course of their interaction on 22 May 2012 - both at the roadside and also at the place of business - and similarly in relation to the conduct of NT WorkSafe officers and the West Lane car park on 18 June 2012.

The highly unusual circumstances are, I suppose, the essential parts of it – it seems confirmed, and I find it as a matter of fact – that Damien Mahoney was required to attend a particular job in town at the Darwin Plaza. He lives in town, he drove straight to the particular premises. There was a need for acetylene.

It seems that the business has already put in a number of procedures and mechanisms to a) insure compliance with the prohibition notice but also, quite properly, to protect its employees. There was a crimping mechanism used to seal pipes, and it seems that some gas cabinets had already been installed, and other safeguards built into the fleet.

The particular vehicle didn't have a gas bottle cabinet, and it was a vehicle being driven by Mr Mahoney Junior on that day. He contacted the proprietor of the business who is his father, and arrangements were made for an acetylene bottle and an oxygen bottle to be delivered to the worksite.

It's conceded by the prosecution and there's nothing to contradict this. I find as a matter of fact that the bottles on a small red trolley were delivered to the van that was parked in the West Lane car park. The acetylene valve was not connected, and that's patently obvious by exhibit P5.

The prosecution don't cavil with, and accept that a number of safeguards were also taken aboard by the director, Mr Mahoney, when the bottles were delivered. That is a water test, and the bottles were turned off at the base tap. There were some procedural safeguards put into place which show a level of common sense.

The acetylene was in the vehicle for approximately 30 minutes, and that's an exceptional situation. I'm a bit concerned about how it was going to get back to the workshop, and the court may be entitled to infer that it was going to be driven. In any event, I don't make any inference. The only base upon which this matter falls to be sentenced now is that the bottles were delivered.

It seems they were placed in the rear of the van. They were there for a period of 30 minutes. The valve was checked, there was a water test, they were placed on a platform, they were in an area which was – though not properly ventilating – apparently there was a hole which allowed for some ventilation.

They are powerful mitigatory matters which really put this matter in a completely different category from the normal matters which have come before other courts, in the material which I read over the luncheon adjournment.

The defendant has no history. The defendant has been a good corporate citizen employing good local folk. The NT WorkSafe officers, their response on 18 June was appropriate in all the circumstances, and there's no criticism at all directed towards them.

On those facts, the offending is at the lower end of the spectrum. It's an offence which obviously the legislature has considered very seriously, carrying half a million dollars in terms of fines for both offences. They are significant fines which obviously the court, when dealing with these matters, can take into account the parliament.

The people of the Northern Territory, through their parliament, have formed the view that these are serious matters, and the community has real concerns about the way in ensuring there are safeguards in place to ensure that people are in a safe work environment.

Employers have that obligation to ensure that they provide a safe work environment and that the person's health and safety are a paramount concern to the employer.

They are the salient facts, of slightly more marginal relevance but still I think they are important from a sentencing perspective, and it was certainly a part of the material yesterday before the court. Counsel made submissions on them. Both counsel touched upon this.

It's conceded that the corporate defendant had put into place a number of rectification methods. Modifying vans, called toolbox meetings when they were first spoken to on 22 May, and ensured that its workers were aware what's happening. Seems there was a practise where if acetylene bottles were required then they were delivered to the site in an open ute and carried in an appropriate and proper way, and there's certainly evidence to the contrary(?).

That goes significantly in the favour of the defendant. Mr Clift made a submission that the court should – given those matters – exercise its discretion not

to convict the defendant. Section 8 of the Sentencing Act creates a structure for when the court needs to exercise its discretion and must have regard to the circumstances when considering whether or not to convict.

There are three disjunctive limbs. Effectively, the character, the extent to which the offence of a criminal nature(?), and the extent to which the offence was committed under extenuating circumstances. Even having regard to one or all of those disjunctive limbs, there's overriding discretion that needs to be exercised. Is it, in all the circumstances, an appropriate exercise of this court's discretion to convict or not convict?

There is no material before this court to the effect that a conviction would invariably result in the loss of the single contract, which albeit is on a month to month basis and subject to review.

There is – and I accept what Mr Clift has said – that on instructions there is now a requirement for the contractor that offended in this particular situation to disclose to the principal contractor whether they have been charged or convicted of any offences.

I'm not sure how much can be read into that. I suspect that the services provided by the defendant to its single client, and the level of satisfaction would be the most significant matters any principal contractor would take into account. There can be no proper inference drawn as to what would be the effect of a conviction or not, having regard to that material.

In all the circumstances the court will not exercise its discretion to not record a conviction, and convictions will be recorded for both counts 2 and 3. In terms of penalty, as I said, this is at the lower end, and there is a potential risk. The one aggravating factor which is of concern – I can tell you this – if it was just count 3 by itself, I think the court would not be troubled as it (inaudible) drawn into the conclusion that it could be quite (inaudible) without conviction.

But it seems that the defendant was on notice, and clearly put on notice on 22 May, that acetylene bottles cannot be kept in the back of the work vans, and there was discussions about that. I've already touched upon that. There's clear notice. There was a prohibition notice. Don't do it.

NT WorkSafe officers, really acting on behalf of the community and for the good of people who work in a day to day area and potentially with volatile gases, are trying to protect them and ensure that employers discharge their obligations to protect them. The corporate defendant was clearly on notice.

However, the mitigatory matters that I have spoken about – the fact that it was there for only 30 minutes, the fact that all of the things the defendant had undertaken before then, the modification of part of the fleet – really means that it is at the lower end of the spectrum of moral culpability.

Given the concessions made by the prosecution, the defendant is entitled to significant discount. I give full credit for the early plea of guilty. There was a hearing in relation to count 2 but it was a point quite properly made, and required a determination.

In any event, the hearing on the facts as related to count 3 traversed the same issue, and I credit to the defendant for conceding all but that one particular element in count 2, and if that's not the full benefit from early plea, it's very close to it.

Mindful of the extremely high maximum penalties, I make the following orders:

Count 3; convicted and fined $5000 plus a victim's assistance levy of $40.

Count 2; convicted without further penalty and fined $40 victim's assistance levy.

I take into account totality, and the fact that it was the same factual matrix.

Is there any matters arising?

MR MURPHY: No, your Honour.

MR CLIFT: No, your Honour.

HIS HONOUR: Adjourn the court.

ADJOURNED