P. SUMMARY OF FINDINGS

629 Our key findings on appeal may be summarised as follows:

(1) The proceedings were not a nullity, were validly instituted and the *Occupational Health and Safety Amendment (Prosecutions) Act* 2003 was not invalidated by the principles enunciated in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

(2) A plea of autrefois convict or a plea in the nature of autrefois convict is not available in summary proceedings.

(3) The rule against double jeopardy extends to summary trials.

(4) There is no bar to us quashing or varying the decision at first instance, or any aspect of it, if the rule against double jeopardy has been breached.

(5) In considering the question of double jeopardy what is necessary is an analysis of, and comparison between, the elements of the two offences under consideration. That is not limited to the legal elements of the offences but it must also include the essential factual elements.

(6) No issue of double jeopardy arises in relation to the charges laid against the appellants.

(7) The reasons given by *Staunton* J for the various findings made and conclusions reached in the liability judgment do not indicate she was influenced by the Coroner's Report or the Judicial Inquiry.

(8) *Staunton* J erred in determining that the risk of inrush of water and/or dangerous gases arose in September 1994. The risk arose sometime on the last shift worked on 29 October 1996. However, given that the risk was caused by the proven failures and was present in each of the three charge periods, this error does not affect her Honour's findings as to liability as we have discussed in our earlier reasons.

(9) *Staunton* J was under the misapprehension that Mr Adam at some point in his career held the position of Mine Manager. Given that the critical aspects of Mr Adam's evidence related to his surveying qualifications and experience, the mistaken view of her Honour regarding Mr Adam's experience as a Mine Manager did not significantly affect the validity of her findings regarding his evidence overall.

(10) *Staunton* J was entitled to regard Mr Adam as an expert on mine surveying practices relevant to Sheet 1 that was produced in the early 20th century and Sheets 2 and 3 that were produced in 1979 or 1980 and that he was a reliable and honest witness for the reasons her Honour expressed in her liability judgment.

(11) *Staunton* J was entitled to rely on the evidence of Professor Thomas for the reasons given in her judgment on liability.

(12) The evidence of Mr Adam and Professor Thomas regarding the anomalies and inconsistencies on Sheets 1, 2 and 3 leads to a conclusion that it would have been necessary, in order to resolve those anomalies and inconsistencies, to search out other sources of information that might have been available.

(13) Clause 8 of the Coal Mines Regulation (Methods and Systems of Working – Underground Mines) Regulation 1984 requires the manager to have regard to information available from the DMR and any other information available to the

manager. In the context of an obligation on the Mine Manager to ensure that the manager takes such steps as may be necessary to prevent any inrush, if the other information was in some way at odds with the DMR information, or threw doubt on the DMR information, then the least the Mine Manager must do is resolve the conflict or doubt and not simply opt to accept the information from the DMR on the basis that it is likely to be more reliable. If the doubt or conflict cannot be resolved then the mining should not proceed because of the catastrophic consequences if the DMR information is wrong.

(14) It cannot be concluded that Sheets 1, 2 and 3 were surveys carried out or certified by a former surveyor for the Gretley Mine or surveys certified as correct by another surveyor. Accordingly, NWCC cannot rely on Sheets 2 and 3 as being survey accurate for the purpose of cl 9 of the Coal Mines Regulation (Survey and Plan) Regulation 1984.

(15) If NWCC was to ensure the safety of workers in the mine it was necessary for it to be completely satisfied that it had paid regard to all of the relevant available information bearing on the location of the old workings in order to ensure it knew precisely where those old workings were and in order to avoid any risk of inrush.

(16) *Weissensteiner* cannot be applied to circumstances where an accused natural person may be perceived to have certain knowledge known only to the accused and a failure by the accused to disclose that knowledge may be used to assess the prosecution case against a corporate defendant that was charged with an offence arising out of the same factual circumstances applying to the accused, on the basis that the accused did not offer evidence of any hypothesis or explanation which was consistent with the innocence of the corporate defendant.

(17) It was not established beyond reasonable doubt that NWCC never considered the Abandonment Register within the DMR in relation to the Young Wallsend old workings. It is conceivable that someone from NWCC could have accessed the Abandonment Register at the DMR and upon requesting access to file Ms 28/7067, which was referred to in the Register, was advised it could not be located. If Ms 28/7067 could not be accessed by NWCC, a copy of an entry in the Abandonment Register would have been of no utility and that may provide an alternative, plausible answer as to why no copy was found in the Gretley survey office.

(18) No abandonment plan was ever filed with the DMR or its predecessor. Sheets 2 and 3 that were first created in 1980 never constituted the abandonment plan.

(19) Unless there was an abandonment plan filed showing conclusively that the workings had been abandoned there must be doubt as to whether further work was undertaken beyond the dates shown on the plan. The Young Wallsend Colliery was *declared* abandoned in 1928 because it was believed that no work had been done for at least fourteen years. That hardly constitutes conclusive evidence that Sheet 1, and hence Sheets 2 and 3, could be taken as accurately representing the extent of the old workings. It leaves open the possibility that further work was undertaken after the dates shown on the plans.

(20) If NWCC did consider the contents of the Abandonment Register and proceeded, nevertheless, to rely on Sheets 2 and 3 then we consider failure (a) of the planning research and assessment charge would have been made out. It could not have been otherwise in circumstances where, assuming NWCC did view the Abandonment Register, that view would have informed the appellant that the workings had been declared abandoned in 1928, some 17 years after the latest date on Sheet 1 in the south eastern portion. Moreover:

(a) No abandonment plan would have been available to be viewed because

none was filed with the DMR.

(b) Sheets 2 and 3 could not have been considered to have constituted an abandonment plan because they were brought into existence in 1980 for the purpose of enabling BHP to complete its geological mapping as well as assisting in assessing coal reserves.
(c) Neither Sheet 2 nor Sheet 3 was dated nor was there any identification of the party responsible for creating the sheets or any formal legend or surveyor notation other than the inscription, "Traced from Record Tracing 21 March 1892".

(d) Unless there is a line on a mine plan that indicates the limit of workings at the time of abandonment one could never be sure that the plan was up-to-date at the time the mine was closed.

(e) Neither Sheet 2 nor Sheet 3 had any line signed off by a surveyor or any other person to say that the precise location of the faces at the time the mine was abandoned had actually been determined.

(f) There was no reason to suspect that further workings in the Young Wallsend Colliery did not take place after the dates appearing on the plan; there was the potential for other workings because 5 December 1910 was written around roadways that were still open-ended and not ruled off.

(21) The absence of a field book, survey notes and calculations relating to the old workings was not sufficient to support an inference beyond reasonable doubt that NWCC failed to properly research the location and extent of the Young Wallsend old workings.

(22) That the geological maps were in NWCC's possession and depicted something different to Sheets 2 and 3 would not be sufficient, by itself, to support an inference that NWCC had failed to properly plan and research the old workings.

(23) The inference is available that NWCC did not carry out any research into relevant texts or newspaper articles. There is no evidence that they did; there is no room for reasonable doubt that they may have, because if they had it would have raised such a strong warning that Sheets 2 and 3 might not be reliable that NWCC would not have proceeded to rely upon Sheets 2 and 3 to the extent it did.

(24) *Staunton* J's ultimate conclusion in relation to failure (a) of the planning, research and assessment charges was correct; NWCC failed to undertake planning by way of properly researching available sources and information on the location and the extent of old coal mine workings, namely, the Young Wallsend coal workings.

(25) The failure to undertake planning by way of properly researching available sources and information on the location and the extent of old coal mine workings was causative of the risk to health and safety of workers, that being a risk of inrush of water and/or dangerous gases into the Gretley Mine from the Young Wallsend old workings.

(26) There was no error in her Honour's findings in relation to failures (b) to (e) of the planning and assessment charges having been made out against NWCC and no error regarding causation.

(27) There was an overwhelming and misguided reliance by NWCC on Sheets 2 and 3 of RT523 that blinded the appellant to the taking of such necessary precautions as a comprehensive and systematic assessment of the risk. Contrary to the appellant's submissions, it was not entitled to rely solely on Sheets 2 and 3 as being unquestionably accurate and reliable. Reliance on Sheets 2 and 3 cannot be accepted as a substitute for a

proper risk assessment.

(28) There was no error in her Honour's findings that failures (g) and (h) of the planning, research and assessment charges had been made out against NWCC and that the failures were causally connected to the risk of inrush.

(29) There was no error in respect of her Honour's findings relating to failure (i) of the planning, research and assessment charges against NWCC and that the failure was causally connected to the risk of inrush.

(30) In light of the findings regarding the charges laid against NWCC under ss 15(1) and 16(1) of the OHS Act and there being no specific challenge to her Honour's liability findings in relation to OPL, no appealable error exists in respect of her Honour's findings against OPL in relation to the planning research and assessment charges under ss 15(1) and 16(1) of the OHS Act.

(31) There was no error in relation to her Honour's findings in respect of failures (a), (b), (c), (d), (e), (f) and (i)-(k) of the system of work charges against NWCC.
(32) Other than the error relating to when the risk arose (which, for the reasons we have stated, does not affect liability), there was no error in relation to her Honour's findings in respect of the system of work charges against OPL.

(33) There was no error in relation to her Honour's findings in respect of the night shift charges against NWCC.

(34) There was no error in relation to her Honour's findings in respect of the night shift charges against OPL.

(35) The corporate appellants did not discharge the onus required to establish it was not reasonably practicable for them to comply with ss 15(1) and 16(1) of the Act. Accordingly, their defence under s 53(a) of the Act must fail.

(36) The corporate appellants failed to discharge the onus placed upon them in relation to the defence raised under s 53(b) and, accordingly, it must fail.

(37) In so far as the decision of *Staunton* J dealt with the meaning of the words “concerned in the management of the corporation” in s 50 of the OHS Act, there was no error.

(38) Mr Porteous was concerned in the management of both NWCC and OPL.

(39) There was no evidence that Mr Porteous used all due diligence to prevent the contravention by the each of the corporate appellants. In those circumstances it is, therefore, unsurprising her Honour's consideration of the matter was not lengthy. As to any submission Mr Porteous was not in a position to influence the conduct of the corporations in relation to their contraventions, it is simply unsustainable given his role and position in the corporations, except as her Honour observed at [963], Mr Porteous could not have been in the position to influence the conduct of the corporations in relation to failures (c) and (d) of the planning, research and assessment charges as he was not, during that period, the Mine Manager at Gretley.

(40) It was not established beyond reasonable doubt that Mr Robinson was concerned in the management of OPL or NWCC. In our opinion, Mr Robinson's role was not managerial but rather was more akin to that of an advisor or consultant to mine management in relation to surveying. Mr Robinson was more in a support role than a role that involved managing or directing the business of the two corporations.

(41) NWCC and OPL have been found to have contravened s 15(1) and s 16(1). All of the elements of the offences have been proven and the time, place and manner of the contraventions have also been proven to the requisite standard. Mr Romcke is deemed, pursuant to s 50 of the Act, to have committed the same contraventions as NWCC and OPL if it is proven beyond reasonable doubt he was concerned in the management of NWCC and OPL and if he has not made out, to the civil standard of proof, one of the two defences in s50(1)(b) or (c). Those are the only circumstances in which Mr Romcke could expect to avoid liability.

(42) Mr Romcke was a person concerned in the management of NWCC.

(43) Mr Romcke was not a person concerned in the management of OPL.

(44) Mr Romcke had not made out the defences under s 50 of the OHS Act as a person concerned in the management of NWCC.

(45) It is clear that the corporate appellants operated the Gretley Mine in some sort of combination that *Staunton* J was not able to identify with any precision but it is also clear that the two companies had separate roles and employed different employees at the Mine. We do not consider it could be concluded that one corporate appellant was the *alter ego* of the other or that for the purpose of sentencing they should have been treated as one entity.

(46) Whilst the sentencing judge's approach to the application of the principle of totality was flawed, and therefore required re-sentencing, having independently considered the objective and subjective factors, we do not consider that her Honour's errors produced the wrong result. We do not consider any error in sentencing occurred as a result of our findings in relation to risk in the section of this judgment dealing with liability. We consider a penalty of $730,000 for the six offences committed by each of the corporate appellants was an appropriate and just outcome.

(47) There was no error in relation to the penalties imposed on Mr Porteous.

(48) Given the finding that Mr Robinson was not a person concerned in the management of NWCC or OPL the appeal regarding conviction must be upheld.

(49) Given the finding that Mr Romcke was not concerned in the management of OPL, the findings regarding penalty in relation to the OPL-related contraventions cannot be allowed to stand.

(50) The combination of errors concerning the time the risk arose, Mr Romcke's relationship to OPL and the totality of his criminality mean that, on re-sentencing, it is appropriate to apply s 10 to the penalties imposed on Mr Romcke for the NWCC-related offences.