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TRANSCRIPT OF PROCEEDINGS

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MAGISTRATES COURT

WILSON, Magistrate

MAG-00263510/15(1)

MAG-00263513/15(1)

MAG-00263521/15(3)

MAG-00263530/15(2)

**DEPARTMENT OF NATURAL
RESOURCES AND MINES**

Complainant

and

**ANGLO COAL (CAPCOAL
MANAGEMENT) PTY LTD and OTHERS**

Defendants

BRISBANE

12.08 PM, FRIDAY, 19 MAY 2017

DECISION

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

BENCH: On 11 December 2014 at approximately 11.10 pm, Ian Downes was working in the East Mains at Grasstree Mine, located near Middlemount, Queensland, approximately 250 kilometres southwest of Mackay. Mr Downes was attending to what is commonly referred to as niche prep with a co-worker, Mr
5 Graham Embelton, in a niche described as a space within a coal rib, being three metres high by 5.2 metres wide. The work involved drilling and pressure grouting in the rib of the niche in preparation for gas drainage work.

Mr Downes was inserting plastic tubes into holes drilled by his co-worker and
10 grouting them into place. While performing this work, a section of the coal rib came away in the niche, striking and killing Mr Downes. On 11 May 2017, the defendant entered a plea of guilty, that being Anglo Coal (Capcoal Management) Proprietary Limited, to one charge of failing to discharge safety and health obligations pursuant to the Coal Mining Safety and Health Act 1999, in contravention of section 34. That
15 contravention caused the death of Ian Martin Downes, a coalmine worker.

Initially, the matter was set for a three week trial. It has been case managed by me through the parties in Mackay at the Magistrates Court. Ultimately, the matter was transferred to Brisbane on the balance of convenience for the parties. Upon the entry
20 of the plea of guilty, the court heard submissions yesterday on penalty and today, I will deliver my decision and my reasons. Ms E.S. Wilson of Queen's Counsel appears, leading Ms O'Gorman of counsel, instructed by Gilshenan & Luton on behalf of the complainant, Department of Natural Resources and Mines, for the Prosecution. Mr T.J. Bradley, Queen's Counsel, appears, leading Ms Freeman of
25 counsel, instructed by Ashurst Australia, on behalf of the defendant company, Anglo Coal.

I have received and tender one bundle in volume of material on behalf of the
30 Prosecution and I mark that Prosecution 1.

EXHIBIT #PROSECUTION 1 ADMITTED AND MARKED

35 BENCH: I received and now tender one volume of material on behalf of the defendant, marked Defendant 1.

EXHIBIT #DEFENDANT 1 ADMITTED AND MARKED

40 BENCH: These volumes contained within them various bundles of material which have been tabulated as separate exhibits. The material includes an agreed schedule of facts, submissions by each party, supported by diagrams, photographs, reports and
45 relevant cases. I thank all parties for their assistance to this court and generally, the written and oral submissions and for the presentation of the matter generally. The gravamen of the offence before the court today is that it was incumbent on Anglo

Coal to ensure the niche was not open until properly inspected and made safe for work.

5 By the deputies marking the inspection board such that the niche was declared open for work, Anglo Coal Proprietary Limited failed to discharge its obligation. Mr Downes was working in an area that was not inspected and the area was unsafe for the work he was doing. The objects and obligations of companies and delegated persons are set out within the relevant act, which is the Coal Mining Safety and Health Act of Queensland 1999. The objects of that act are to protect the safety and health of persons at coalmines and persons who may be affected by coal mining operations, and to require that the risk of injury or illness to any person resulting from coal mining operations be at an acceptable level.

15 The circumstances as agreed are set out within a statement of facts within Prosecution Volume 1 at the second tab. I intend to read into the record the agreed statement of facts. On 11 December 2014, Mr Ian Downes, a drillers offsider, employed by VLI Drilling Proprietary Limited, was performing work at Grasstree Mine. He was working in an area of the mine classified and known as a niche. Along with driller, Mr Graham Embelton, he was performing niche preparation work there, which involved drilling grout holes and installing tubing in the grout holes in the rib of the niche. As indicated earlier, at 11.10 pm, a section of the coal in the rib came away and struck Mr Downes and as a result of that, he died.

25 The Grasstree Mine is located on a mining lease. Anglo Coal were the operator of the mine. Their Australian company number is 010037564, otherwise known as Anglo Coal (Capcoal Management) Proprietary Limited. In August 2011, mining occurred at that site between 2011 and 2013 and in September 2013, one of the longwalls known as 807 was removed. In late November 2014, a decision was made at the mine to commence gas drainage activities in the East Mains. The East Mains was at the time the subject of a project to recover that part of the mine for further production in 2015.

35 While mining had occurred in the East Mains between 2011 and 2013, the East Mains had been disused in fact since September 2013. The decision to recover East Mains and commence gas drainage activities was a significant decision, I understand, for the mine and the project and the recovery was considered critical for further production commencing in 2015. Anglo's technical services department were in charge of the activities. Anglo had a contract with VLI Drilling Proprietary Limited, under which it performed necessary gas draining activities. On the 4th of December 40 2014, an email was sent from technical services to a number of senior people who were involved with East Mains recovery, including senior executives and an underground mine manager.

45 The email indicated that VLI would commence niche preparation in coming days and that before niche prep could start, stowage would be removed from the niche. Stowage is noted to be wet material comprising of stone, rubbish and coal fires. Various persons, including a Mr McInerney and a Mr Harrop, the supervisor,

attempted to at one stage inspect the mine. It was covered in stowage. That inspection did not in fact occur. Niche preparation apparently typically took a week and on the 9th of December, a stowage permit related to the removal of stowage noted that the stowage had been removed so that the VLI workers could have rapid access to the drill site.

At the time of arranging for VLI workers to be deployed, Anglo Coal was aware that the niche was in a part of the mine that had been disused for more than a year and in addition, the stowage which had been removed between 4 and 7 December 2014 had been sitting in the niche for more than a year. Various works commenced in the niche between 9 December up until the death on the 11th of December. During this time, the mine's database system, Fusion, reflected the niche preparation work that was being done. On the 11th of December at approximately 11.30 am, that is, about 12 hours prior to Mr Downes' death, a deputy inspected the East Mains area, including the niche, and he noted that VLI workers were setting up pump lines and the drill rig at the niche. During day shift, a senior site executive also attended at the niche. He saw that equipment and a crew were working in and around the niche and at about 3 pm that day, a deputy inspected the East Mains area and he marked on his deputy's report that the East Mains was safe to work.

Despite the attendance of two deputies, the senior site executive and underground mine manager, the hazards in the niche were not identified. I am told that that relates to the fact that in fact, the road was what is called "no road-ed" and that in fact, the deputies did not technically have access to the niche at that particular time. At the start of night shift, two deputies went to attend the area. They did not inspect the East Mains but they moved an inspection board to the entrance to the area and marked the area as being open for work until 1 am on 12 December 2014.

During night shift, Mr Embelton, who was Mr Downes' co-worker, entered the East Mains and proceeded to the niche. On the way, he passed the inspection board which indicated that that area was open for work. At the niche, he commenced drilling holes in the rib and he was joined by Mr Downes, who also passed the same inspection board noting that the area was open for work. The two men had a brief discussion about the nearest emergency exit and Mr Downes started installing tubing and applying grout in the holes that had been pre-drilled by Mr Embelton. Whilst he was inserting the tubing and applying grout, a large section of coal came away from the rib, fatally injuring him.

By operation of section 181B of the Queensland Penalties and Sentences Act, the maximum penalty that can be imposed on Anglo Coal for this offence is 5000 penalty units. Noting that at the date of the offence, a penalty unit was \$113.85, the maximum penalty therefore is \$569,250. No other penalty can be imposed on Anglo Coal at this time. I adopt Mr Bradley Queen's Counsel's submission on how the court should properly when considering penalty. Mr Bradley submitted to the Court that the Court does not or should not look at the outcome of the offending, that is, the death of the worker, but one needs to look at the offending or actual conduct that constitutes the offence and the outcome and the nature or duty of the obligation that

was breached because the conduct of the defendant is to be sanctioned and not the outcome. That is an important and fundamental platform upon which I proceed today. Mr Bradley says it is the objective gravity of the defendant's conduct that has to be assessed within the scheme of the offence, in other words, the defendant here, he says, falls to be sentenced for its act or omission because that is the offence, not the outcome. I adopt those submissions and I proceed on that basis.

Queen's Counsel for the defendant urges this court to consider situations that, in fact, might be considered more serious insofar as the conduct or omission of a company prosecuted under this section. He includes examples such as a company that has, for instance, no safety system or mechanism in place, a situation where a direction might be given not to comply with certain safety protocols or directions to remove protections or barriers that may render equipment unsafe. He says, for example, where there are known errors in systems and corrective action is not taken. Queen's Counsel says that the case before the Court today could be categorised such: that the measures that were in place were insufficient to adequately protect the workers involve. I adopt that view.

Both the Prosecution and the Defence submit that a fine in the order of \$200,000 is appropriate in all the circumstances. The Prosecution press for a conviction and the defendant concedes that in this case a conviction should be recorded. I have perhaps, however, inferred that Prosecution were perhaps a little circumspect on penalty and the Court notes that this sentence traverses somewhat uncharted waters, to use Ms Wilson's language, as there are no authorities in Queensland for sentencing operators where a breach of obligation has caused death and where the same operator has had a previous conviction for a breach of obligation causing death.

In coming to my conclusions today I have taken into account a number of factors in mitigation put forward by Mr Bradley of Queen's Counsel on behalf of his client, Anglo Coal. I take into account the plea of guilty. It was not early but nonetheless averted a trial and made in the interest of justice and as soon as possible after an agreed statement of facts resolved immediately after the commencement of trial and further disclosure. I accept that Mr Bradley has said that his client was not in a position to enter an earlier plea but did so at the first opportunity once the facts had been renegotiated and settled based on the evidence. I also note that on behalf of the company Mr Bradley acknowledged the unacceptability and tragic loss of life. He did so, and I quote from the transcript, in the following terms:

It is clear from victim impact statement –
says Mr Bradley –

and tendered that enormous – the enormous seriousness and its consequences. The defendant does not contend in any way that this matter ought be minimised. What we do say, and it's set out in paragraph 3 of the written submissions, is the position taken by the parent entity of the defendant, is that this loss of life should not have happened and that the group is absolutely committed to

ensuring that such an event never occurs again at any of its operations and with that in mind has made significant changes to the way they operate since this tragic event.

5 I was to later glean in submission that not only were the changes made, that they were made within one week of Mr Downes' death. I accept the Prosecution are unable to necessarily confirm that, but I do accept that there has been by way of mitigation further checks and balances by way of what is called a work revision or work permit system now requiring everyone in the chain to sign off on the scope of
10 work. That system is described in the transcript at page 30. Mr Bradley says:

*We've had to make changes in our systems so that they are more robust, to make our people check the work. The work systems of the contractors, in other words, have the contractors then obtain from us under a new system a permit to
15 do the work.*

He says this was necessary because there is a suggestion that the workers were working outside of the scope of works. Regrettably, that was not made known because of all of the factors and circumstances involved in this tragic death. Mr
20 Bradley goes on to say:

*To do the particular work they're doing from now on they must sign a form by their supervisor and by our ERZ controller so that there is now a physical record of the communication between the two as to the work that's going to be
25 done and where it's going to be done.*

He goes on to say that the system operates – it is essentially a revision or modification or refinement of a system that has been in place but now requires signatures where it did not before. So, in fact, he says the workers and everyone the
30 chain of command are putting their names to the fact that what they are supposed to do they are doing and that he is – in many ways, it was described as pre-check system. I take into account that the company did make an immediate change to the checks and balances and the processes in order to ensure a far safer and risk free workplace into the future. I also note that, and certainly it has not been brought to
35 my attention, and I proceed on the basis that Anglo Coal have not been convicted of any such breach under this Act for offences that have occurred since 2014.

The factors that I take into account that might aggravate the sentence – and I adopt the line of Ms Wilson who says that workers should not be the last line of defence. I
40 absolutely, wholeheartedly accept that submission. It is unacceptable in any industry or occupation for workers to be sent into areas that have not been properly remediated, authorised, inspected or in any way noncompliant. That no inspection was ever performed on a disused part of the mine in this niche after remedial works had taken place to ensure that bolts and other reinforcements were in place and in
45 order and fit for the purpose is not acceptable.

I note from the agreed facts that there were a number of corroded bolts near where the rock fall happened. In some instances, the corrosion was such that the plates of the bolt had holes through the full thickness of the plate. In other cases, the plate was no longer sitting tight against the rim. I saw in submissions photographs where the plates that attached to the bolts were not flush against the coal face, therefore, not providing the necessary reinforcement and scaffolding of the coal face or the wall and, therefore, endangering all of those who worked in the event, such as this, that the coal face were to fall. I note at paragraph 46 of the agreed facts that there were also a number of bent bolts that had been damaged by the loader and had been – and had removed – been removed in the stowage days before the fatality. **In the area of the rock fall there were two bolts missing entirely.** As a result of the corroded, damaged and missing bolts, the supports were not performing in the way they were designed to and were inadequate to prevent the spalling rib.

It is absolutely inferred that an inspection of that space prior to Mr Downes and Mr Embelton entering the niche that night would have and should have and could have identified the inadequacy of this – of the scaffolding and measures – risk management measurements. **For inspectors to, without inspecting the niche prior to night shift on 11 December 2015, erect a sign indicating the all clear to the workers and, therefore, risking the life of all who worked within that space on that night is, again, entirely unacceptable.** The high risk nature of underground coal mining requires a scrupulous level of vigilance. No matter what system is in place, and certainly **I accept that Anglo Coal had many safety management systems and protocols, they are only as strong and as safe as the weakest link.** The lack of communication and/or understand between Anglo and VLI contractors, such that they commenced work on the night of 11 December 2014, caused the death of a hardworking, innocent man unaware of his fate as he stepped into the niche that night. He was entitled to believe that he was safe, that the risks had been minimised and that he was also entitled to believe when he saw the sign indicating the site was open that it had been inspected and that Anglo had complied with its obligations.

I now intend to refer to the victim impact statement. Amongst the rhetoric of legislation, reports, submissions, diagrams and case law, there is a grieving family. They should be heard and it seems appropriate for me to read into the record the statement of Mrs Anne Downes, who writes to the Court as follows:

Dear your Honour - - -

MS WILSON: Your Honour, could I – I do this very sparingly. The wife of Mr Downes has asked that it – she wanted that to just not be read into the record. But if it's a matter for sentencing, obviously, that it should be - - -

BENCH: I was not aware of that.

MS WILSON: Yes.

BENCH: And I intend to respect her wishes.

MS WILSON: Thank you.

BENCH: I have had the benefit of a letter that I understand Mrs Downes wishes to keep private, so perhaps what I can do is best summarised by saying that I am to take
5 from this victim impact statement that she is grieving, that there are children now without a father, that there are parents without a son and that she has a sense of hopelessness and futility about her future without someone she called her soulmate. I, as I say, respect her wishes for me not to specifically refer to the detail of her statement, sufficient for her to know that the Court has heard what she has to say.

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In my view, the sentence before the Court today needs to properly take into account the prior history of Anglo Coal. The sentence today is exacerbated, or the penalty that I impose, by the fact that Anglo Coal has a prior conviction for failing to discharge obligations under the same Act resulting in the death of Paul McGuire only
15 seven months prior to Mr Downes' death. A verdict and judgment has been properly put before the Court in these proceedings. It indicates that Anglo was fined \$137,500 upon that conviction in the Mackay Magistrates Court on the 23rd of November 2016 before another Magistrate. The material before me today includes the circumstances of the death relating to that conviction. I take into account the
20 prior history of Anglo and the circumstances upon which the company was convicted last year.

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I have also been assisted by a number of cases as guidance regarding the quantum of penalty and those cases have previously been read into the recorded by respective
25 Queen's Counsel. They are included in the relevant volumes prepared and admitted by – and marked by me today. There is a general consensus by counsel that penalty cannot be calculated by any type of exact mathematical exercise. I accept that not only is this Court in uncharted waters in respect of convicting a second time a company for an identical breach within a short period. Many of the cases provided
30 helpfully by way of a having a sense of where on a continuum of penalty this matter may fit.

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Taking into account the matters that I must in the Penalties and Sentences Act Queensland, the circumstances of the charge before the court, a plea of guilty by the
35 defendant, the prior history for like offending and the cases that I have referred to as in guidance, the range put up, and also I have had regard to the range put up by Prosecution and Defence as being in the order or range of \$200,000. I consider that that fine does not adequately take into account the aggravating criminal history of like offending, the – and not withstanding the submission that had I been proceeding
40 with this offence alone without any prior history, that the penalty may have been similar or somewhat less than that imposed in respect of Mr McGuire's death.

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In my view, there needs to be an adequate loading to reflect a – a deterrence factor. In all of the circumstances, I consider the more appropriate penalty to be – to be set
45 at 50 percent of the maximum penalty that was allowable as at 2014. That amount is \$284,600 – \$284,625. I convict Anglo Coal. I order a fine in the amount of \$284,625 with three months to pay, and I direct that a conviction be recorded noting

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that that has been conceded by the defendant. Now, Mr Bradley, I'll first turn to you. Have I covered off on all of the matters that I must in this sentence?

5 MR BRADLEY: Yes, your Honour.

BENCH: All right. Is there anything remaining, Ms Wilson?

MS WILSON: No, your Honour.

10 BENCH: Well, thank you all again. I appreciate, as I say, the presentation of this matter from the word go. And I don't think that there's anything further that can be done. I wish you all a good day, and I adjourn the court.

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ISSUED SUBJECT TO CORRECTION