

## MAGISTRATES COURT OF THE AUSTRALIAN CAPITAL TERRITORY

**Case Title:** **Morgan v Commonwealth of Australia (as represented by the Department of Industry, Science and Resources)**

**Citation:** **[2026] ACTMC 23**

**Hearing Date:** 25 August 2026

**Decision Date:** 24 September 2026

**Before:** Magistrate Temby

**Decision:** See [155]

**Catchwords:** **INDUSTRIAL LAW** – SENTENCING – judgment and punishment – Work Health and Safety – Category 2 offence – Science exhibit

**Legislation Cited:** *Crimes Act 1914*, Part 1B  
*Work Health and Safety Act 2011* (Cth), ss 10, 19, 32, 245, 248

**Cases Cited:** *Bluga Underground Operations Ltd v Nash* [2016] NSWCCA 37  
*Capral Aluminium Ltd v WorkCover Authority of NSW* [2000] NSWIRComm 71  
*Comcare v Commonwealth of Australia* [2007] FCA 662  
*Comcare v The Commonwealth of Australia* (unreported, 9 March 2020, Magistrate Prowse)  
*DPP v Amcor Packaging P/I* [2005] VSCA 219  
*DPP v Frewstal Pty Ltd* [2015] VSCA 266  
*DPP v The Crown in Right of the State of Victoria* [2024] VCC 810  
*DPP v Vibro-Pile (Aust) Pty Ltd* [2016] VSCA 55  
*Georgopolous v The Queen* [2010] NSWCCA 246  
*Nash v Silver City Drilling (NSW)* [2017] NSWCCA 96  
*R v Commercial and Industrial Construction Group Pty Ltd* [2006] VSCA 181  
*R v Irvine* [2009] VSCA 329  
*SafeWork NSW v Carricks Plumbing and Gasfitting Pty Ltd* [2022] NSWDC 175  
*SafeWork NSW v Inghams Enterprises Pty Ltd* [2023] NSWDC 580  
*SafeWork NSW v McConnel Dowell Constructors (Aust) Pty Limited (No 3)* [2021] NSWDC 105  
*SafeWork NSW v Modco Homes Pty Ltd* [2024] NSWDC 565  
*SafeWork NSW v Carbon BMC Pty Ltd* [2023] NSWDC 349

*SafeWork NSW v JA Investment Group Pty Ltd* [2021] NSWDC 569

*SafeWork NSW v Oz Motorsports Pty Ltd* [2020] NSWDC 201

*The Queen v Kilic* [2016] HCA 48

*WorkCover Qld v Archerfield Kart Hire Pty Ltd* (unreported, Magistrates Court of Queensland)

*E202276* (unreported, Magistrates Court of Queensland, 20 September 2018)

**Parties:**

Paul Morgan (Informant)

Commonwealth of Australia (as represented by the Department of Industry, Science and Resources) (Defendant)

**Representation:**

**Counsel**

Patricia McEniery (Informant)

Carmen Currie (Defendant)

**Solicitors**

Commonwealth Director of Public Prosecutions (Informant)

Maddocks (Defendant)

**File Numbers:**

CC 413820 of 2024

## **MAGISTRATE TEMBY:**

1. On 2 February 2022, Questacon installed one of two plasma globes in an area known as 'Awesome Earth' in Gallery 3 of the National Science and Technology Centre. A second plasma globe was installed on 21 June 2022. As part of the exhibit, Questacon's visitors were encouraged to interact with the plasma globes.
2. The plasma globes were made of glass and filled with noble gas and an electrode in the centre. When electricity is supplied to the globe it emits currents of light tendrils within the gas contained inside the globe. The tendrils of light are affected by persons touching the outside of the globe.
3. Questacon also made alcohol-based hand sanitiser available to visitors. Alcohol-based hand sanitiser is flammable. Questacon identified that there was a risk of fire from a person touching the plasma globes with alcohol-based hand sanitiser, however its response to that risk was inadequate.
4. On 23 July 2022, a 9 year old visitor to Questacon applied alcohol-based hand sanitiser to her hands from one of Questacon's sanitiser dispensing stations before she touched one of the plasma globes. After touching the globe, the child's right hand caught fire. The child tried to shake the fire off before wiping her right hand with her left. As a result, both of the child's hands ignited.
5. A member of the public, along with the child's mother, extinguished the fire. The child's mother and Questacon staff provided first aid to the child and Questacon staff called an ambulance. The child was treated at the scene before being transported to Canberra Hospital by ambulance.
6. The child suffered second degree burns to her wrists, hands and fingers and a blister to her right forearm.

## **The offence**

7. The Commonwealth, as represented by the Department of Industry, Science and Resources (**DISR**) was charged with, and pleaded guilty to, a Category 2 offence under the *Work Health and Safety Act 2011* (Cth) (**WHS Act**).
8. The Commonwealth has a health and safety duty, pursuant to s 19(2) of the WHS Act, to ensure, so far as is reasonably practicable, that the health and safety of other persons, including visitors to Questacon, are not put at risk from work carried out as part of the conduct of its business or undertaking (**s 19 duty**). The work carried out by the

Commonwealth included the installation, maintenance and operation of the plasma globes and the provision of hand sanitiser stations.

9. The Commonwealth was charged with contravening its s 19 duty between 20 February 2022 and 23 July 2022. Between those dates there was a risk of fire from a person with alcohol-based hand sanitiser on their hands touching one of the plasma globes (**the specified risk**). Contact between the hand sanitiser and the plasma globe could result in spark ignition of the hand sanitiser.
10. The Commonwealth accepts that it failed to take one or more of the following three control measures to eliminate or minimise the specified risk that existed during the relevant period:
  - (a) arranging the plasma globes in a way that they could only have been subject to supervised use by trained Questacon workers;
  - (b) replacing alcohol-based sanitiser with non-alcohol-based hand sanitiser or providing portable soap and water handwashing stations; or
  - (c) warning members of the public against using flammable substances, including alcohol-based hand sanitiser, prior to or when touching the plasma globes.
11. The Commonwealth further accepts that its failure to comply with its s 19 duty exposed individuals, including the child who was injured on 23 July 2022, to a risk of death or serious injury. The Category 2 WHS offence with which the Commonwealth was charged, pursuant to s 32 of the WHS Act, is therefore proved.

**The Commonwealth is the entity which is to be sentenced**

12. The Commonwealth, through DISR, conducts a business or undertaking that includes the operation of the National Science and Technology Centre, Questacon. It has done so for 37 years.
13. Questacon is an interactive science museum located in Parkes, ACT, which has more than 200 interactive exhibits. In 2022, those exhibits included the plasma globes in Gallery 3.
14. While both parties referred in their written submissions to DISR as being the defendant to these proceedings, and as having pleaded guilty to the charge, they confirmed at the sentencing hearing that it is the Commonwealth which is the defendant. DISR is an agency of the Commonwealth, not a legal entity which is separate from it.
15. Following the sentencing hearing, I invited further submissions from the parties as to the consequence of the Commonwealth being the defendant, rather than DISR, in terms of

identifying whether the defendant had a history of offences relating to its safety operations. In their initial written submissions, both parties submitted that the defendant did not have any history of offences relating to its safety operations, however they had defined the defendant as being DISR.

16. In my communication to the parties, I expressed my view that, the parties having confirmed at the sentencing hearing that the defendant to the proceedings is the Commonwealth, it is the record of the Commonwealth which is relevant to the question of the defendant's antecedents (not just the record of DISR, which the parties had focused on in their written submissions). The Prosecution agreed with that view.
17. The Commonwealth submitted that the position taken by the Prosecution in its written submissions, being that '*The Offender has no prior history of offences or regulatory action*', is correct. However, that submission did not engage with the fact, as both parties confirmed at the sentencing hearing, that the defendant to the proceeding is the Commonwealth (not DISR, as they had described in their written submissions).
18. In support of its submission, the Commonwealth referred to s 248 of the WHS Act which, the Commonwealth submitted, recognises the 'Responsible Agency' of the Commonwealth as having the status and rights of the accused in WHS proceedings. The Commonwealth referred, in particular, to s 248(6)(b)(i) of the WHS Act which, the Commonwealth submitted, observes that it is the acts or omissions of the 'Responsible Agency' that constitutes the offending conduct.
19. The Commonwealth's submission did not refer to s 10 of the WHS Act which makes plain, in s 10(2), that: '*The Commonwealth is liable for an offence against this Act*'. This is the basis upon which Division 5 of Part 13 of the WHS Act (within which s 248 is located) proceeds.
20. Section 245 of the WHS Act is also located in Division 5 of Part 13. Relevantly:
  - (a) subsection 245(1) provides that: '*If the Commonwealth is guilty of an offence, the penalty to be imposed on the Commonwealth is the penalty applicable to a body corporate*' (s 245(1)); and
  - (b) subsections 245(2) and (3) identify how physical and fault elements of an offence are to be established against the Commonwealth.
21. Subsection 248(4) of the WHS Act provides that the responsible agency in relation to an offence (being, as defined in s 248(6)(b)(i), DISR in this case) is entitled to act against the Commonwealth in proceedings for an offence, and provides for the procedural rights and obligations of the Commonwealth to be conferred on the agency. However, that does

not mean that it is the agency rather than the Commonwealth which is the defendant to the proceedings. That is not what s 248(4) says and such an interpretation is inconsistent with ss 10 and 245 of the WHS Act.

22. It is therefore clear that the defendant to the proceedings is the Commonwealth, not DISR. As such, the Commonwealth's history of offences in relation to its safety operations are a relevant sentencing consideration (not just DISR's record in relation to its safety operations). I discuss the Commonwealth's antecedents, and the relevance of its criminal history, later in these reasons.
23. In my reasons, I refer to the Commonwealth when discussing the entity with responsibility for discharging the s 19 duty and which is to be sentenced in these proceedings. I refer to DISR or to Questacon when discussing the agency through which the Commonwealth conducted itself during the relevant period.

### **Sentencing considerations**

24. The Commonwealth is to be sentenced in accordance with Part 1B of the *Crimes Act 1914* (Cth) (**Crimes Act**). Subsection 16A(2) of the Crimes Act sets out a non-exhaustive list of considerations that the Court must take into account, where relevant and known.
25. The maximum penalty for a Category 2 WHS offence at the time of the offending conduct was, for a body corporate, \$1.5 million. Subsection 16A(1) of the Crimes Act provides that a Court must impose a sentence that is of an appropriate severity in all the circumstances.

### **Reported WHS incidents in relation to the plasma globes and risk assessments conducted in relation to the use of hand sanitiser and the operation of the plasma globes**

26. Following the COVID-19 pandemic, Questacon made hand sanitiser available to visitors in Gallery 3.
27. Between 4 August 2021 and 21 June 2022, Questacon conducted a total of five risk assessments in relation to the plasma globes. The risk assessments demonstrate that, at least as early as 2 February 2022, Questacon was aware of the risk associated with touching the plasma globes after applying alcohol-based hand sanitiser.
28. The manufacturer of the plasma globes provided a warning, in the operating instructions for the product, that '*This product can be a fire hazard*'. The warning did not identify any risk associated with the use of hand sanitiser, however a risk assessment conducted by

Questacon on 2 February 2022, at the stage of installing the first plasma globe, identified the *'risk of fire – sparks from metal touching the globe, hand sanitiser'* as a hazard.

29. The risk was assessed as 'possible', the likely consequences as 'minor' and the risk level was assessed to be *'moderate'* in the absence of any control measures. The risk assessment identified that by implementing particular control actions, namely *'visitor interactions to be monitored. Hand sanitiser location to be assessed'*, the risk level would be 'low'.
30. In response to the risk assessment, hand sanitiser was positioned around Gallery 3 at a distance that Questacon considered would permit the hand sanitiser then being used, Purell Antiseptic Gel hand sanitiser, to dry or evaporate while a person walked from the hand sanitiser dispenser to the plasma globe.
31. On 3 February 2022, Questacon conducted a test and observed that a spark could be generated from the plasma ball using a metal object and hand sanitiser. A WHS Incident Report was raised regarding this test, described as a 'near miss incident'.
32. As a result of this report, on 8 February 2022, a further risk assessment was conducted in relation to the use of the plasma globe. The hazards identified by this risk assessment included *'fire caused by applying alcohol-based hand sanitiser to globe, then igniting by touching the globe'*.
33. Questacon conducted testing of a foaming hand sanitiser, which Questacon thought would be safer than the gel sanitiser it had been using. Questacon was unable to replicate ignition using the alternative foaming hand sanitiser and a decision was made to replace the gel hand sanitiser with the Purell Antiseptic Foam hand sanitiser.
34. While Questacon considered that the testing showed that the foaming hand sanitiser would not ignite, the Commonwealth accepts that the testing was relatively unscientific. Further, according to expert evidence obtained by the Prosecution, which was not challenged by the Commonwealth, the foaming hand sanitiser was no safer than the gel hand sanitiser and using it instead of the gel hand sanitiser therefore did not reduce the potential risk that had been identified.
35. I note that a safety data sheet (**SDS**) for the foaming hand sanitiser was available to Questacon and was maintained on a database named Chem Alert. The SDS states that the foaming sanitiser is a *'flammable liquid and vapour'*. Next to 'precautionary statements', the SDS states, under 'prevention', that the product should be kept *'away from heat/sparks'*, to *'use only non-sparking tools'* and to *'take precautionary measures*

*against static discharge*'. The label for the Purell Antiseptic Foam sanitiser also specifies that the hand sanitiser is flammable.

36. The Commonwealth accepts that Questacon should have consulted the SDS, which should have guided it to the alternative control measures specified in the charge, such as the use of non-alcohol-based hand sanitiser, despite not being able to replicate ignition in the test it conducted of the foaming hand sanitiser.
37. In addition to the substitution of the gel hand sanitiser for the foaming hand sanitiser, the sanitiser dispensing station was moved further away from the plasma globe. From reviewing the CCTV footage of the 23 July 2022 incident, I estimate that the dispensing station used by the child was approximately 10 metres away from the plasma globe that she touched.
38. Questacon assessed the risk level, after the controls were implemented, to be 'low'.
39. On 15 February 2022, a group of students formed a 'chain' from the plasma globes and 'zapped' another student by touching them. There was no reported injury, however the incident showed that static discharge could occur at the plasma globe.
40. On 20 February 2022, a visitor touched the plasma globe after applying a large amount of hand sanitiser gel and received a shock and 'pin prick' to the finger. First aid was not required.
41. On 12 June 2022, a parent moved their child's head away from the plasma globe and a spark jumped from their hand to their child's head, causing a tiny burn at the site of touch. First aid was required.
42. On 15 June 2022, a parent inadvertently shocked their child when they touched the plasma globe and their son's hand. The parent reported that they could see a spark arcing from their hand to their son's hand. First aid was required.
43. On 21 June 2022, a risk assessment was conducted after Questacon installed the second plasma globe in Gallery 3. This risk assessment identified the same fire hazard as in the previous risk assessment with the same control actions and risk level rating.
44. On 9 July 2022, a visitor used their own alcohol-based hand sanitiser and burnt their finger after touching one of the plasma globes. First aid was required.

## **Objective seriousness**

### ***General principles***

45. The objective seriousness of a Category 2 WHS offence is determined by (*DPP v Frewstal Pty Ltd* [2015] VSCA 266 at [127]):
- (a) the extent of the duty holder's failure to ensure, so far as was reasonably practicable that workers and others were not exposed to risks to their safety (that is, the extent to which it departed from its statutory duty); and
  - (b) the extent of the risk of death or serious injury which might result from the breach (that is, the likelihood of an event occurring as a result of the breach which endangers the safety of others, and the potential gravity of the consequences of such an event).
46. In terms of the potential consequences of the risk, I note that the focus must be on the risk arising from the failure to take reasonably practicable steps to avoid injury, not the likelihood of injury resulting. Conduct will be more serious, the more serious the potential injuries, whether or not they are likely to materialise (*Nash v Silver City Drilling (NSW)* [2017] NSWCCA 96 at [53]).
47. Further, while the occurrence of death or serious injury may manifest the degree of seriousness of the relevant detriment to safety, and harm to the victim of an offence is a relevant sentencing consideration, the objective seriousness of the duty holder's offence is to be assessed by reference to the potential consequences of the risk created by an offender's conduct rather than the harm that is in fact suffered as a consequence of the risk materialising: *DPP v Frewstal Pty Ltd* [2015] VSCA 266 at [127]; *DPP v Vibro-Pile (Aust) Pty Ltd* [2016] VSCA 55 at [200]).
48. Considerations which are relevant to an assessment of the duty holder's culpability include (*SafeWork NSW v Modco Homes Pty Ltd* [2024] NSWDC 565 at [49]):
- (a) the availability of steps to eliminate or minimise the risk;
  - (b) the ease with which mitigating steps could have been taken;
  - (c) whether the risk was an obvious or clear one;
  - (d) whether the risk was known, or ought reasonably to have been known to or identified by the offender (offending will be more serious if the risk was foreseeable, even if the precise cause or circumstance of exposure to the risk were not foreseeable, and will be even more serious if the risk was not only foreseeable but in fact foreseen by the offender - *Comcare v Commonwealth of Australia* [2007] FCA 662 at [120]); and
  - (e) the vulnerability of the workers and others exposed to the risk.

49. How and why the failure occurred is also relevant. As Maxwell P observed in *R v Commercial and Industrial Construction Group Pty Ltd* [2006] VSCA 181 at [31]:

*In assessing the company's culpability, it will be relevant to know, for example, whether the breach was the result of a failure to adhere to systems put in place by management or, alternatively, was the result of a failure by management to establish adequate safety systems and procedures in the first place.*

50. The culpability of an offender will turn on an evaluation of all the various factors, which may pull in different directions (*Nash v Silver City Drilling (NSW)* NSWCCA 96 at [42]).

### **Commonwealth's submissions**

51. The Commonwealth submitted that:

- (a) there is no evidence of any previous incidents at other museums involving the ignition of hand sanitiser when using a plasma globe and the Commonwealth therefore did not have knowledge of the risk before installing the globes;
- (b) the fact that Questacon risk-assessed the plasma globes five times between August 2021 and June 2022 demonstrated a consistent and active consideration of the safety of the installation;
- (c) Questacon identified the relevant risk and took measures to mitigate the risk;
- (d) its offending did not involve complete ignorance of the risk or a complete failure to address it, and did not display disregard for safety;
- (e) the fact that none of the six incident reports that were made between February and July 2022 related to an incident involving hand sanitiser igniting and causing a fire meant that those incident reports did not suggest that the specified risk was likely to occur, or that Questacon's assessment of the risk as 'low' was incorrect; and
- (f) while it ought to have consulted the SDS for the foaming hand sanitiser, which should have guided it to the alternative control measures specified in the charge, the steps it took brought it close to compliance with its duty and that, ultimately, the breach was a genuine mistake that was made as to the safety of the replacement foaming hand sanitiser based on practical testing undertaken by Questacon rather than by reference to the SDS.

52. The first four of the above submissions (summarised in paragraphs 51(a) to (d)) are uncontentious and I accept them.

53. I also accept the fifth submission (summarised in paragraph 51(e)) despite the submission made by the Prosecution that the recurrence of reported incidents involving the plasma globes between 20 February and 23 July 2022, in spite of the measures that were adopted after 3 February 2022 (moving the hand sanitiser dispensing stations and changing from a gel to foaming hand sanitiser), demonstrated that the ongoing safety risk should have been known by the Commonwealth.
54. I accept that Questacon was aware of the ongoing safety risk, however the relevance of most of the reported incidents after 3 February 2022 to Questacon's awareness is not significant. The reported incidents did not involve the risk of fire eventuating, which is the risk particularised in the charge that was brought against the Commonwealth.
55. As noted in my discussion of the Prosecution's submissions later in these reasons, a range of information available to Questacon should have made clear to it that it should have pursued alternative control measures to those which it adopted. This included the incident report of 15 February 2022, which indicated that static discharge could occur at the plasma globe, and the SDS for the foaming hand sanitiser, which stated that precautionary measures should be taken against static discharge.
56. However, there is no evidence that the fact that particular harms were caused as a result of the incidents, including a 'zap', a 'pin prick' and burns, meant that there was any particular likelihood that the risk of fire would eventuate. To the contrary, the incident of 20 February 2022, when a visitor touched the plasma globe after applying a large amount of hand sanitiser and suffered a shock or 'pin prick', but did not cause a fire, supports the Commonwealth's submission that the incidents did not suggest that the specified risk was likely to occur.
57. Save for the submission that the steps that the Commonwealth took brought it close to compliance with its duty, I also accept the Commonwealth's sixth submission (summarised in paragraph 51(f)). I do not accept that the steps that the Commonwealth took brought it close to compliance with its duty because, as earnest as Questacon may have been in seeking to address the risk it identified:
- (a) there is no evidence as to the extent to which it reduced the risk of fire by moving the hand sanitiser stations further away from the plasma globe exhibit;
  - (b) the change from a gel hand sanitiser to a foaming hand sanitiser did not reduce the risk of fire;
  - (c) Questacon did not implement a system of direct supervision of the plasma globe exhibit despite the fact that its 2 February 2022 risk assessment had identified

that one of the control measures it should have adopted was monitoring of visitor interactions; and

- (d) as discussed further below, in my consideration of the Prosecution's submissions, Questacon failed to establish adequate safety protocols, there were control measures that it could have implemented without significant inconvenience or cost (including the supervision control measure it had identified itself), the inadequacy of its safety protocols continued for several months and, during that time, it exposed vulnerable members of the community to the possibility of serious injury.

*Commonwealth's submissions as to the context for its offending conduct*

58. The Commonwealth also relied on three circumstances which, it submitted, placed the offending conduct in context.

59. Firstly, the Commonwealth submitted that the offence occurred in the context of the COVID-19 pandemic. The Commonwealth submitted that:

*At the time, Questacon was required to provide hand sanitiser, and patrons were required to use it, by virtue of public health restrictions in place at the time. Alcohol-based hand sanitiser was regarded as necessary and was expected to be provided and used. As a consequence, the specified risk arose because of the public health requirements that called for the presence and use of a flammable product in the gallery, when in ordinary circumstances it could have been eliminated.*

60. The Commonwealth was unable to identify any 'public health requirement' that called for the use of a flammable product in the gallery. The Commonwealth submitted that it followed guidance provided by Safe Work Australia, specifically a Safe Work Australia guidance note, dated 9 June 2020, titled 'COVID-19 Information for workplaces – Cultural institutions – Hygiene', and information published by the World Health Organisation in relation to the use of hand sanitiser.

61. The Safe Work Australia guidance note stated, amongst other things:

- (a) *'Safe Work Australia does not regulate or enforce WHS laws or COVID-19 restrictions on business operations. If you want to know how WHS laws apply to you or need help with what to do at your workplace, contact the WHS regulator in your jurisdiction';*
- (b) *'A key way you can protect workers and others from the risk of exposure to COVID-19 is by requiring workers and others to practice good hygiene. Below are measures to ensure good hygiene in your workplace';*

- (c) *'You must direct your workers, customer and others in the workplace to practice good hygiene while at the workplace. Good hygiene requires everyone to wash their hands regularly with soap and water for at least 20 seconds and drying them completely, preferably with clean, single use paper towel ...'*
  - (d) *'An alcohol-based hand sanitiser with at least 60% ethanol or 70% isopropanol as the active ingredient must be used as per the manufacturer's instructions when it is not possible to wash hands'.*
  - (e) *'To enhance good hygiene outcomes ... provide alcohol-based hand sanitiser in appropriate locations for workers and visitors or library users to use ... If possible, install automated or enclosed alcohol-based hand sanitiser dispensers to ensure it cannot be accidentally ingested or misused'.*
62. The Commonwealth did not submit that it was legally required to comply with the Safe Work Australia guidance note or any information published by the World Health Organisation and I am not satisfied that those documents contained 'public health requirements' to which Questacon was subject. Further, to the extent that the guidance note stated that the use of alcohol-based hand sanitiser was required to be used, that is inconsistent with the Commonwealth's acceptance that one of the control measures that it could have adopted to address the specified risk was the use of non-alcohol-based hand sanitiser.
63. Nevertheless, I accept, consistently with the advice given in the Safe Work Australia guidance note, that the use of alcohol-based hand sanitiser was generally regarded as appropriate to minimise the transfer of the COVID-19 coronavirus and other illnesses in the community and that Questacon considered that it was appropriate to follow that advice. In this respect, I note that the statement of Joanne White, Executive Director and Head of Division of Questacon, states:
- At the time of the incident, guidance issued by the World Health Organisation (WHO), the Australian Government and Hand Hygiene Australia recommended alcohol-based hand sanitisers where soap and water were unavailable. Alcohol-based formulations were preferred over non-alcohol-based alternatives due to their recognised effectiveness against COVID-19 and other pathogens.*
64. This context is relevant to the Commonwealth's culpability for its offending conduct.
65. The Commonwealth accepts that it should have consulted the SDS for the foaming hand sanitiser, which I consider should have made clear that Questacon should have pursued alternative control measures to those which it had adopted. The Commonwealth accepts

that this included the provision of non-alcohol-based hand sanitiser or portable soap and water handwashing stations.

66. However, the recommended use of alcohol-based hand sanitisers in public spaces like Questacon provides a reasonable explanation for why Questacon pursued an alcohol-based hand sanitiser solution. As discussed below, in my consideration of the Prosecution's submissions, it is also relevant to the ease with which the Commonwealth could have implemented the control measure of providing non-alcohol-based hand sanitiser instead of alcohol-based hand sanitiser.
67. The second contextual circumstance relied on by the Commonwealth is that the primary purpose of Questacon is to provide fun and interactive learning experiences for young people to explore and experience science in action. The Commonwealth submitted that this objective serves a number of important public interests and informed what measures were reasonably practicable for Questacon at the time.
68. The Commonwealth submitted that it ought not be considered reasonably practicable to eliminate a risk by removing an exhibit or diminishing the interactive quality of an exhibit, when that risk might be reasonably mitigated by some other means. The Commonwealth submitted that the public interest served by Questacon's education goals underscored the importance of keeping exhibits such as the plasma globes accessible, so far as was possible, during the pandemic.
69. I note that removing the plasma globes was a control measure that, in the charge as initially brought against the Commonwealth, it was alleged that the Commonwealth failed to take to discharge its s 19 duty. However, following negotiations, the form of the charge that the Commonwealth pleaded guilty to did not contain that particular.
70. Accordingly, it is not clear why the Commonwealth raised the limitation on its capacity to remove the plasma globes as being relevant to the context for its offending. I am not to proceed on the basis that that was a control measure that it could have taken to discharge its s 19 duty. The charge, as amended, contains the three control measures that the Commonwealth accepts it could have taken.
71. I accept that the operation of Questacon serves a public purpose, however the significance of that fact with respect to the Commonwealth's culpability for its offending conduct is not clear. It is not alleged that the Commonwealth should have taken any steps which would have undermined its operations. In particular, none of the three control measures that the Commonwealth accepts it could have taken to discharge its s 19 duty would have prevented it from keeping exhibits such as the plasma globes accessible, so far as was possible, during the offending period.

72. At the sentencing hearing, the Commonwealth drew a comparison between Questacon, as a public institution which operates in the public interest, and a company operating a for-profit enterprise. Again, the relevance of that distinction for present purposes is not clear.
73. I do not need to determine what controls were reasonably practicable for Questacon to take, which might be a question with respect to which Questacon's public purpose would be relevant. In the same circumstances, for example, it might have been reasonably practicable for a for-profit company to have removed the plasma globes from its exhibition, because the only consequences for it might have been a reduction in its revenue, whereas it is not accepted that that was a reasonably practical measure for Questacon to take.
74. As I have noted, for the purposes of these proceedings, the Commonwealth has admitted that there were three control measures that it could have taken. That is the basis upon which it is to be sentenced.
75. There is no suggestion that taking those control measures would have had any substantial impact on Questacon's operations or that the Commonwealth would have had difficulty directing sufficient resources to implement those measures. Nor is there any suggestion that the public benefit that Questacon provided would have been impacted by the implementation of the control measures. Further, because of Questacon's success in promoting its public purpose, in terms of the large number of visitors who attended Questacon, and Questacon's encouragement of visitors interacting with its exhibits, Questacon created a situation in which a large number of people were exposed to the safety risk that existed.
76. I do not consider that the fact that Questacon operated in the public interest is relevant to the Commonwealth's culpability for its offending, except in the way I have already discussed, namely:
- (a) to the extent to which it is recognised in the agreement the parties reached as to the way the charge would proceed (limited to the three control measures the Commonwealth accepted that it could have taken); and
  - (b) that there was a reasonable explanation for Questacon pursuing an alcohol-based hand sanitiser solution, given the recommended use of alcohol-based hand sanitisers in public spaces like Questacon (which, as discussed below, may have presented a practical difficulty for Questacon to implement a non-alcohol-based hand sanitiser solution).

77. Thirdly, the Commonwealth submitted that the circumstances of the 23 July 2022 incident, which involved the injured child taking five pumps of hand sanitiser from the dispenser, being a greater quantity than a person would ordinarily be expected to dispense, had not been foreseen during the risk assessment that was undertaken prior to the incident. The Commonwealth submitted that the circumstances in which the risk manifested were unusual and unlikely, as opposed to an inevitability in relation to the ordinary anticipated usage.
78. I accept that taking five pumps of hand sanitiser is more than most people would ordinarily take. However, that is of limited significance for three reasons:
- (a) firstly, there is no evidence as to how many pumps Questacon used to test whether contact between the foaming hand sanitiser and the plasma globe could result in fire;
  - (b) secondly, there is no evidence as to what the usual quantity of foaming hand sanitiser that people visiting Questacon used was, nor, more specifically, the quantity (or range of quantities) that children visiting Questacon would ordinarily use. Children are not known for their restraint and it should have been anticipated by Questacon that they would not limit themselves, for example, to a single pump; and
  - (c) thirdly, there is no evidence as to the relationship between the number of pumps of hand sanitiser that a person might use on their hands, and the likelihood that subsequent contact with the plasma globes would result in fire.
79. Accordingly, while I accept that the circumstances in which the risk manifested were likely to have been unusual, I am unable to make any findings as to:
- (a) the extent to which the quantity of hand sanitiser used by the injured child exceeded the usual range for children;
  - (b) the extent to which it exceeded the quantity tested by Questacon; nor
  - (c) the significance of the injured child using the quantity that she did in terms of the likelihood of her subsequent contact with the plasma globe creating fire.

### ***Prosecution's submissions***

80. The Prosecution submitted that:
- (a) the risk of fire from a person touching the plasma globes with alcohol-based hand sanitiser was foreseeable, and in fact foreseen by Questacon, which was aware of the risk from 2 February 2022;

- (b) the potential consequences of the risk eventuating involved serious injury, given the potential for a child's clothing or hair (or, I would add, as in this case, skin) to be ignited;
- (c) people exposed to the risk included vulnerable members of the community such as children;
- (d) the Commonwealth's breach continued over several months, from 20 February to 23 July 2022;
- (e) Questacon did not monitor visitor interactions with the plasma globes (at least not directly, as opposed to generally supervising Gallery 3), being one of the control measures it had identified to address the fire risk; and
- (f) there were three control measures that Questacon could have taken being (the charged particulars), any one of which would have eliminated or minimised the risk of harm.

81. I accept each of those submissions. I note, in relation to Questacon's awareness of the risk, that:

- (a) in the risk assessment of 2 February 2022, Questacon assessed the risk of fire from hand sanitiser as being possible;
- (b) in the test conducted on 3 February 2022, Questacon observed that a spark could be generated from the plasma ball using a metal object and hand sanitiser;
- (c) in the risk assessment of 8 February 2022, Questacon again identified the risk of fire caused by applying alcohol-based hand sanitiser to the globe, ignited by touching the globe;
- (d) the 15 February 2022 incident indicated that static discharge could occur at the plasma globe;
- (e) the label for the foaming hand sanitiser stated that it was flammable;
- (f) the risk assessment of 21 June 2022 identified the same fire hazard as in the previous risk assessment, with the same control actions and risk level rating, even though Questacon had replaced the gel hand sanitiser with the foaming hand sanitiser by then; and
- (g) the SDS for the foaming hand sanitiser, which the Commonwealth accepts that it should have consulted, stated that the product was a flammable liquid and vapour, that it should be kept away from sparks and that precautionary measures should

be taken against static discharge. In circumstances where Questacon was aware that a spark could be generated from the plasma globe using a metal object and hand sanitiser, and was aware that static discharge could occur at the plasma globe, consideration of the SDS should have made clear that Questacon should have pursued alternative control measures to those which it had adopted.

82. The Prosecution also submitted that the specified control measures could have been easily implemented. In relation to that submission:
- (a) I accept that signage at the plasma globes, relating to the use of alcohol-based hand sanitiser, could have been installed at negligible cost;
  - (b) I accept that the additional expenditure required to directly supervise the use of the plasma globes by trained staff would have been financially feasible for the Commonwealth (and the likelihood of the risk eventuating and the extent of the possible harm far outweighed any potential financial implications in any event); and
  - (c) I accept that replacing the alcohol-based hand sanitiser with non-alcohol-based hand sanitiser would have involved minimal inconvenience and cost in terms of the mechanical tasks required to be undertaken to implement that control measure.
83. However, I do not know how easy it would have been to provide portable soap and water handwashing stations and there were likely to have been practical difficulties in replacing alcohol-based hand sanitiser with non-alcohol-based hand sanitiser. Questacon is a major public institution that had responsibility for managing a range of risks, including the spread of the COVID-19 coronavirus and other illnesses. As reflected in the Safe Work Australia guidance note, and the sources of information referred to in Ms White's statement, alcohol-based hand sanitisers were recommended for use in public spaces because they were more effective than non-alcohol-based hand sanitiser in eliminating viruses. Changing to a non-alcohol-based hand sanitiser may have carried other risks for Questacon, in terms of the spread of viruses, both with respect to its visitors and staff.
84. I have addressed the Prosecution's submissions in relation to the relevance of the recurrence of reported incidents involving the plasma globes in my consideration of the Commonwealth's submissions.

### ***Assessment of objective seriousness of offending conduct***

85. The Prosecution submitted that the objective seriousness of the Commonwealth's offending is above the mid-range. The Commonwealth submitted that its offending sits

in the lower range, less than mid-range offending. Each of their submissions strongly focused on the considerations which support their respective views, however the various considerations must be considered together. The below is a summary of the relevant considerations.

86. On the one hand:

- (a) the likelihood of the risk of fire eventuating was low (based on the absence of any reported incidents at Questacon and other museums and the fact that Questacon had not been able to manufacture the risk eventuating through testing);
- (b) Questacon was concerned to ensure that the operation of the plasma globes was safe, it had attempted to address the risk it had identified and it considered that it had done so (albeit mistakenly); and
- (c) there was a reasonable explanation for why Questacon pursued an alcohol-based hand sanitiser solution given the recommended use of that type of hand sanitiser in public spaces like Questacon.

87. On the other hand:

- (a) the risk was foreseeable, and in fact foreseen by Questacon, which was aware of the risk from 2 February 2022 and identified it in several risk assessments, including after Questacon had implemented control measures;
- (b) Questacon ought to have had regard to the SDS for the foaming hand sanitiser, which should have made clear that Questacon should have pursued alternative control measures to those which it had adopted;
- (c) the potential gravity of the consequences of the risk eventuating included burn injuries, which are serious injuries that were not limited to a person's hand catching fire, as happened in the 23 July 2022 incident, particularly if a person's clothing or hair caught on fire;
- (d) Questacon's response to the specified risk was inadequate. It failed to establish and maintain adequate safety protocols. In this respect:
  - (i) Questacon did not implement (or adequately implement) one of the control measures it had identified, in that it did not directly monitor visitor interactions with the plasma globes;
  - (ii) the foaming hand sanitiser was no safer than the gel hand sanitiser and using it instead of the gel hand sanitiser did not reduce the potential risk that had been identified;

- (iii) there was no evidence as to the significance of placing the sanitiser dispensing station any particular distance from the plasma globes, in terms of the risk of fire, and thus no evidence as to the extent to which Questacon reduced that risk by moving the sanitiser dispensing station further away from the plasma globes; and
  - (iv) there were three steps available to Questacon to eliminate or minimise the risk of harm, two of which (installing signage at the plasma exhibit and arranging for direct supervision of the exhibit) would have been easy to implement at little cost to the Commonwealth;
  - (e) the Commonwealth was in breach of its s 19 duty for approximately five months; and
  - (f) during that period, a large number of people were exposed to the specified risk, including vulnerable members of the community such as children.
88. In my view, this is a serious example of a Category 2 WHS offence, which approaches the mid-range of the spectrum for that offence.

**Injury, loss or damage resulting from the Commonwealth's offence**

89. As noted earlier in these reasons, a 9 year old girl was injured in the 23 July 2022 incident as a result of the Commonwealth's breach of its s 19 duty. She suffered second degree burns to her wrists, hands and fingers and a blister to her right forearm.
90. The girl's mother, Ms Hendry, provided a victim impact statement to the Court. In that statement, she described the physical and emotional impact of the incident on her daughter and the impact that it had on her as well.
91. Ms Hendry described the incident as the worst day of her life. She said that seeing her daughter screaming and on fire was horrific and is a memory that she will carry with her for the rest of her life. Having been treated at the hospital and returned to their home interstate, Ms Hendry noted that her daughter struggled to sleep through the constant pain of her burns, that both her hands were bandaged and that she was unable to undertake basic tasks such as writing, brushing her hair and brushing her teeth. She said that she endured months of treatment.
92. Ms Hendry had to take significant unpaid time away from work to care for her daughter, who struggled through pain, frustration and loss of independence. Ms Hendry said that the physical injuries eventually healed, but the emotional effects lasted much longer. She noted that her daughter cannot erase the memory of what happened and there have

been ongoing practical impacts too. Her daughter remains frightened of flames and will not use hand sanitiser.

93. I am satisfied that the consequences of the 23 July 2022 incident described by Ms Hendry constitute injury, loss or damage to her and her daughter resulting from the Commonwealth's offence. I have taken that harm into account in sentencing the Commonwealth.

### **Character and antecedents**

94. I am aware that the Commonwealth has a record of WHS offences, although a criminal history was not tendered at the sentencing hearing in the usual way. The Prosecution provided a transcript of a decision given in the NSW Magistrates Court, *Comcare v The Commonwealth of Australia* (unreported, 9 March 2020, Magistrate Prowse), which was another case in which the Commonwealth was convicted of a Category 2 WHS offence.
95. The Department of Defence was the responsible agency in that case, which arose from inadequate supervision of army cadets. The court agreed with a submission made by the prosecutor in that case that the Commonwealth could not be treated as a first offender, having regard to the '*recitation of other matters where the Commonwealth has been prosecuted*', although the court noted that the Commonwealth's record was '*probably unsurprising in some respects, given the size and breadth of the defendant*'.
96. The court in *DPP v The Crown in Right of the State of Victoria* [2024] VCC 810 (***DPP v Victoria***) made a similar observation in sentencing the State of Victoria in WHS proceedings conducted under the Victorian WHS legislation. At [79], Quin J said:
- Although the Department has some prior convictions, it was submitted they were of little relevance in the context given the size of the Department's operations and its consequent exposure to risks in carrying out those operations. None of these prior matters relate to issues arising in the provision of swimming activities by schools and I accept that specific deterrence has limited operation.*
97. The Commonwealth similarly referred to a decision of the Victorian Court of Appeal which discussed the need to consider the criminal history of a corporate defendant in the context of the size of the company and the breadth of its operations: *DPP v Amcor Packaging P/I* [2005] VSCA 219 at [25].

98. The Commonwealth also relied on the statement of Ms White in support of its submission that the Court should take into account DISR's broader character. Ms White's statement refers to:
- (a) the long period of time over which Questacon has been operating (more than 37 years) and the large number of people who have visited Questacon during that period (more than 13.5 million people);
  - (b) the public purpose guiding Questacon's operations, with Questacon being a national institution dedicated to promoting scientific literacy, innovation and engagement. It supports government priorities by delivering high impact science engagement, contributing to national STEM capability and strengthening connections between science, education and the broader community;
  - (c) Questacon's response to the 23 July 2022 incident, including:
    - (i) the provision of first-aid to the injured child and regular follow-up welfare checks with Ms Hendry;
    - (ii) financial support for travel arrangements for the child's family and reimbursement of immediate out-of-pocket expenses; and
    - (iii) guidance about the process for making a claim for compensation; and
  - (d) Questacon's broader response with respect to its WHS obligations, including:
    - (i) removal of the plasma globes;
    - (ii) assessment of the other exhibits;
    - (iii) undertaking an audit and review of Questacon's WHS policies, procedures and management system;
    - (iv) implementation of the recommendations arising from that review; and
    - (v) taking a number of actions to strengthen WHS governance, assurance, risk management, organisational capability and officer oversight.
99. I accept that the fact that Questacon has operated for many years, with millions of people having attended and interacted with its exhibits without any prior history of offences or regulatory action, is demonstrative of a strong commitment to safety in its operations. The steps taken by Questacon since the 23 July 2022 incident to review and improve its WHS procedures are consistent with that commitment.

100. As discussed at the beginning of these reasons, the Commonwealth relied on DISR's absence of offences in support of its submission that it may be afforded a degree of leniency as a first-time offender. However, as also discussed, it is the Commonwealth which is the defendant to these proceedings. Given its prior convictions for other WHS offences, the Commonwealth is not entitled to the leniency that might be afforded to an unrecorded defendant.
101. Nevertheless, I do take into account the fact that the Commonwealth has no history of WHS offences with respect to DISR's operation of Questacon, and that Questacon has a strong commitment to safety. Specific deterrence has a limited role to play in the sentence I impose.
102. I accept that Questacon provides a significant and valuable service to the community and to education. That service, and Questacon's commitment to safety, demonstrate the good character of the Commonwealth, at least insofar as DISR's operation of Questacon is concerned.

### **Plea of guilty**

103. The Commonwealth submitted that its plea had significant utilitarian value, being the avoidance of a complex and lengthy trial involving many witnesses. I agree.
104. The Commonwealth also made submissions in relation to the timing of the plea, by reference to what it said was the expeditious way that it approached each stage of the negotiations that it entered into with the Prosecution. However, the discount to be afforded to the Commonwealth reflects the timing of the plea and the benefit to the community and any victim of the offence, rather than the reasonableness of the timing of the Commonwealth's actions. The Commonwealth entered its plea two years after it was charged (having indicated a plea of guilty approaching two years after it was charged), which is not an early plea.
105. The Commonwealth also submitted that its plea is indicative of remorse. A plea is weak evidence of remorse (*Georgopolous v The Queen* [2010] NSWCCA 246), although it is at least an acceptance of responsibility.
106. I will allow a discount of 20%.

### **Remorse**

107. I accept that the Commonwealth is remorseful for its offending. That is reflected in the statement of Ms White and in the Commonwealth's written and oral submissions.

108. I note Ms Hendry's disappointment that, once her family arrived home, there was '*no meaningful follow-up to ask how [redacted] treatment and recovery were progressing, how she was coping emotionally, or how our family was managing*'.
109. It is possible that the Commonwealth could have done more to support Ms Hendry and her family. However, as Ms White noted in her statement, Questacon did provide financial assistance and guidance about the process for making a compensation claim and undertook welfare checks of Ms Hendry of some kind.
110. Ms Hendry's observations do not cause me to doubt the genuineness of the Commonwealth's remorse.

### **Cooperation with authorities**

111. The Commonwealth submitted that it provided assistance to authorities by complying with the investigation into its conduct, including responding to all requests for the production of documents and information. The Prosecution agrees that the Commonwealth complied with statutory notices as required but submitted that, since it did nothing more than what was legally required, it is not entitled to any discount for the cooperation that it provided to authorities.
112. I have taken the Commonwealth's compliance with its obligations into account as demonstrating the seriousness with which it took the 23 July 2022 incident and its commitment to complying with its legal obligations, including its WHS obligations. However, the kind of assistance that the Commonwealth provided does not warrant a specific discount in relation to its sentence.
113. The Commonwealth also submitted that it provided assistance to authorities because it '*pro-actively identified particulars and an offence to which it could plead guilty*'. That submission cannot be accepted.
114. The Commonwealth was charged with an offence in August 2022. There is no suggestion that the Commonwealth assisted the Informant to identify that offence. There then followed a period of almost two years over which the Commonwealth first sought to resolve the matter on the basis that it enter into enforceable undertakings and then, when that proposal was rejected, to negotiate the particulars of the charge down from one containing an alleged seven control measures that the Commonwealth could have taken to discharge its s 19 duty to one that contained only three such control measures.
115. Negotiating out of self-interest, as occurred, to limit the extent of the Commonwealth's liability, is neither an act by which the Commonwealth '*pro-actively identified particulars and an offence to which it could plead guilty*' nor the provision of assistance to authorities.

## **Comparable cases**

116. In sentencing the Commonwealth, I must have regard to current sentencing practice and patterns. In that respect, the parties referred to a number of cases which they submitted provided some assistance with respect to the present sentencing exercise, although both parties acknowledged the differences in the factual scenarios that were considered in each of the cases.
117. I have had regard to the sentencing outcomes in each of the cases referred to by the parties, and the reasons of the courts in coming to those outcomes (to the extent that they are available), in determining the appropriate sentence for the Commonwealth in the present matter. In doing so, I note, as the High Court observed in *The Queen v Kilic* [2016] HCA 48, at [22], that while examination of cases in which sentences have been determined for the same offence:

*may provide a relevant “yardstick” by which a sentencing court can attempt to achieve consistency in sentencing and in the application of relevant sentencing principles’, the requirement to have regard to sentences imposed in those cases ‘does not mean that the range of sentences imposed in the past fixes the boundaries within which future sentences must be passed; rather the range of sentences imposed in the past may inform a “broad understanding of the range of sentences that would ensure consistency in sentencing and a uniform application of principle”.*

118. Consistency does not mean numerical equivalence but the consistent application of relevant legal principles.

## **Cases involving a risk of fire**

119. The Prosecution identified three cases in which, like the present case, victims (workers in those cases) suffered burns as a result of the defendant’s offending. The cases are *SafeWork NSW v Carbon BMC Pty Ltd* [2023] NSWDC 349, *SafeWork NSW v JA Investment Group Pty Ltd* [2021] NSWDC 569 and *SafeWork NSW v Oz Motorsports Pty Ltd* [2020] NSWDC 201. In each case, the defendant failed to adequately address the risk of fire caused by explosions.
120. The NSW District Court found that the offending in each case fell in the mid-range of objective seriousness (with one assessment being, specifically, the upper half of the mid-range). It appears that fewer people were exposed to the risk of harm than in the present case, however the likelihood of the relevant risk eventuating, and the gravity of the consequences if it did, were higher than they were in this case and the victims suffered more significant burns than the child victim in the present case. The defendants had also

not undertaken a (or undertaken an adequate) risk assessment. I do not know the period over which the defendants were charged as having been in breach of their WHS duty in these cases.

121. The NSW District Court determined the appropriate penalties to be fines (prior to the relevant discounts) of \$600,000 (*SafeWork NSW v Carbon BMC*), \$240,000 (*SafeWork NSW v JA Investment Group*) and \$180,000 (*SafeWork NSW v Oz Motorsports*).

***Cases particularly relied on by the parties***

122. The three cases that the parties particularly relied on were:

- (a) *WorkCover Qld v Archerfield Kart Hire Pty Ltd*, unreported, Magistrates Court of Queensland, 25 July 2017 (***WorkCover Qld v Archerfield Kart Hire***);
- (b) 'E202276', unreported, Magistrates Court of Queensland, 20 September 2018 (***E202276***); and
- (c) *DPP v Victoria*.

123. The Prosecution submitted that *WorkCover Qld v Archerfield Kart Hire* is helpful. The Commonwealth submitted that *E202276* and *DPP v Victoria*, in which the relevant breaches both occurred in an educational context, are relevant and comparable. I note that a number of the considerations considered in *DPP v Victoria* in particular, in which the defendant was also a government agency with the objective of educating children, are relevant to the present sentencing exercise.

***WorkCover Qld v Archerfield Kart Hire***

124. In *WorkCover Qld v Archfield Kart Hire*, the defendant operated a go kart track at which a 15 year old girl was injured. At least on the day of the incident, the defendant had in place a range of safety measures, including the provision of helmets to participants, the giving of verbal inductions (which included instructions on overtaking, speeding issues and flag signals), supervision of participants as they drove around the track and having in place a tyre wall at one of the turns in the track.
125. As the girl approached that turn, she failed to slow. She collided with the tyre wall and was thrown forward (the karts were not required to be, and were not, installed with seat belts). The force broke the steering column and the girl sustained cuts and abrasions which required surgery. The tyre wall was ineffective in controlling deceleration of a kart travelling at speed.
126. I agree with the Prosecution that this case is broadly comparable to the present case although, unfortunately, the only record of the court's decision is set out in a WorkSafe

Queensland media release. Accordingly, I was only able to consider a summary of the court's decision.

127. Like the present case, it also occurred in a 'recreational activity' setting, people exposed to the risk included children and the defendant was conscious of the need to operate safely. Unlike the present case, however, it had not undertaken a risk assessment in relation to the relevant risk and had a conviction less than two years prior to the incident.
128. The likelihood of the risk eventuating and the gravity of the consequences if the risk eventuated are not stated in the summary of the case. A critical factor in that regard, being how quickly the go karts could be driven in the relevant part of the track, is also not stated.
129. The summary of the case also does not identify whether the risk was foreseeable, whether the defendant was aware of the risk, the ease with which it could have implemented appropriate control measures or the period of time over which the defendant was charged with being in breach of its WHS duty.
130. It seems likely that more people (including younger children) were exposed to the relevant risk in the present case.
131. The court in *WorkCover Qld v Archfield Kart Hire* imposed a fine of \$100,000. Given that an early guilty plea was entered, it is likely that the court determined that the appropriate penalty, prior to discount, was a fine of at least \$133,000 (that figure would reflect a 25% discount), although the extent of the discount afforded by the court is not stated.

#### *E202276*

132. *E202276* is another case with respect to which I am reliant on a case summary produced by WorkSafe Queensland.
133. The defendant operated a number of schools, one of which organised demonstrations to be conducted during school assembly for a 'science week'. That included the use of a hazardous chemical, sodium hydroxide, which is corrosive to skin and eyes. The school identified control measures, including the use of a protective screen and safety glasses.
134. However, the school did not have a protective screen and instead implemented an 'exclusion zone' between the teacher undertaking the demonstration and the students.
135. During the demonstration, some of the students moved closer and, at some point, one of the bottles containing the chemicals burst, causing its contents to spray over the students at the front of the demonstration. Approximately 60 students reported contact

with the chemical, although only one student is recorded as having received burns. She was taken to hospital and released the next day, requiring eye washouts and ointments.

136. Like the present case, the facts involved a science demonstration where a risk assessment had been conducted but adequate control measures were not taken, multiple children were exposed to a risk of harm and a child in fact suffered burns. However, the potential gravity of consequences from fire in the present cases are likely to have been more serious than they were from the chemical spill and the defendant in *E202276* appeared to have been charged with breaching its WHS duty on a single day, in comparison to the five month period over which the Commonwealth was in breach of its WHS duty. The likelihood of the risk eventuating in *E202276* is not made clear from the case summary.
137. The court fined the defendant \$50,000 without recording a conviction. The court had regard to the defendant's plea of guilty, the significant post-incident measures it had taken and the fact that the defendant is predominantly a not-for-profit enterprise which provides substantial social services to a variety of community and charitable organisations.
138. I consider that the present case is more serious than *E202276*.

*DPP v Victoria*

139. *DPP v Victoria* concerned a prosecution in relation to the conduct of the Victorian Department of Education with respect to the operation of a primary school. Like the present case, the State acted through a government agency with responsibility for achieving a range of public purposes.
140. The school had arranged an excursion for students in Year 2 to attend and swim at a local pool. There was an inflatable device set up in the pool.
141. There was a risk to children who were non-swimmers or weak swimmers of drowning while using the pool and the inflatable device, resulting in serious injury or death. The court did not make a finding as to the likelihood of that risk eventuating but instead noted that there was an inherent danger in the activity. The prosecution submitted that the risk was real while the State submitted that, having regard to the policies in place and the expertise of the pool operator, the likelihood was low.
142. The State contravened its WHS duty as a result of the school's failure to provide information to staff at the pool about the children's swimming abilities. While the school had collected this information from the children's parents, it did not provide the information to pool staff.

143. The department had an extensive suit of policies, procedures and systems in place to ensure the safety of school children with respect to excursions and school related activities, including swimming lessons and other swimming activities. The school also paid for an additional lifeguard to be present to supervise the use of the inflatable device (two lifeguards were present to supervise the children at the pool) and three school staff members also attended to supervise.
144. One of the lifeguards surveyed the children about their swimming ability and split them into a group who could swim (who were allowed to use the inflatable device) and a group who could not (who were instructed to remain at the shallow end of the pool). The lifeguard did not conduct an assessment of the children's swimming abilities prior to them getting in the pool, although he did identify weak swimmers who had stayed to use the inflatable device and directed them to the shallow pool area.
145. Like the present matter, multiple children were exposed to the relevant risk, however the breach of the State's duty occurred on a single day, rather than over the five month period that the Commonwealth was in breach of its duty.
146. The gravity of the consequences of the risk eventuating, including death, were more serious than the present matter. Although, tragically, one of the children who had been directed to stay in the shallow pool area drowned, it was not established that his death was caused by the school's failure to provide information about his swimming ability to pool staff. In contrast, as I have found earlier in these reasons, the harm suffered by Ms Hendry and her daughter was caused by the Commonwealth's breach of its s 19 duty.
147. The court found that responsibility for the safety of the children in the course of the activity at the pool clearly rested with the pool operator, but that the school maintained a role in ensuring, as far as practicable, that steps were taken to ensure the safety of the children. The court found that the school's failure to reduce the risk to the children by providing the information they had obtained as to their swimming ability involved a serious breach of the State's duty.
148. The court sentenced the defendant to a fine of \$170,000 before applying a discount for the State's guilty plea.
149. I accept the Commonwealth's submission that *DPP v Victoria* is broadly comparable to the present case.

### **Sentence**

150. The primary considerations to which I must have regard in determining an appropriate sentence are the objective seriousness of the offending conduct and the importance of

the sentence reflecting the need for general deterrence (*SafeWork NSW v Carricks Plumbing and Gasfitting Pty Ltd* [2022] NSWDC 175 at [33]; *SafeWork NSW v Inghams Enterprises Pty Ltd* [2023] NSWDC 580; *Comcare v Commonwealth of Australia* [2007] FCA 662, at [120]).

151. Having regard to the objects and terms of the WHS Act, general deterrence is a particularly relevant factor (*Comcare v Commonwealth of Australia* [2007] FCA 662 at [120]; *R v Irvine* [2009] VSCA 239 at [52]). The sentence I impose should provide a reminder to all entities conducting a business or undertaking, both private and public, of their obligation to protect workers and others against harm to their health and safety through the elimination or minimisation of risks arising from their work.
152. Specific deterrence is also a relevant sentencing consideration given the purpose of the WHS Act (*Comcare v Commonwealth of Australia* [2007] FCA 662 at [120]; *Capral Aluminium Ltd v WorkCover Authority of NSW* [2000] NSWIRComm 71 at [73] – [74], cited with approval in *Bulga Underground Operations Ltd v Nash* [2016] NSWCCA 37 at [178], [181]), particularly as Questacon continues to operate hundreds of public interactive displays (*SafeWork NSW v McConnel Dowell Constructors (Aust) Pty Limited (No 3)* [2021] NSWDC 105 at [31]). However, as I have found in my discussion of the Commonwealth's antecedents and character, the significance of that sentencing consideration is limited in circumstances where the Commonwealth has no history of WHS offences with respect to DISR's operation of Questacon and given Questacon's strong commitment to safety, including its commitment to improved safety practices and its strong safety record. There is a low risk of the Commonwealth re-offending with respect to DISR's operation of Questacon.
153. I have also taken into account:
- (a) the harm to Ms Hendry and her daughter;
  - (b) the Commonwealth's remorse;
  - (c) the Commonwealth's plea;
  - (d) the significant and valuable service that Questacon provides to the community and to education; and
  - (e) Questacon's commitment to safety and its WHS and other legal obligations.
154. Having regard to all of the above considerations, and the maximum penalty that is applicable to the Commonwealth's offence, I have determined that the appropriate punishment is a fine of \$175,000. That will be reduced by 20% for the Commonwealth's plea, resulting in a fine of \$140,000.

## Orders

155. I make the following orders:

1. On the charge of committing a Category 2 offence, contrary to s 32 of the *Work Health and Safety Act 2011* (Cth), the Commonwealth of Australia (as represented by the Department of Industry, Science and Resources) is convicted.
2. The Commonwealth is required to pay a fine of \$140,000.

I certify that the preceding one hundred and fifty-five [155] numbered paragraphs are a true copy of the Reasons for Decision of his Honour Magistrate Temby.

Associate: Shanaea Hamad

Date: 24 September 2026