



New South Wales Industrial Relations Commission

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Inspector Barry Childs v Kirk Group Holdings Pty Limited & Anor [2005] NSWIRComm 1 (24 January 2005)

Last Updated: 16 February 2005

NEW SOUTH WALES INDUSTRIAL RELATIONS COMMISSION

CITATION : Inspector Barry Childs v Kirk Group Holdings Pty Limited & Anor [2005]
NSWIRComm 1

FILE NUMBER(S): IRC 1730, 1731, 1732 & 1733

HEARING DATE(S): 26/11/2004

DECISION DATE: 24/01/2005

PARTIES:

PROSECUTOR:

Inspector Barry Childs

DEFENDANTS:

Kirk Group Holdings Pty Limited

Graeme Joseph Kirk

JUDGMENT OF: Walton J Vice-President

LEGAL REPRESENTATIVES

PROSECUTOR:

Mr J Agius, Senior Counsel

Mr A Searle of counsel

SOLICITOR:

Ms A Devasia

WorkCover Authority of New South Wales

THIS AND THE FOLLOWING "17" PAGES
IS ANNEXURE "B" IN THE AFFIDAVIT
OF ED LARSEN SWORN/AFFIRMED
THE 27th DAY JUNE, 2005
BEFORE ME: [Signature]
SOLICITOR/A.C.T.

DEFENDANTS:

Mr L Aitken of counsel

Dr CS Ward of counsel

SOLICITOR:

David Lardner

CASES CITED: Cameron v The Queen (2002) 76 ALJR 382

Capral Aluminium Limited v WorkCover Authority (Inspector Mayo-Ramsay) (2000) 49 NSWLR 610

Department of Mineral Resources of NSW (McKensey) v Kembla Coal & Coke Pty Ltd (1999) 92 IR 8

Fisher v Samaras Industries Pty Ltd (1996) 82 IR 384

Inspector Gregory Maddaford v Graham Gerard Coleman & Anor [2004] NSWIRComm 317

Inspector Hannah v Wonar Pty Limited (unreported, Fisher CJ, CT90/1214, 30 June 1992)

Lawrenson Diecasting Pty Ltd v WorkCover Authority of New South Wales (Inspector Ch'ng) (1999) 90 IR 464

Maddaford v CSR Limited and Mulgoa Quarries Pty Ltd [2004] NSWIRComm 337

O'Sullivan v The Crown in the Right of the State of New South Wales (Department of Education and Training) (2003) 128 IR 158

Riley v Australian Grader Hire Pty Ltd (2001) 103 IR 143

Rodney Morrison v Powercoal Pty Ltd [2003] NSWIRComm 416

Warman International Limited v WorkCover Authority of New South Wales (1998) 80 IR 326

Wong v Melinda Group Pty Limited (1998) 82 IR 118

WorkCover v TRW [2001] NSWIRComm 52

WorkCover Authority (NSW) v ACI Operations Pty Limited (unreported, Schmidt J, CT93/1025, 25 February 1994)

WorkCover Authority of New South Wales (Inspector Ankusic) v McDonald's Australia Limited & Anor (2000) 95 IR 383

WorkCover Authority of New South Wales (Inspector Childs) v Kirk Group Holdings Pty Limited and Anor [2004] NSWIRComm 207

Workcover Authority of New South Wales (Inspector Farrell) v Schrader (2002) 112 IR 284

WorkCover Authority of New South Wales (Inspector Patton) v Fletcher Constructions Australia Ltd (2002) 123 IR 121

LEGISLATION CITED: Fines Act 1996

Occupational Health and Safety Act 1983

JUDGMENT:

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

IN COURT SESSION

CORAM: WALTON J, Vice-President

Monday, 24 January 2005

Matter No IRC 1730 of 2003

INSPECTOR BARRY CHILDS v KIRK GROUP HOLDINGS PTY LIMITED

Prosecution under section 15(1) of the Occupational Health and Safety Act 1983

Matter No IRC 1731 of 2003

INSPECTOR BARRY CHILDS v GRAEME JOSEPH KIRK

Prosecution under section 50(1) of the Occupational Health and Safety Act 1983

Matter No IRC 1732 of 2003

INSPECTOR BARRY CHILDS v KIRK GROUP HOLDINGS PTY LIMITED

Prosecution under section 16(1) of the Occupational Health and Safety Act 1983

Matter No IRC 1733 of 2003

INSPECTOR BARRY CHILDS v GRAEME JOSEPH KIRK

Prosecution under section 50(1) of the Occupational Health and Safety Act 1983

JUDGMENT OF THE COURT

[2005] NSWIRComm 1

1 This matter concerns an accident which occurred on 28 March 2001 at Mount Hercules Farm, a property owned by Kirk Group Holdings Pty Limited ("the Company"), located at Razorback Mountain near Picton in the State's south ("the Farm") involving a Polaris All Terrain Vehicle ("ATV"). On that day, Mr Graham Palmer, a part-time Farm Manager employed by the Company, died as a result of injuries he sustained when the ATV he was driving on the Farm overturned.

2 The facts are detailed in the judgment on culpability. In short, Mr Graeme Kirk, who controlled the business activities of the Company, conferred the responsibility for all operational aspects of the

Farm to Mr Palmer, including those relating to occupational health and safety. There was some evidence of Mr Palmer's wilfulness - for example, Mr Kirk gave evidence that Mr Palmer (who had become a close personal friend of his) had a "forceful personality" and "was not a person who took advice easily". Similarly, an employee and a contractor both gave evidence that on several occasions they had heard Mr Kirk tell Mr Palmer to slow down and be careful when riding the ATV.

3 On 28 March 2001, Mr Palmer unnecessarily chose to drive the ATV off-road, down a steep hill (the surface of which was slippery and loose), in preference to using the road which ended at the same point and which had been constructed specifically (with a hairpin turn, a lower gradient and sufficient width) to provide a safe route from top to bottom for "any sort of reasonable machine" including "a reasonable length of trailer". In doing so, Mr Palmer towed three lengths of steel tubes by attaching them to the carry racks at the rear of the ATV. At the foot of the slope, the ATV overturned, pinning the fatally injured Mr Palmer underneath it.

4 The ATV came with an "Owner's Safety and Maintenance Manual" (the "Owner's Manual") which contained specific warnings concerning the risk of the ATV overturning, including towing from the carry racks (as Mr Palmer did); driving down excessively steep hills, driving over hidden rocks, bumps or holes or excessively rough, slippery or loose surfaces; and driving without due regard for the driver's level of experience and familiarity with the terrain. There was no evidence as to whether Mr Palmer had read the Owner's Manual or was in any way familiar with its contents. The Company did not give a copy of the Owner's Manual to any of its employees or contractors including Mr Palmer to read prior to using the ATV, nor did it require them to have read it.

5 The Company was prosecuted for breaches of ss15 and 16 of the *Occupational Health and Safety Act 1983* ("the Act") arising from its failure to protect the health and safety at work of Mr Palmer and the non-employees present on the Farm (being farming contractors). Mr Graeme Kirk was also prosecuted, as a person concerned in the management of the Company, for deemed contraventions of s15(1) and s16(1) of the Act pursuant to s50(1).

6 The charge laid under s15(1) (being Matter No. IRC 1730 of 2004) was as follows:

The alleged offence is that [the Company], on 28 March 2001, at "Mount Hercules Farm", 340 Mount Hercules Road, Razorback in the State of New South Wales, a work place operated by [the Company] failed to ensure the health, safety and welfare at work of its employees, in particular Graham George Palmer, contrary to s15(1) of the *Occupational Health and Safety Act 1983*.

7 The particulars of that charge were that the Company failed to:

- (a) provide or maintain systems of work that were safe and without risks to health in relation to the operation of the [ATV];
- (b) provide such information, instruction, training and supervision as may be necessary to ensure the health and safety at work of its employees in relation to the operation of the [ATV];
- (c) to take such steps as are necessary to make available in connection with the use of any plant (namely the ATV) at the place of work adequate information about the use for which the plant is designed and about any conditions necessary to ensure that, when put to use, the plant is safe and without risks to health;
- (d) ensure that the [ATV] was only operated by persons with appropriate training;
- (e) adequately identify, assess and control risks and hazards in relation to the operation of the ATV on the farm.

8 The charge laid under s16(1) (being Matter No. IRC 1732 of 2004) was as follows:

The alleged offence is that [the Company], being an employer, on 28 March 2001, at "Mount Hercules Farm", 340 Mount Hercules Road, Razorback in the State of New South Wales, a work place operated by [the Company] failed to ensure that non-employees, namely David Thorn, Jason McLeod and Craig Haden, were not exposed to risk of injury arising from the conduct of its undertaking while they were at "Mount Hercules Farm", contrary to s16(1) of the *Occupational Health and Safety Act 1983*.

9 The particulars of that charge were that the Company failed to:

(a) ensure that persons not in the employer's employment were not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work in relation to the operation of the [ATV];

(b) ensure that the [ATV] was only operated by persons with appropriate training;

(c) adequately identify, assess and control risks and hazards in relation to the operation of the ATV on the farm.

10 The charges laid against Mr Kirk under s50(1) of the Act (being Matter Nos. IRC 1731 and 1733 of 2004) recited the offences alleged under s15(1) and s16(1) and, in relation to each offence, alleged as follows:

[Mr Kirk], being a person concerned in the management of [the Company], is deemed to have contravened the same section pursuant to s50(1) of [the Act].

11 The particulars of those offences were materially the same as those in Matter Nos. IRC 1730 and 1732 of 2003, applying to Mr Kirk as a person concerned in the management of the Company.

12 The Company and Mr Kirk pleaded not guilty. The matters were heard together and on 9 August 2004 the Court delivered its judgment in Matter Nos. IRC 1731, 1732, 1733 and 1734 of 2004: *WorkCover Authority of New South Wales (Inspector Childs) v Kirk Group Holdings Pty Limited and Anor [2004] NSWIRComm 207*.

13 I note that, whilst each of the above charges (and corresponding matter numbers) were correctly identified in the judgment in *Kirk*, the matter numbers were incorrectly listed in the heading to that judgment. The matter numbers and the charges should be as stated above (and as appears in the heading of this judgment).

14 The Court made the following findings (at [163]):

In these circumstances, and having regard to the preceding application of the relevant legal principles, I find that the Company has failed to satisfy the requirements of ss15 and 16 of the Act and that the charges in Matter Nos. IRC 1730 and 1732 are proven, subject to any defence that is established. The defendants did not make any submission that, in the event that the charges against the Company were proven, ss50(b) or (c) should apply to exonerate Mr Kirk from liability. Given my earlier findings that Mr Kirk was effectively the mind and actor of the Company, who controlled the relevant actions of the Company at the Farm, and was effectively the instrument of the Company's failure, there is no basis for overturning the deemed contravention dictated by s50 and I find that the charges against Mr Kirk pursuant to s50 of the Act, being Matter Nos. IRC 1731 and 1733, are also proven, subject to the establishment of any defence under s53.

and later (at [168]):

There was nothing to ground a defence given the complete failure by the Company to take any steps to ensure the health and safety of employees or contractors in relation to the use of the ATV on the Farm, in circumstances where there were simple, practicable steps available, and no reason why those steps could not have been taken.

15 This judgment deals with the appropriate penalty to be imposed and the question of costs. In the present proceedings, the defendants relied on additional evidence from Mr Kirk and Sri Ranga Rajan Somasuntharam, the Company's Financial Controller.

16 It is pertinent to identify the broader corporate structure in which the Company operates. The defendants provided a rudimentary diagram of that corporate structure. Mr Kirk and his wife, Mrs Kay Kirk, are the sole shareholders of three separate corporate entities. One entity is the Company, which owns the Farm. The second entity is Kirk Engineering Services Pty Limited, which owns a factory at Picton and which operates a printing business which the Court has inspected. The third entity is Mt Hercules Pastoral Co. Pty Limited, which owns and operates a large commercial feedlot at Cootamundra. The Cootamundra farm was purchased in mid-2002, after Mr Palmer's fatal accident.

17 As I discuss later, given Mr Kirk's role as shareholder and corporate mind of each corporate entity and the parties' common approach as to how to take into account the group corporate structure for the purpose of sentencing, the nature of the operations conducted by each entity and their respective approaches to occupational health and safety are relevant to my determination of the penalties to be imposed on both the Company and Mr Kirk personally. In particular, the prosecutor and defendants conceded that the respective corporate entities should be considered as a composite group so that the Court may make a favourable assessment of the Company in relation to the subjective factors of the matter (as to its standing as a good 'corporate citizen') and may have regard to specific deterrence (in relation to the operation of the Cootamundra farm).

submissions

18 Three relevant matters were comparatively uncontroversial. First, as I have mentioned, Mr J *Agius* SC (with whom Mr A *Searle* of counsel appeared on behalf of the prosecutor) conceded that, given Mr Kirk's controlling interest and common involvement in the Company and its two related corporations, it would be appropriate for the Company to have the benefit of what appears to be the good industrial citizenship of the related corporations, but also the detriment associated with the need for specific deterrence arising from the existence of those corporations and, in particular, the farming venture at Cootamundra. Mr L *Aitken* of counsel (with whom Dr CS *Ward* of counsel appeared on behalf of the defendants) concurred and submitted that Mr Kirk was a "scrupulous and dedicated professional" in business matters, and that the Court should "take into account [that] when Mr Kirk is operating something in a business mode we know he will be attending to it or causing others to attend to it with the full discretion that he can". This seems a sensible approach in the circumstances, and I shall sentence the defendants within those parameters.

19 Secondly, Mr *Agius* conceded that, to the extent that Mr Kirk had shown remorse, the corporate defendant should be considered to have demonstrated remorse. The prosecutor acknowledged that Mr Kirk felt a great deal of remorse and sadness because of the personal relationship he had with Mr Palmer but distinguished remorse from contrition. Whilst Mr Kirk had accepted responsibility for the accident (as distinct from criminal liability) and made a number of admissions at trial (indicating some degree of contrition), there was no other evidence of the defendants' contrition. In particular, the usual element of contrition - a guilty plea - was missing.

20 Thirdly, the prosecutor accepted that, on one view, the objective seriousness was greater in relation to the s15 offences than in relation to those under s16 because, although the contractors were exposed to risk, the consequences were not fatal. However, Mr *Agius* submitted that the risks were

nevertheless high in relation to the contractors due to the nature of the terrain on the Farm and the fact that none of the contractors had been given any instructions regarding the use of the ATV nor had they been given the Owner's Manual to read. Mr *Agius* further submitted that "the fact that there was a death is an indication of the nature and scope of the risk itself that the contractors were exposed to" and that "the objective seriousness might be slightly different but not greatly so".

21 Additionally, Mr *Agius* contended that the objective seriousness of both offences fell in the high range for three principal reasons. First, Mr Kirk, and through him the Company, was aware of the risks to safety posed by the use of the ATV. Mr Kirk had personally overturned the ATV in an earlier accident. Even without this actual knowledge of the risks, Mr Kirk ought to have been aware of the risks: the Owner's Manual contained specific warnings concerning the risk of the ATV overturning (which included driving on excessively steep hills; hidden rocks, bumps or holes; excessively rough, slippery or loose surfaces; the driver's level of experience and familiarity with the terrain and the very towing method employed by Mr Palmer on the day of his death) and Mr Kirk had access to the Owner's Manual. Secondly, Mr Kirk, and through him the Company, whilst aware of Mr Palmer's recalcitrance, nevertheless entrusted him with the responsibility of developing and enforcing an occupational health and safety program for the Farm, a task for which he had no particular skills or experience. Thirdly, there were remedial steps which could have been taken to avoid the risks associated with the use of the ATV. The simplest of those steps would have been to remove the ATV entirely, or alternatively to secure it in a lockable container such as the one at the Farm at the time of the accident.

22 It should be noted that Mr *Aitken* submitted that "the only way of limiting risk in some way was not to allow the bike to be used at all. If that had been done, then the whole very sad accident would not have occurred". Mr *Aitken* submitted that merely locking up the ATV would not have prevented the accident or avoided the risk in the present matter, as Mr Palmer held the keys to the container where the ATV was stored. This submission overlooks the absence of instructions which could have been given to Mr Palmer as to the use of the ATV including off-road use.

23 As to general deterrence, the prosecutor submitted that the penalty imposed must demonstrate that:

- (1) farms where people are employed are undertakings covered by the provisions of the Act;
- (2) employers cannot rely on an insufficiently or inappropriately trained manager to be responsible for occupational health and safety obligations;
- (3) recalcitrant behaviour on the part of employees will not excuse employers from their obligations in occupational health and safety matters; and
- (4) the use of equipment on farms requires appropriate risk assessment having regard to the nature of the specific risks to health and safety arising from the use of that equipment on a particular farm.

24 Finally, in his written submissions, the prosecutor contended that, given that each defendant had been convicted of two offences, the defendants should each be sentenced on the basis that one offence - whichever is first recorded as a conviction - would be a prior conviction for the purposes of s51A of the Act, such that the second offence would attract the higher maximum penalty prescribed by that section. The prosecutor was granted the opportunity to make further written submissions in support of that contention, or alternatively to withdraw from it. The prosecutor subsequently notified the Court in writing that he did not press this submission. I do not propose to determine the matter in this judgment, given the absence of submissions on the question.

25 Mr *Aitken* submitted that Mr Kirk (and therefore also the Company) has paid a large, personal cost in relation to the accident: the Farm no longer operates as a commercial enterprise; Mr Kirk no

longer resides on the Farm; and Mr Kirk lives in the city in rented accommodation. In those circumstances, he submitted, the Court should treat the defendants leniently.

26 Mr *Aitken* further submitted that, on any objective basis, Mr Palmer's fatal accident could not have been foreseen. According to Mr *Aitken*, the lack of foreseeability of the actual accident was the appropriate test for the purposes of sentencing. In support of this submission Mr *Aitken* relied upon the following passage from *Capral Aluminium Limited v WorkCover Authority (Inspector Mayo-Ramsay)* (2000) 49 NSWLR 610 (at [81]):

We now deal more particularly with the nature and quality or gravity of the offence committed by the appellant. It will be observed from the appellant's submissions on appeal, which we have extracted earlier, that the major contention, other than those with which we have already dealt, is the lack of any prior indication as to safety issues with the protective clothing issued to employees at the appellant's plant. There was therefore, it is submitted, no basis upon which the breach of safety could have been considered reasonably foreseeable. The question of foreseeability is relevant to the assessment of the seriousness of the offence. We consider that the appropriate approach is that of *Walton J*, Vice-President, in *Department of Mineral Resources of NSW (McKensy) v Kembla Coal & Coke Pty Ltd* (1999) 92 IR 8 at 27:

Whilst the reasonable foreseeability of an accident may not be relevant to the question of liability under the Act (see *Drake Personnel Ltd t/as Drake Industrial v WorkCover Authority of New South Wales (Inspector Ch'ng)* (1999) 90 IR 432, the degree of foreseeability is a significant factor to be taken into account when assessing the level of culpability of the defendant. The existence of a reasonably foreseeable risk to safety which is likely to result in serious injury or death is a factor which will be relevant to the assessment of the gravity of the offence: see *Camilleri's Stock Feeds* (32 NSWLR at 700); *James Moore v Vibro-Pile (Aust) Pty Ltd* (unreported, *Hungerford J*, CT96/1163, 28 May 1997, at 17) and *Work Cover Authority of New South Wales (Inspector Kelsey) v University of Sydney* (unreported, *Hill J*, CT95/1280, 12 April 1997 at 16).

27 He refined this submission, however, to accept that whilst the foreseeability of the particular incident (as opposed to the general risk) is not directly relevant to sentencing, Mr Palmer's behaviour on the day of the accident may be a matter which operates to mitigate the objective seriousness of the offence: *Riley v Australian Grader Hire Pty Limited* (2001) 103 IR 143.

28 Mr *Aitken* agreed with two of the prosecutor's written submissions: that an employer cannot discharge its duty under the Act by delegation of safety matters to a supervisor or manager (*WorkCover Authority of New South Wales (Inspector Patton) v Fletcher Constructions Australia Ltd* (2002) 123 IR 121 at [40]-[42]); and that the Act is intended to protect against human errors, including inadvertence and even foolish disregard for personal safety (*WorkCover v TRW* [2001] NSWIRComm 52 at [13] - [14]). However, he submitted that the prosecutor erred in submitting that "the defendant took no steps whatsoever to fulfil the duties imposed upon them by law beyond reliance upon the deceased to carry out their responsibilities. He was not equipped for the task to the knowledge of the defendants". Mr *Aitken* contended that the defendants had taken steps to minimise the risks associated with the use of the ATV on the farm: he submitted that "we had the training video and also had an instruction manual and various decisions given, commands given about who was to actually operate the bike which was under lock and key".

29 As to general deterrence, Mr *Aitken* submitted that showing some leniency to Mr Kirk in the present matter would not adversely affect the message that should be sent to the broader farming industry.

30 Finally, Mr *Aitken* submitted that this is a matter in which "a significant not a large penalty should be imposed"; significant simply because of the consequence of the breach.

consideration

31 The primary factor to be considered in determining the appropriate sentence to impose in this matter is the objective seriousness of the offence, or put differently, an objective assessment of the nature and quality of the offence: *Lawrenson Diecasting Pty Ltd v WorkCover Authority of New South Wales (Inspector Ch'ng)* (1999) 90 IR 464 at 474. In that respect, this Court also notes the observations of the Full Bench in *Warman International Limited v WorkCover Authority of New South Wales* (1998) 80 IR 326 at 339:

The penalty must reflect the nature and quality of the particular offence; the level of penalty must, on the one hand, compel attention to occupational health and safety risks in order to ensure that persons are not exposed to such risks at their workplaces but, on the other, must not be oppressively high.

See also *Fisher v Samaras Industries Pty Ltd* (1996) 82 IR 384 at 388; *WorkCover Authority of New South Wales (Inspector Ankucic) v McDonald's Australia Limited & Anor* (2000) 95 IR 383 at 427.

32 The maximum penalty for each of the offences with which the Company has been charged is \$550,000 and the maximum penalty for each of the offences with which Mr Kirk has been charged is \$55,000.

33 The risk in the present matter was that the ATV could overturn (or otherwise unbalance) in certain circumstances, including when driven off-road or when used for towing. The existence of that risk was repeatedly and unmistakably proclaimed in the Owner's Manual and had been experienced personally by Mr Kirk.

34 In *Kirk*, I made the following findings which are relevant to the objective seriousness of the offence:

[52] ... I am satisfied beyond reasonable doubt that the gradient of the terrain, the nature of the slope's surface, the total mass of the vehicle, and the improper hitching of the steel to the ATV's racks rather than to the tow bar were factors which, when combined, led to the ATV overturning on 28 March 2001...

[105] In my view, the evidence demonstrates, beyond reasonable doubt, that Mr Kirk (and therefore the Company, except in the case of (k)):

- (a) had not seen or read the Owner's Manual prior to Mr Palmer's accident;
- (b) did not supervise the daily activities of employees or contractors working on the Farm;
- (c) did not conduct a risk assessment, or request any other person to conduct a risk assessment, regarding the use of the ATV on the Farm;
- (d) did not take any steps to limit or restrict access to the ATV to only those employees and contractors who were suitably qualified and trained to ride the ATV;
- (e) did not ensure that employees or contractors read and understood the Owner's Manual;
- (f) gave no instructions to any employee or contractor, including Mr Palmer, that conditions for use of the ATV specified in the Owner's Manual must be adhered to;
- (g) gave no instructions to Mr Palmer to instruct employees and contractors only to use the ATV in accordance with the Owner's Manual;

- (h) gave no particular instructions to any employee or contractor as to how the Owner's Manual would be applied at the Farm;
- (i) gave no instructions to any employee or contractor that the ATV was not to be used off-road or on sloping terrain (either generally or of a particular gradient);
- (j) relied on Mr Palmer to give instruction and training without equipping him with the knowledge or tools to undertake those duties, and without supervising or monitoring his performance of those duties;
- (k) approached the creation of a safe system of work differently between two businesses he operated; and
- (l) had no system in place to assess and determine whether or not employees of, or contractors to, the Company were trained in the use of the ATV, or were using the ATV in a manner which was safe and without risk to health.

35

I further found that:

- (1) Mr Kirk himself had accidentally overturned the ATV while driving it, but did nothing about occupational health and safety in relation to the ATV on the Farm;
- (2) none of the Company's employees or contractors were instructed or trained in relation to the use of the ATV, beyond a demonstration of the basic functions of the vehicle;
- (3) there was no system in place in relation to the use of the ATV with respect to towing; and
- (4) the Company neglected its duties under the Act by placing Mr Palmer "in charge" of the health and safety of employees and contractors on the Farm, and compounded the problem by failing to ensure (a) that Mr Palmer had the necessary skills to conduct a risk assessment, to provide or arrange training, to instruct others in the safe use of the ATV or to supervise the use of the ATV or that (b) Mr Palmer actually carried out his duties, particularly with respect to health and safety. Consequently, it had no effective control over use of the ATV prohibited or warned against by the Owner's Manual.

36 In light of those findings as to the litany of the defendants' failures, and in the statutory context of ss15 and 16 of the Act, the offences must be viewed as objectively serious. This seriousness is compounded by the ready availability of numerous simple, straightforward steps which could have been taken to reduce or avoid the risk (such as locking up the vehicle, simply banning the use of the ATV off-road, or requiring strict compliance with the Owner's Manual): see for example *WorkCover Authority (NSW) v ACI Operations Pty Limited* (unreported, Schmidt J, CT93/1025, 25 February 1994) and *Department of Mineral Resources of NSW (McKensey) v Kembla Coal & Coke Pty Ltd* (1999) 92 IR 8 (at 27).

37 I reject Mr Aitken's submission that the only way to have limited the risk would have been to ban all use of the ATV and note that this implies an obligation to eliminate the entire risk, an idea systematically rejected in *O'Sullivan v The Crown in the Right of the State of New South Wales (Department of Education and Training)* (2003) 125 IR 361 at [141]. Nor do I attach any weight to Mr Aitken's submission (which is contrary to my findings in *Kirk* extracted above) that some steps (in the nature of a system of work) had, in fact, been taken to minimise the risk associated with the use of the ATV on the Farm, viz "we had the training video and also had an instruction manual and various decisions given, commands given about who was to actually operate the bike which was

under lock and key".

38 The prosecutor further submitted that Mr Kirk's failures were even more serious when considered in the context of his other business activities. According to Mr *Agius*, a comparison of the printing business and the farming venture demonstrated that Mr Kirk was well and truly aware of his health and safety responsibilities as an employer and that the standards evident in the factory were absent at the Farm. The prosecutor further submitted that there was no satisfactory explanation offered for such a lapse in standards and that Mr Kirk's lack of understanding of his obligations in relation to the Farm was so dangerous that it must be reflected in the penalty imposed.

39 Finally, the seriousness is further compounded by virtue of the fact that the risk was reasonably foreseeable: *Capral Aluminium* at [82]. In this case, the risk was more than reasonably foreseeable: it had actually happened to Mr Kirk on a previous occasion. I note that Mr *Aitken* effectively retracted his submission that lack of foreseeability of the actual accident was relevant to sentencing, in favour of a submission based on mitigation due to Mr Palmer's behaviour. Had he not done so, I would have rejected it in no uncertain terms. As I noted in *Kirk*, in response to similar agitation by the defendants, the Full Court stated clearly in *Drake Personnel Ltd t/as Drake Industrial v WorkCover Authority (NSW) (Inspector Ch'ng)* (1999) 90 IR 432 that the concept of "reasonable foreseeability" does not apply to the duty imposed by s15 - it is relevant to a defence under s53 only - and even in that situation, it is the reasonable foreseeability of the risk, not that actual accident, which is relevant. The Full Bench did not depart from this approach in *Capral Aluminium*.

40 I acknowledge that Mr Palmer's recklessness in driving down a steep, slippery slope in a vehicle prone to overturn (in preference to driving down a road purpose built for safety) played an important part in the actual accident and particularly increased the likelihood of a fatal outcome. I accept Mr *Aitken's* submission that Mr Palmer's behaviour on the day of the accident may be a matter which operates to mitigate the objective seriousness of the offences, but I do not consider that such mitigation would be substantial. In one sense, Mr Palmer's actions may be said to have augmented the objective seriousness: as Mr *Agius* submitted, despite being aware (to an extent) of Mr Palmer's wilfulness, including occasional lack of care and speeding when driving the ATV, the defendants entrusted him with the responsibility for occupational health and safety at the Farm when he had no particular skills or experience for the role.

41 In conclusion, and in accordance with the decision of the Full Bench in *Riley v Australian Grader Hire* at [15], I consider that the defendants should be accorded a reduction of the penalties to be imposed on the basis of Mr Palmer's recklessness on the day of the accident.

42 The breaches of the Act by Mr Kirk and the Company had most serious consequences. However, this fact does not, of itself, demonstrate the objective seriousness of the offences. The issue was considered recently by a Full Bench of this Court in *Maddaford v CSR Limited and Mulgoa Quarries Pty Ltd* [2004] NSWIRComm 337 at [17] - [18]:

The relevance to the gravity of an offence of injuries suffered as a result of a breach of the *Occupational Health and Safety Act* and the relevance of potential serious consequences or serious injuries of that breach, are well settled: see, for example, *Capral Aluminium Limited v WorkCover Authority of New South Wales (Inspector Mayo-Ramsay)* at paras [94] and [95] where it was held:

[94] We consider that the limited injuries suffered by Mr Stafford must be seen in the context of that evidence and also in light of the principles which have been laid down in relation to the relationship between the seriousness of injuries suffered, or which may have been suffered, and the gravity of the offence. We consider that the relevant principle can be stated in this way. The gravity of the consequences of an accident, such as the damage or injury, does not, of itself, dictate the seriousness of the offence or the amount of penalty. However, a breach where there was every prospect of serious consequences might be assessed on a different basis to a breach unlikely to have such

consequences. The occurrence of death or serious injury may manifest the degree of seriousness of the relevant detriment to safety: *Tyler v Sydney Electricity* (1993) 47 IR 1 at 5; *Inspector Hannah v Wonar Pty Limited* (unreported, Fisher CJ, CT90/1214, 30 June 1992) at 9; *Watson v Southern Asphaltes Pty Limited* (1996) 83 IR 446 at 456; *Wong v Melinda Group Pty Limited* (1998) 82 IR 118 at 131; *WorkCover Authority of New South Wales v Albury City Council* (1999) 90 IR 397 at 408 - 409; *Lawrenson Diecasting Pty Limited* at 476; *WorkCover Authority of New South Wales (Inspector Ankucic) v McDonald's Australia Limited* at 90 - 91; and *Page v Walco Hoist Rentals Pty Limited (No. 2)* at 22.

[95] It must however be recognised that the principle does not lead to the proposition which, at least implicitly, was relied upon by the appellant. That is, relatively minor injuries of themselves demonstrate that the offence was not a serious one. We do not consider that is or represents a correct statement of principle or correctly portrays the situation here. We consider the relevant risk was not exemplified by the limited nature of the injuries suffered, and thus those injuries do not give an accurate insight into the seriousness of the breach of the Act. Rather, we consider that the breach of the Act, although limited to the failure to provide adequate protective clothing, was a very serious one indeed.

We do not consider that the proper application of the relevant principles requires the sentencing judge to expressly specify the type of injury that could have been suffered as a result of the particular breach of the legislation, although it is appropriate in most cases for there to be an indication of the kind of consequence that could have resulted from the breach.

See also, for example, *Inspector Hannah v Wonar Pty Limited* (unreported, Fisher CJ, CT90/1214, 30 June 1992); *Lawrenson Diecasting* at 476; *Capral Aluminium* (at [94] - [95]), *Wong v Melinda Group Pty Limited* (1998) 82 IR 118 at 131; *WorkCover v McDonald's* at 428; *Rodney Morrison v Powercoal Pty Ltd* [2003] NSWIRComm 416 at [32].

43 In my view, Mr Palmer's death did manifest the seriousness of the risk caused by the defendants' failures. I am prepared to accept that the objective seriousness is marginally greater in relation to the s15 offences than in relation to those under s16 because the consequences for the contractors exposed to risk were not fatal. However, the difference in objective seriousness is not great: although no contractor died as a result of the defendants' failures, they were each exposed to the risk that the ATV could overturn (or otherwise unbalance) in various circumstances, and it is impossible to divorce the risk of fatality or at least serious injury from such an occurrence.

44 The need for general deterrence looms large in this matter. The Court in *WorkCover Authority of New South Wales (Inspector Farrell) v Schrader* (2002) 112 IR 284 emphasised the need to impose suitable penalties which will deter others from breaching their health and safety obligations. The Court held at [69] - [70]:

The purpose of the Act is well known and often referred to in judgments of this Court. In my view, it is important, when considering notions of general deterrence, that the Court be cognisant of the fact that the Act is for the benefit of the public generally and particularly employees at work. The goal is the prevention, deterrence and punishment of breaches of health and safety requirements. The notion of general deterrence is well understood. However, in my view, and in accordance with what was stated by the Full Court in *Capral Aluminium* (at [72] - [74]), in cases such as this, it should be reiterated that "one of the main purposes of punishment, ... is to protect the public from the commission of such crimes by making it clear to the offender *and to other persons with similar impulses* that, if they yield to them, they will meet with severe punishment" (emphasis added): *R v Rushby* [1977] 1 NSWLR 594 at 597 per Street CJ citing *R v Radich* [1954] NZLR 86 at 87 (adopted by this Court in *Capral Aluminium* at [72]).

Further, I would note that it has been described as "the fundamental duty of this Court" to ensure that

any penalty imposed is severe enough to "compel attention to occupational health and safety issues so that persons are not exposed to risks to their health and safety at the workplace": *Fisher v Samaras Industries Pty Limited* (1996) 82 IR 384 at 388 adopted in *Capral Aluminium* (at [74]).

45 I agree with the prosecutor that general deterrence plays a significant role in the present matter to compel attention by employers in the farming industry - whether large commercial enterprises or small hobby farms - to their occupational health and safety obligations. In particular, employers must be reminded to take a diligent and proactive approach to the assessment and management of risks associated with the use of farm equipment, much of which is inherently dangerous.

46 As to specific deterrence, the Full Bench in *Capral Aluminium* held (at [76] - [77]):

... the attitude of a defendant to questions of workplace safety and any steps taken to improve safety following an accident may be relevant to specific deterrence. Here the objective is to deter the particular offender from repeating the offence: see Ruby, *Sentencing* (5th Edition, Butterworths, Toronto, 1999) at 10. The propensity to re-offend must be considered when determining the weight, in any, to be attached to specific deterrence. In *R v Pickard* [1998] VSCA 50, for example, Winneke P and Charles JA of the Victorian Court of Appeal stated (at 4):

An assessment by the judge of the risk of a prisoner re-offending is not a feat which requires any refinement of thought process. If the judge is satisfied that the accused constitutes such a risk that the penalty to be imposed should reflect an aspect of specific deterrence, it will be because he or she has no doubt that the accused poses such a risk. In our view, it is not a question of distinguishing between degrees of risk. It is simply because the judge perceives that the risk is such that the penalty should be one which will deter the accused from re-offending. The greater the judge perceives the risk to be, the more heavily specific deterrence will weigh in the instinctive decision as to the appropriate sentence.

In sentencing, a court may disregard the element of specific deterrence if satisfied that the risk of re-offending is low or non-existent. The court may form such a view as a result of the rehabilitation of the offender: *R v Corner* (unreported, Court of Criminal Appeal, 19 December 1997) or because the offender will not have the opportunity to commit a similar offence in the future: *R v Macdonell* (unreported, Court of Criminal Appeal, 8 December 1995). However, we think it unlikely that the weight to be attached to specific deterrence could be reduced to zero in case of offences under the Act. At least where the offender continues to be an employer, risks to the safety of its employees or contractors may exist or be possible. Breaches of the duties imposed by the Act may occur both by commission and omission. Employers are required to maintain constant vigilance and take all practicable precautions to ensure safety in the workplace. They must adopt an approach to safety which pro-active and not merely re-active: *WorkCover Authority of New South Wales v Atco Controls Pty Ltd* (1998) 82 IR 80 at 85. In view of the scope of these obligations, in most cases it will be necessary to have regard to the need to encourage a sufficient level of diligence by the offender in the future. This is particularly so where the offender conducts a large enterprise which involves inherent risks to safety: see *WorkCover Authority of New South Wales (Inspector Glass) v Kellogg (Aust) Pty Ltd* [2000] NSWIRComm 53 at 46.

47 I accept that the defendants no longer operate the Farm as a commercial enterprise and that no employees or contractors are engaged to work on the Farm. The prospect of the defendants re-offending in relation to any enterprise or undertaking associated with the Farm is virtually nil. However, Mr Kirk, through his various corporate guises, continues to be an employer in the farm sector (as mentioned earlier, Mt Hercules Pastoral Co. Pty Limited has acquired a large commercial feedlot at Cootamundra) and the possibility remains that a risk to the health or safety of employees or contractors may exist or arise in the future. As earlier noted, the defendant conceded that I should have regard to the operations of this feedlot with respect to specific deterrence. Accordingly, and given the potentially dangerous nature of the farming industry (although I will take into account later

the defendants' attention to occupational health and safety in this area), there is a clear need to encourage a proactive approach to health and safety by specific deterrence.

48 I note that there are compelling subjective considerations which mitigate in favour of both the Company and Mr Kirk, not least of which is the obvious remorse felt by Mr Kirk over the accident and the death of his friend. Mr Kirk has been profoundly affected by the accident and has suffered great personal sadness as a result of the death of Mr Palmer. His remorse was evident in both his demeanour and his evidence. I accept Mr Kirk's evidence that "the event has been thought about by me every day of my life. I lost a good mate".

49 The mitigating effects of remorse were discussed in *Department of Mineral Resources of NSW v AM Hoipo & Sons Pty Ltd* (2000) 99 IR 137. In that matter, the director of the defendant company experienced considerable distress, sadness and ill health related to the loss of his employee and good friend. The Court held (at [64]):

I accept that Mr Hoipo's regret and contrition are genuine. Contrition, repentance and remorse after the offence are mitigating factors which may lead to a reduction in the sentence which may otherwise have been imposed: see *Neal* (1982) 56 ALJR 848 at 852. I also note that, although the quarry continues to be owned by the defendant, it is now operated by a third party and various improvements have been made. The personal impact of Mr Banville's death on Mr Hoipo has clearly made this a very difficult time for him. He has, in a real sense, already paid a significant penalty. Nonetheless, the offence is such that the imposition of a significant penalty is required.

50 Mr Kirk has also paid a high price for his breach of the Act: he no longer resides in the homestead on the Farm; he has moved to rental accommodation in the city; the goats which were being run commercially on the Farm have been sold; there are no employees or contractors engaged to work on the Farm; and the tenants who now reside in the homestead are forbidden to go beyond the immediate surrounds of the homestead.

51 In that regard, I note the observations of *Street CJ* in *R v Rushby* [1977] 1 NSWLR 594 (at 597):

If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine that appropriate amount of punishment.

52 In *WorkCover Authority of New South Wales (Inspector Farrell) v Morrison (No 2)* (2002) 112 IR 312, I considered the effects of the defendant's breach in that matter on his personal, business and professional circumstances when determining the penalty at [68]:

Contrition, repentance and remorse after an offence are mitigating factors which may lead to a reduction in the sentence otherwise to be imposed: *AM Hoipo & Sons Pty Ltd* (at [64]); *Corinthian Industries (Sydney) Pty Ltd v WorkCover Authority of New South Wales (Inspector Wilson)* [2000] NSWIRComm 46 (at [17]). I consider that the defendant is contrite and has demonstrated a high level of remorse. I have also had regard to the significantly adverse changed personal, business and professional circumstances of the defendant which arose as an aftermath of the incident: see *Berrima* at [201]. It is appropriate to take account of the defendant having assisted the prosecutor with its investigations. Further, I consider, on the evidence of the defendant, noting that there was no demur on behalf of the prosecutor, the defendant has otherwise operated as a good industrial citizen for a period of some 20 years without prosecution having been brought against him.

53 As to contrition, the prosecutor submitted that "there is no reduction available in these matters on account of any plea of guilty or expressed contrition". In oral submissions, Mr *Agius* conceded that it could not be denied that there were "some elements of contrition". He correctly pointed out, in my view, that Mr Kirk (and therefore the Company) had demonstrated some contrition. Mr Kirk willingly made a number of admissions going to liability, and further, as put by Mr *Agius*, he "never denied responsibility, not criminal liability, but responsibility in the sense that he brought [Mr Palmer] onto the property and he was aware Mr Palmer was a bit of a renegade". I agree that there is some evidence of the defendants' contrition in Mr Kirk's willingness to give evidence, his open admissions and his acknowledgement of a level of responsibility for the accident. My assessment of the defendants' contrition will therefore be a factor in my determination of penalty.

54 Mr *Agius* submitted that the absolute sign of contrition is a guilty plea, which was missing in the present matters. However, a defendant may not be penalised for the absence of a guilty plea. A majority of the High Court in *Cameron v The Queen* (2002) 209 CLR 339 considered the implications for sentencing where a plea of not guilty is entered (at [12] per *Gaudron, Gummow* and *Callinan JJ*):

Although a plea of guilty may be taken into account in mitigation, a convicted person may not be penalised for having insisted on his or her right to trial. The distinction between allowing a reduction for a plea of guilty and not penalising a convicted person for not pleading guilty is not without its subtleties, but it is, nonetheless, a real distinction, albeit one the rationale for which may need some refinement in expression if the distinction is to be seen as non-discriminatory.

55 I am satisfied that Mr Kirk (and therefore the Company) are entitled to a degree of leniency, flowing in part from their expressed remorse (and contrition) and because of the adverse effects already being felt by the defendants arising out of or relating to the accident which gave rise to the offences.

56 Neither the Company nor Mr Kirk have prior convictions. Notwithstanding the present matter, I consider the defendants to be good industrial citizens. The principal enterprise conducted by the Company involves the design and manufacture of printing cylinders for packaging. By consent, the Court undertook an inspection of the factory operated by Kirk Engineering Services Pty Limited during the trial. I am satisfied that, on the evidence before me, in relation to its primary business activities, the Company is aware of its obligations pursuant to the Act and takes those obligations seriously; conducts regular health and safety meetings and keeps appropriate records; and is committed to creating and maintaining harmonious industrial relations, with a particular emphasis on employee comfort, happiness and safety.

57 As earlier mentioned, Mr Kirk's extensive experience operating a large and potentially dangerous printing business should have made him alert to the health and safety issues present on the Farm. In that regard, I agree with the prosecutor's submission that Mr Kirk's knowledge of his occupational health and safety obligations (demonstrated by the good conditions at his factory in Picton) is in stark comparison with his lack of attention to those same obligations on the Farm. However, I accept that the Company did not purchase the Farm with the intention to operate it as a commercial venture in the same way as it operated its printing business. Whilst not excusing those failures, I am willing to accept that Mr Kirk and the Company are otherwise highly commendable industrial citizens, who significantly lost track of their obligations when it came to the activities undertaken on the Farm.

58 I will treat favourably Mr Kirk's overall history of good industrial citizenship, and the health and safety history of the related bodies corporate, when determining penalty for both defendants.

59 No direct evidence was tendered regarding the defendants' financial resources. The affidavit of the Company's Financial Controller, Mr Somasuntharam, indicated that the Company had grown from having an annual turnover of about \$600,000 in 1988, to a current turnover of about \$20

million. Whilst it appears that that evidence was tendered to demonstrate the size of the Company's operations, no doubt to emphasise its good health and safety record, it also suggests that the Company has substantial means. No evidence was presented in relation to Mr Kirk's financial means and no issue was raised in relation to the application of s6 of the Fines Act 1996 with respect to either defendant. Accordingly, there is no issue of impecuniosity or limited means as may arise for consideration under that Act.

60 In the present matter, the factual circumstances giving rise to the charges against the Company and Mr Kirk are identical. In those circumstances, it is appropriate that I compare the respective sentences imposed on each defendant to ensure the principle of parity is not violated, making due allowance for relevant differences in their levels of culpability. The issue of parity was discussed recently in *Inspector Gregory Maddaford v Graham Gerard Coleman & Anor* [2004] NSWIRComm 317 where a Full Bench held (at [110] - [111]):

Of fundamental importance to the administration of justice is a consideration of parity when determining sentence: *Griffiths v The Queen* (1997) 194 CLR 293 at 326-327; *Signato v The Queen* (1998) 194 CLR 656 at 670; *Capral Aluminium* at [62] - [65]; *Inspector Ankucic v McDonalds* at 434; *P F Thearle & Co Pty Limited v WorkCover Authority of New South Wales (Inspector Reynolds)* [2002] NSWIRComm 102.

The principle of parity was described in the joint judgment of *Dawson and Gaudron JJ* in *Postiglione v The Queen* (at 301-302) as follows:

The parity principle upon which the argument in this Court was mainly based is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them. In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. If so, the notion of equal justice is not violated. On some occasions, different sentences may indicate that one or other of them is infected with error. Ordinarily, correction of the error will result in their being a due proportion between the sentences and there will then be equal justice. However, the parity principle, as identified and expounded in *Lowe v The Queen*, recognises that equal justice requires that, as between co-offenders, there should not be a marked disparity which gives rise to "a justifiable sense of grievance". If there is, the sentence in issue should be reduced, notwithstanding that it is otherwise appropriate and within the permissible range of sentencing options.

Discrepancy or disparity is not simply a question of the imposition of different sentences for the same offence. Rather, it is a question of due proportion between those sentences, that being a matter to be determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality.

61 I adopt those statements of principle in the present matter.

62 Given that the offences have common elements, it is also necessary to have regard to the principle of totality, which prevents each offender from being penalised more than once for the commission of such common elements. The correct application of that principle was discussed in *O'Sullivan v The Crown in the Right of the State of New South Wales (Department of Education and Training)* (2003) 128 IR 158 (at [177] - [178]):

The principle of totality is described in *Warman* (at 339) (applying *WorkCover Authority of New South Wales v Waugh and Anor* (1995) 59 IR 89) as follows:

The principle of totality allows a court when sentencing to avoid a straight-forward arithmetical addition of sentences appropriate to each individual offence where the offences are similar, thus avoiding doubling of penalty by enabling the judge to consider a single overall penalty which

includes the circumstances of a second or further offence.

The proper approach to the application of the principle of totality is found in the decision of the Full Bench in *Crown in Right of the State of New South Wales (Department of Education and Training) v Keenan* (2001) 105 IR 181 which considers the High Court's ruling in *Pearce v The Queen* (1998) 194 CLR 610. The Full Bench held that:

[23] The effect of *Pearce* is that, in sentencing a defendant for more than one offence, the Court is required to fix an appropriate sentence for each offence and then consider questions of cumulation, concurrence and totality. It is only after determining an appropriate sentence for each offence that the Court should consider whether the sum of the separate sentences properly reflected the totality of the criminality involved.

[29] In an appropriate case, however, it may still be appropriate to impose a single penalty for multiple offences under the Act, but only as the result of the operation of the principle of totality after separate penalties have been assessed for each offence. However, we consider that the preferable course is that separate penalties should be imposed after the principle of totality is applied.

[51] In view of our conclusion that the two offences contained very substantial common elements, it could not be considered that the deduction made by her Honour was appropriate and sufficient. In a case such as this, the totality principle must be applied to ensure that the defendant is not punished more than once for the common elements of the offences and that the resultant penalty is appropriate to the overall criminality of the offences for which the defendant is being sentenced.

63 In determining penalty I have had regard to the objective seriousness of the offences and the various subjective factors discussed earlier, including the defendants' level of remorse and history of good industrial citizenship. I have also had regard to the principle of parity. In relation to the Company, I consider the appropriate penalties are as follows:

- (1) in Matter No. IRC 1730, a fine of \$100 000; and
- (2) in Matter No. IRC 1732, a fine of \$90 000.

64 Having regard to the common elements of the two offences by applying the totality principle and overall criminality, I consider the total fine should be reduced to \$110 000. Accordingly, the fines to be imposed in relation to each offence are:

- (1) in Matter No. IRC 1730, a fine of \$58 000; and
- (2) in Matter No. IRC 1732, a fine of \$52 000.

65 Similarly, in relation to Mr Kirk, I have considered the nature and quality of the offences committed by Mr Kirk, as well as the strong subjective factors, discussed earlier, which mitigate the seriousness of those offences. I consider the appropriate penalties to be imposed on Mr Kirk are as follows:

- (1) in Matter No. IRC 1731, a fine of \$10 000; and
- (2) in Matter No. IRC 1733, a fine of \$9 000.

66 Again, having regard to the common elements of the offences, I do not consider that the sum of those penalties accurately reflects Mr Kirk's level of criminality. Applying the principle of totality, I consider that the total fine should be reduced to \$11 000. The fines to be imposed on Mr Kirk in relation to each offence are therefore:

(1) in Matter No. IRC 1731, a fine of \$6 500; and

(2) in Matter No. IRC 1733, a fine of \$4 500.

orders

67 I make the following orders:

(1) in Matter No IRC 1730 of 2003, the defendant, Kirk Group Holdings Pty Limited, is fined an amount of \$58 000, with a moiety thereof to the prosecutor;

(2) in Matter No IRC 1731 of 2003, the defendant, Graeme Joseph Kirk, is fined an amount of \$6 500, with a moiety thereof to the prosecutor;

(3) in Matter No IRC 1732 of 2003, the defendant, Kirk Group Holdings Pty Limited, is fined an amount of \$52 000, with a moiety thereof to the prosecutor;

(4) in Matter No IRC 1733 of 2003, the defendant, Graeme Joseph Kirk, is fined an amount of \$4 500, with a moiety thereof to the prosecutor;

(5) the defendants shall pay the prosecutor's costs as agreed or in default as assessed.

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