

N.B. Copyright in this transcript is the property of the Crown. If this transcript is copied without the authority of the Attorney-General of the Northern Territory, proceedings for infringement will be taken.

NORTHERN TERRITORY OF AUSTRALIA

WORK HEALTH COURT

No: 22429139

WORK HEALTH AUTHORITY

and

TIGER CONTRACTING PTY LTD

JUDGE LEDEK

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON 4 DECEMBER 2025

Transcribed by:
EPIQ

HIS HONOUR: Then I have the matter with two charges against Tiger Contracting. And there's a resolution to which of those.

MR CREAN: Charge 1 is to be withdrawn, your Honour, that's the s 32 charge on the basis of a plea to charge 2.

HIS HONOUR: Understood.

MR CREAN: Section 33.

HIS HONOUR: All right then. Well, given Mr Officer here has had full instructions, I can take the plea through counsel.

MR OFFICER: You can, your Honour.

HIS HONOUR: All right, thank you. It feels odd with people standing in this court, Mr Crean. Do you want to just stay seated because it doesn't make a whole lot of sense.

All right, so charge 1, application to withdraw, I grant it. Similarly, in relation to that complaint made - well, this is where I don't have the date, but it's actually been prepared - I assume that 11 October was the date it was laid given when it was received, but it's not in the actual charge sheet. It's been overlooked. All right, so motion to withdraw, it is dismissed and the company is discharged.

Charge 2, a plea of guilty through counsel. And that is that on 24 October at Berrimah, Tiger Contracting as its proprietary limited entity, being a person conducting a business undertaking with the Health and Safety duty under s 19(3) of the *Work Health and Safety Act*:

- (3) To ensure so far as is reasonable:
 - (a) the provision and maintenance of a work environment without risk to health and safety;
 - (b) the provision and maintenance of safe systems of work, safe use of plant; and
 - (c) and the provision and maintenance of any information, training, instruction or supervision that is necessary to protect all persons from risk to their health and safety arising from work carried out as part of the conduct of that business or undertaking, failed to comply with that duty, contrary to s 33 of the *Work Health and Safety Act*.

And the particulars are made out there. Is there any amendment to the particulars?

MR CREAN: No, your Honour. Perhaps if I could hand up an amended particulars document.

HIS HONOUR: All right, thank you.

MR CREAN: I also, perhaps, your Honour, might hand up the agreed facts for sentence which are amended. Thank you.

MR OFFICER: That's by consent, your Honour.

HIS HONOUR: Sorry.

MR OFFICER: The facts are agreed.

HIS HONOUR: Thank you. All right, I replace and I mark that up. All right, I've received those particulars. I have the facts agreed. I mark them as P1 - or exhibit 1, I should say. Facts tendered and agreed, exhibit 1.

EXHIBIT 1 Agreed facts.

HIS HONOUR: All right, was there anything further that's being proffered by the Authority?

MR CREAN: My learned friend, I understand, has a summary of the law in terms of his submissions.

HIS HONOUR: All right.

MR CREAN: If your Honour is assisted, there's a short extract of the - - -

HIS HONOUR: I certainly would. I will receive that.

MR CREAN: Thank you. And your Honour, just to note that the maximum penalty for this offence under s 33, being body corporate - - -

HIS HONOUR: Yes.

MR CREAN: - - - is \$500,000, s 43 sets out (inaudible).

HIS HONOUR: Yes, I see that. We're going to be nowhere near the maximum, I would suggest in the circumstances, but all right. Yes, Mr Officer, is there anything that you want to provide at this juncture?

MR CREAN: No, your Honour. I've had a chat with Mr Officer and it is proposed that he would take your Honour through his submissions, and I don't anticipate there will be a great deal that I will need to say.

HIS HONOUR: Thanks, Mr Crean. I know it's unnatural for lawyers with a great deal of advocacy experience to rise to their feet on every occasion, so once again, you're welcome to stay seated.

All right, so Mr Officer, over to you.

MR OFFICER: You don't mind if I stand. It helps my - - -

HIS HONOUR: Okay, does it? The brain flow and the blood move around the body, very good.

MR OFFICER: - - - movements, and I keep a watchful eye on the prosecution.

HIS HONOUR: I won't resist the urge then.

MR OFFICER: Your Honour, I'm going to hand to you, from the outset, what is titled "Brief submissions on law re: sentencing". Firstly, I apologise for the brief being spelt incorrectly, but when I hand this to you, you can strike out par 6, which is what is known as the *Madgwick* factors. They are only relevant to a s 32 offence. My friend and I agree and we wouldn't need to trouble you with those.

I also should acknowledge, your Honour, that given Mr Crean and I appear on opposites of the Bar table in these types of matters, I fear of being accused of plagiarism. I have known prior submissions appear (inaudible) Mr Goodfellow, which set out the law. Your Honour, before I turn to that law, I want to start with what we say is the appropriate disposition in this case to guide your Honour where the submissions will go.

It would be our respectful submission that no conviction be recorded, that there be a small fine and, your Honour, I will take the unusual step of indicating to you that it would be an appropriate range within the \$10,000 to \$15,000 mark and that's by this reason, by reference to three cases that I can find around Australia where there is some harmony or analogous circumstances.

Your Honour, there's one from this court, albeit it's not a published decision, the *Little Miss Korea* matter, her Honour, Franz J was presiding. That was a s 32 offence.

HIS HONOUR: Yes.

MR OFFICER: Your Honour might be aware of the way in which the legislation works, you've got cascade and seriousness.

HIS HONOUR: Yes.

MR OFFICER: Section 31 is reckless. Section 32 is the exposure offence. Section 33 is merely just a breach of duties. In that particular case, your Honour, there was one s 32 offence, six persons were injured, varying degrees, when a gas

explosion occurred on one of the charcoal fires. Causation was not a matter in that case.

The plea was on the basis that the exposure was a gas cannister sitting next to hot charcoal and the safeguards or the reasonable, practical measures that should have been taken to avoid eruption. In that case, there was no conviction recorded and a fine of \$12,000 was imposed.

There's an authority out of South Australia in the Employment Tribunal, a s 33 offence. Again, slightly different in the sense of the plea was on the basis of failure to have procedure and supervision over employees. But in that case, in my respectful submission, I think was quite extraordinarily more serious than this. Employees were reporting harassment and other (inaudible) admissions on the employees' (inaudible).

In that case, they were convicted and after a 40 percent reduction under the statutory plea regime down there, they were fined \$10,000. Your Honour, I can give you the citation for that case and the name for it, as I should.

HIS HONOUR: Sure.

MR OFFICER: It's *Martyn Campbell v Tad-Mar Electrical Pty Ltd* [2019] SAET 225 and judgment delivered on 13 November 2019. Your Honour, the final matter which is not any matter I've been involved in or is there a published decision, but it's on the WorkSafe website. It's a matter of *Kerr Contracting & Co*. Now, that was two s 31 offences, so the most serious short of industrial manslaughter.

HIS HONOUR: Yes.

MR OFFICER: Where an employee was angle grinding a gas drum. It had been washed and cleaned, but it still sparked and ignited and caused an eruption. Again, one of those aggravating factors in that case, as I understand it, was they didn't even report it to WorkSafe for some seven days. That's not the situation in this case. There was \$20,000 in compensation ordered to the victim in that particular case.

So, your Honour, hence why I start with the range of somewhere between \$10,000 and \$15,000 for a case such as this, albeit, in my respectful submission, all of those three cases are actually in a higher category of seriousness than this case because, 1) of the conduct; 2) the s 32 offence that confronted *Little Miss Korea* and the courts have said that you look at the maximum penalties for each provision as the starting point to determine the seriousness of the offence, and here we're at the lowest offence possible.

Your Honour, the reason I take you through those three cases is because, as set out in the brief submissions, the object of the work health and safety regime around the country and national harmony in effect, and to be as consistent according to s 3H, "Maintaining and strengthening the national harmonisation of laws relating to work health and safety and facilitate a consistent national approach."

So in my respectful submission, as your Honour indicated right from the outset, the fine should be quite low, despite the maximum being \$500,000. Your Honour, can I take you to agreed fact 10. And I will not labour the point beyond this. It's what the authorities in the brief submissions I've provided to your Honour talk about.

In short circumference, it's this. Section 33 offences are not concerned with causation. They are not concerned with exposure to a risk; that is an exposure element. There is no such element. They are not concerned with manifestation of that risk and they are not concerned with the possible consequences of that risk.

This is, put in simple terms, risk-based offending, where an employer or an employee, despite whoever is charged, must look prospectively, not retrospectively, to safeguard against a risk materialising. For example, in this case, the risk that it occurred in this particular case - if someone had a ciggie around refuelling - the risk was that could spark an ignition.

Much like, your Honour, if you're at a petrol station, you see the big warning signs that say, "Don't use your mobile phone". We all know that that's a risk. Your Honour, I really need to emphasise and put colloquially, ram that point home, that they are not to be sentenced on causation.

Your Honour need not be troubled by causation. It's simply, did they do enough to prevent the risk, in this case, one of those being an employee having a ciggie around the petrol causing fire. And your Honour, to make good that proposition, you'll see brief submissions on sentencing in *DPP v Frewstal*.

HIS HONOUR: Yes.

MR OFFICER: *DPP v Amcor Packaging*, ignoring par 6.

HIS HONOUR: Yes.

MR OFFICER: And this seems to be a duplication, *Nash v Silver City Drilling*. I won't read them out; your Honour's got them.

HIS HONOUR: Yes.

MR OFFICER: Suffice to say that are on all fours with my submission (inaudible).

HIS HONOUR: Very good.

MR OFFICER: Your Honour, in this case, this is not offending which is the result of an act or omission of the company. And what I mean by that is, your Honour, they didn't positively do something or positively fail to do something. It's simply that they did not do enough in terms of preventing a risk from materialising.

What I mean by that, your Honour, is there's a case out of New South Wales, *SafeWork New South Wales v NLH New South Wales Pty Ltd* [2023] NSW 501, a situation arises in construction work and they should have put safeguards in place, but the court said it's not conduct and omissions of the actual employer, it's actually the conduct or omission by the employee for which falls at the feet of the employer.

And again, to make that proposition, your Honour, is precisely what Brownhill J has ruled in the Court of Appeal decision - so the single judge appeal decision of *Kalidonis* and, your Honour, that citation.

HIS HONOUR: Yes, please.

MR OFFICER: *Kalidonis NT Pty Ltd v Work Health Authority* [2025] NTSC 28. Your Honour, completely separate circumstances, in this case, death. So a quite horrific death. And what her Honour said at par 22:

Kalidonis was an entity charged with the offences. As a body corporate, it acts through its officers and relevant employees. Prima facie, his acts whilst operating an excavator for the purposes of his responsibilities in the Maningrida project of those at Kalidonis, his employer.

Over at par 25, and I'm paraphrasing some of these, your Honour, to save time:

It follows the process of attribution must be according to the principles of common law which takes into account the context and purposes of the *Work Health and Safety Act*.

Paragraph 26:

Knowledge may be knowledge of a body corporate if it is known by the officer or agent, it was an appropriate one for the particular inquiry, or if it is contained in current official records of the body corporate.

Paragraph 27:

It is immaterial to the question of liability of what level in the hierarchy of employees the safety breaches occur. In other words, the liability of the company does not depend upon a failure by the person or persons who embody the company to take all reasonable precautions.

Paragraph 28:

Safe system of work will only protect workers from risk to their safety if it is accompanied by the employer's active implementation of the safe work system in the workplace and the employee's duty requires the employer to ensure that all procedures and instructions are actively and positively complied with by employees with ongoing supervision and constant monitoring to ensure that the safe system is being applied in practice.

An employer should recognise that it is common experience where human error will be encountered in the workplace, which can range from inadvertence, inattention or haste through foolish disregard to personal safety, to deliberate noncompliance of prescribed safe system - - -

HIS HONOUR: Well, that was the point that I was going to be asking counsel about. To what extent do I leave the failure in the duty to provide enough training or protection with respect to process, in this instance, the transfer of fuel to a person who's smoking whilst using fuel in a jerry can? The commonsense application of the inherent knowledge of all people that flames around fuel do not combine.

MR OFFICER: That's right, your Honour, you don't need to be Einstein to work out, you don't take a match to fuel stop.

HIS HONOUR: That's right. And that's what par 28 is reinforcing out her decision in *Kalidonis*, right.

MR OFFICER: Your Honour, it is. And can I just dovetail off that, in my application for no conviction, we say that this is not a trivial matter, leaving aside good character. They don't come before these courts with any record at all for this type of offending or Work Health Safety matters at all.

But we would say in the unique circumstances the law has designed and we're stuck with - and as her Honour, Brownhill J has noted - it seems unfair at one level that a company can be responsible for the acts of employees where they're stupid, or where they are reckless. But unfortunately, that's what the law says. So my submissions as to why this - - -

HIS HONOUR: I wasn't promoting it as an excuse to avoid culpability, it was for about how much can I leaven the ultimate penalty by factoring in that particular aspect, because it really goes to the heart of the non-conviction more than anything, does it not?

MR OFFICER: And hence why I say, your Honour, it's unfair for this company, in the circumstance of this case because you're going to have that attribution by the conduct of employees.

HIS HONOUR: Had there been any such prosecutions - and I should have probably asked Mr Crean at the start - are there any prior breaches of the *Safety Act* before? This is the first instance.

MR OFFICER: For this company, yes.

HIS HONOUR: This company. And the company has been around a long time.

MR OFFICER: It has, since 2011.

HIS HONOUR: I don't know that you need to go much further, Mr Officer, do you?

MR OFFICER: I don't think I do, your Honour. Just let me check my notes. Your Honour, to the imposition of penalty, we have agreed costs - - -

HIS HONOUR: Okay, great.

MR OFFICER: - - - in the sum of \$13,750 inclusive.

HIS HONOUR: Do I need to have that sum confirmed by the court on a payment schedule, or is that determined between the parties?

MR OFFICER: I think it's just an order for and then - - -

HIS HONOUR: Okay then. All right then, I'll do that. Agreed costs as to - you'll have to repeat the sum for me.

MR OFFICER: \$13,750 inclusive.

HIS HONOUR: Yes. All right, then. Is there time to pay for that?

MR OFFICER: My client has requested 30 days, inclusive with the fine. But I think the fine's different, making it into payment plans.

HIS HONOUR: They certainly can. Costs are very different.

MR OFFICER: Costs are different, 30 days for that. Your Honour, I did have some submissions about steps that have been taken since, but if your Honour doesn't need to hear them.

HIS HONOUR: I don't think so. Well, as for the sake of completeness because it does go to, okay, event, then repercussion and confidence that I would have in the company that it won't happen again.

MR OFFICER: This is by consent. It's not under the hand of an affidavit.

HIS HONOUR: Thank you.

MR OFFICER: So I'm grateful to my friend.

HIS HONOUR: Good.

MR OFFICER: There are three documents. The first is a refuelling from jerry cans and drums safe operating procedure that they have adopted from the Queensland government, which talks about all the precautions needed.

The second is a tree trimming safe work method system that has since been updated with item 7 on that safe work method system talking about what's to be done in refuelling processes.

And then, the last one is a chainsaw operation, similarly at item 7, the safe work method system has been updated to include a precaution in relation to refuelling, given that they operate a business or undertaking which has plant that needs refuelling. I'll tender those three, or whether your Honour marks them separately.

HIS HONOUR: Yes, thank you, I will. I'll mark them exhibit 2 as a bundle. And I think that it's by consent, Mr Crean.

MR CREAN: Thank you.

HIS HONOUR: Thank you.

EXHIBIT 2 Bundle of documents: refuelling from jerry cans and drums safe operating procedure; tree trimming safe work method system and chainsaw operation.

HIS HONOUR: The other things are filing, so I won't mark them; they're a bundle of safe work plans. All right, thank you for that. Mr Officer, it appears Mr Crean - - -

MR CREAN: Unless I can assist, there's nothing that the Authority wants (inaudible).

HIS HONOUR: All right. Thank you for that. I understand that by that acquiescence, you tacitly agree with the thrust or the primary thrusts of Mr Officer's submissions to date. Look gentlemen, I'm going to have to read the material that has been put before me.

I should not be making a decision without properly informing myself of the things that have been touched on this morning. What's a good time for you today?

MR OFFICER: Any time, your Honour, I'm free.

HIS HONOUR: All right. We'll come back at midday, is that all right, 12 o'clock. That way your afternoons will be free. Okay then. All right, I'll make sentence at 12 o'clock. Thank you both.

ADJOURNED

RESUMED

HIS HONOUR: All right, returning to the matter of Tiger Contracting and the plea that was entered this morning. Just a quick question, I've tried to find - and I know that it's an unreported decision at this stage, I think it's *CJ* and *LJD* who pled guilty to the *Little Miss Korea*. I was trying to determine whether or not there was a conviction.

MR OFFICER: No, there wasn't.

HIS HONOUR: It doesn't state that anywhere that I could see, and I was trying to get a hold of Judge Franz to find out whether she could remember or not.

MR OFFICER: I'm pretty certain, because it was in the agreed facts that the court wouldn't be in error if they didn't record a conviction.

MR CREAN: There was a condition as to actually (inaudible) assurance officer.

HIS HONOUR: Yes, all right, okay. Look, I'm not surprised, because the summary that I was able to have access came from the site. Ordinarily, if there had been a conviction, it's made pretty clear and it was just left out. So I assumed that it wasn't part of the overall sentence. All right, well, if there's nothing further, I'll proceed to sentence.

This matter was previously listed for hearing. There were two parties engaged in the prosecution by WorkSafe NT through this court and that was discontinued with respect to Daniel, but there was a negotiated outcome with respect to *Tiger Contracting*, the entity or body corporate that was responsible for the events of 24 October 2022.

There was no requirement or need for a hearing. The parties resolved and the matter was able to proceed on an agreed set of facts and a negotiated plea to one of the two charges.

In that respect, I confirm that the plea took place in relation to charge 2 in full satisfaction that there were contraventions where there was a person conducting business, as I immediately read out at the start to confirm the plea through counsel that there were contraventions of s 19(3) of the *Work Health and Safety Act*, Parts A, C, D and F, which therefore means that there was a failure to comply with a duty contrary to s 33 of the same Act.

The particulars of the offence were that, at all material times, Tiger Contracting was a body corporate conducting a business, undertaking or providing arboreal services from the facility at 28 Pruen Road Berrimah NT at all material times. It engaged workers including Rhys Dott (?), Joshua Courter (?) and Daniel Gooley. The defendant, that is Tiger Contracting, had a health and safety prescribed by s 19(3) of the Act:

(3) So far as reasonably practicable:

- (a) provide for the provision and maintenance for a work environment without risks to health and safety;
- (b) the provision and maintenance of safe systems of work;
- (c) the safe use of plant; and
- (d) the provision and maintenance of any information, training, instruction or supervision as necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking.

Further, Tiger Contracting failed to comply with those duties as follows; being at the workplace, workers had access to petrol fuel for weed killing various plants.

Petrol fuel is a flammable substance and should be kept away from all ignition sources, such as lit cigarettes, to mitigate the risk of ignition, and it was possible for a worker in the possession of a lit cigarette to come into proximity of petrol fuel while refuelling vehicles, and it was possible for a worker's lit cigarette to ignite petrol fuel and cause injury to workers.

Tiger Contracting also failed to provide and maintain, so far as was reasonably practicable, a safe work environment, because it failed to ensure that, at any time when fuel was being used, safe systems at work relating to the safe use of fuel in the workplace was provided and maintained, and information, training, instructions and supervision on the safe use of fuel in the workplace were provided and maintained.

Therefore, a failure of at type described and accepted to be so in those particulars was a breach of their duty. The facts are as follows, without regurgitating those past ones that I've just alluded to, on that day, at all material times, those three persons, Rhys, Joshua and Daniel, were employed as workers.

And it was working out of that address at Pruen Road, being the workplace. For the purposes of assisting that work, they own and provided a Great Wall utility vehicle to one of their workers, being Porter. And for the purposes of assisting the work carried out, Tiger provided a shed to store jerry cans and unleaded fuel used for mixing and refuelling the power equipment and on occasions, it seems, vehicles. The vehicle being that Great Wall utility.

Jerry cans of fuel was "plant" within that meaning under the regulations and Act. The risk from that work carried out and risk arising from the plant was that, at all material times, the work carried out, refuelling the equipment, presented a foreseeable risk to persons present at the workplace by reason of one or more of the following:

The use, handling and storage of flammable substances giving rise to that risk if exposed to ignition source could ignite and if ignited, the flammable substance would cause a fire and would cause workers or other persons to sustain either, in the most extreme example, fatal injuries due to heat exposure, burns or smoke inhalation, or serious injury such as serious burns to the body. That is the risk that was being averted to.

About 3:50 pm on that day, Porter and Dott were using a jerry can to refuel the vehicle marked in the workplace. Courter was using the jerry can to decant unleaded fuel into a funnel being held in the vehicle by Dott. Tiger Contracting had a policy not to refuel the vehicle with jerry cans at the workplace; that is the workplace at 28 Pruen Road, which is where this event was occurring.

It was in contradiction to their already established policy. On this particular day, Porter had not fuelled the vehicle before attending the workplace and needed to add some fuel from the jerry can to be able to drive the vehicle to a petrol station for refuelling.

Therefore, it was a small amount of fuel that was necessary to simply travel from a distance of Pruen Road to the nearest service station, which I wouldn't imagine was too far. However, even that small amount of fuel necessary to be able to give the vehicle the fuel necessary to get there to refuel itself in a place outside of the workplace gave rise to the events that followed.

And I think the Authority accepts that, at this stage, it was one of the employees who placed a cigarette in Dott's mouth. That's an employee of Tiger Contracting. That employee has not been identified. Then an employee, also not identified, used a lighter to attempt to light the cigarette and a spark was seen, a fireball erupted and ignited the fuel being decanted from the jerry can causing flames to burn Dott on his hands and face, and also, which engulfed the vehicle.

The workers ran from the vehicle, responded to the fire. Dott was provided first aid at the workplace and then conveyed to the Palmerston Regional Hospital ED and then onto the Royal Darwin Hospital as an inpatient. As agreed between the parties, it is accepted the type of contracting had a smoking policy that designated areas for smoking. The location where the incident occurred was not a designated area.

There were already two policies then in place; 1) that nothing was to be refuelled at the workplace, and 2) if anybody was to be smoking, it was to be in a designated area. Both of those things were contravened by the actions of the employees.

And it is here where I have to accept between the parties that Tiger Contracting is not to be sentenced for causing the fire or the injuries to Dott, but may use these factors in considering the nature and gravity of the failure to comply with the duty. And that follows from the established authorities referred to by Mr Officer in his submissions.

The failure of those duties then amounts to Tiger Contracting having inducted workers on company policies and procedures, including an employee handbook which outlined health and safety requirements of workers and a “No smoking” policy on the premises near the fuel.

However, their internal policies and procedures governing the safe use and handling of flammable substances, including training, instruction or supervision for workers in refuelling work being carried out and risk assessments for refuelling work being carried out at the workplace was not done in the same way.

As a result of the incident, Dott received injuries, including superficial dermal burns to his face and bilateral limbs, at 10.5 percent of the body surface area. That always seems like a big number, but in actuality, it is a non-substantial set of burns to the whole body surface area. He was required to have work off due to his injuries. He made a workers compensation claim for lost income and returned to work. Those are the facts.

With respect to the way that I approach the appropriate penalty today, I am reminded that I am to consider the national harmonisation of penalties across every jurisdiction and States and Territories of this country that are governed by these laws.

That is so that everybody is essentially working off the same page and they know that there was not some parochial or particular set of approaches to these similar types of offending or breaches in different places are peculiar to the jurisdiction.

So I’m mindful of the comparatives that have been presented to me. I accept absolutely as being presented, as does the Authority, that there is an accurate depiction of the main objectives of the Act in which I must maintain through the sentence I am making today; that is, by protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant.

Then as well, securing compliance through the effective and appropriate compliance enforcement measures and that’s what I’m doing today, and maintaining a strength in the national harmonisation that’s always relating to work health and safety, which I have just alluded to.

I had been given three authorities effectively that assist me in modulating the approach that I’m to take given the offence or the breach that’s occurred in contravention of s 33 as opposed to other more serious sections, such as s 31 or s 32.

I have been referred to *DPP v Frewstal* and that’s where I must take into account four particular limbs; most importantly that the accused is to be punished according to the gravity of the breach of the duty owed under the Act, not according to the result or consequences.

Secondly, that that gravity of the breach is measured by two factors, the seriousness of the breach itself and the extent to the risk of death or serious injury that might result from a breach.

Thirdly, an assessment of the extent of the risk itself, which involves consideration of a further two factors which is the likelihood of the occurrence of the event will result in a breach endangering the safety of employees; and the potential gravity of the consequences of such an event.

And that's where I'm looking backwards in some respect, but I have been reminded that I'm talking about, in this instance, where there is risk, I have to look at it prospectively, not retrospectively. But the authority in *Frewstal* says that I have a whole combination of factors to weigh up in that regard.

Fourthly, that in the particular case where there might be serious injury or death, and it's not necessarily relevant here, but only in the sense that it might manifest or demonstrate the degree of seriousness of the relevant threat to their health. So that is where I am being asked to look at result compared to event.

DPP v Amcor, the predominant distillation of that authority is that, to a substantial extent, the seriousness of the breach must be assessed by reference to the potential consequences, and that's picking up on the submissions of Mr Officer, and the measure of evidence in this regard concerning the safety of the employees in the circumstances, which also raises the issue that I had about employees doing something contrary to accepted commonsense.

Smoking whilst using fuel, in anyone's purview, would be a risky and unsafe thing to do. Further, the authority of *Nash v Silver City Drilling*, to discount the seriousness of the risk by reference to the unlikelihood of injury resulting is apt to lead to error. So I have to be mindful of that.

The conduct in question is the failure to respond to the risk of injury conduct which would be more serious. The more serious the potential injuries, whether or not they are likely to materialise and the objective seriousness of the conduct will also be affected by the ease with which mitigating steps could have been taken.

In relation to the events of this particular day, what is it that could have been done beyond what hadn't already been in place. The knowledge, at first instance, that there was a problem with the vehicle not having enough fuel and it being brought to a supervisor's attention or the like, so that there could have been another vehicle used or some other remedy provided.

The second is the idea that anybody could smoke in that workplace in places outside of the designated areas where there are these things being used and stored, etcetera, is quite clearly an obvious risk and education was fundamental in that regard.

As Mr Officer said, you must make allowance or expectation for there being stupidity, and acts of stupidity, and that's the whole purpose of establishing practices to safeguard against the eventuality of somebody being stupid.

I was taken to a number of comparatives with respect to proceedings in this jurisdiction and others. And it behoves me then to have to reference them so I can make meaningful comparison. I was directed to *Kerr Contracting & Co* and that particular prosecution and sentence.

Although there are similarities or aspects that are similar, in that somebody suffered significant harm from burns, the case is completely dissimilar in that there was a delay in providing appropriate medical care beyond what was initially provided.

And then therefore that he was continued to be directed to work, that it wasn't reported in the way that it should have been and that, in all cases, there was a significant liability imparted on the employer for his direct involvement in making the event occur in the first place and subsequently, all the things that he did thereafter.

Now, I note in that case, there was a conviction across those two charges for more serious offending and he was placed on a good behaviour order for two years. All right, and this is common law authority, if there is a sentence that is so grossly lenient as to be impracticable available for comparison, I am allowed to ignore it. But nonetheless, I can still take it as a reference point, and I'm being asked to.

That was a conviction, a good behaviour bond and an order to pay - it seems to me, or at least comes across as some sort of restitution of \$20,000. It wasn't a fine or a penalty, it was compensation and that was an unusual feature of that particular proceeding.

Then there was the *Little Miss Korea* incident and again, that was a s 32 prosecution and plea, and it was patrons that were affected in that occasion. But it was the workplace environment that was the wrongdoing in that instance.

And those individuals were fined \$12,000. There were five people who were caught up in that minor flammable explosion where there would have been - and it's an interesting thing to note - obvious concerns for gas cannisters being in close proximity to hot charcoal embers that are giving radiant heat to such a degree that their risk would have been fairly obvious.

But nonetheless, in all the circumstances, given the early plea and the negotiated outcome and the facts that were accepted, that fine penalty was deemed appropriate. There was no challenge to that. It remains as part of the sentencing matrix on other matters that I can take into account, most importantly, that there was no conviction.

I was also taken to the matter of *Martyn Campbell v Tad-Mar*. That also had a number of features where there was an early plea, an acceptance and obvious

contrition and remorse and a number of steps taken to remedy the cause of the original failures.

I note that that was also - although it involved burns and fire - it was more of a hazing situation. It was where there was a supervisor who deliberately squirted fluid onto their employee and then lit it, and there was some significant injury that arose.

There was a conviction and a fine of \$15,000 on that instance. That was more to do with there being an absence of any recognised policy with respect to the way employees and employers, through their divisional heads, maintain standards of bullying and harassment. And so there's a slight difference in that respect there as well.

What I'm being asked to make an assessment about is, did they do enough to prevent the risk, and that's essentially what's being pled to, that they agree that, at least on this occasion, it wasn't enough although they had been doing things, things were in place.

And then in that vein, I say, thereafter, there had been subsequent changes to their operative policies. I note in at least their two primary functions, the business where they are using things that are fuelled based, chainsaw operation and tree filling, they have discrete periods that relate to the refuelling of plant and the rules that are applicable and the methodologies that ought to be applied.

They have also imported, as I've been told from the Queensland government, wholly a safe operating procedure component about refuelling from jerry cans and drums. It is now part of the overall training and induction methodology of the company that is now being trained.

I was also taken to *Kalidonis*. I have read that and that is also an offence contrary to s 32, a far more significantly graver penalty provision arrangement there and circumstances that cover more additional reckless type conditions with respect to the body corporate's responsibility to its employees, and I see now why there was reference to both sides of the Bar table having familiarity with these particular concepts and issues.

Her Honour, Brownhill J made some conclusions there. There was a significant penalty. It's not present in the body of the judgment. It doesn't say what the maximums were off 32 - \$1.5m, that puts it in closer relief - but they were significant penalties. That was challenged on appeal. Ultimately, that was not up-taken and the original Local Court determination stood.

But again, that was the death of a person in circumstances where her Honour concluded the Local Court found it was exercising its reasons properly on all the evidence that it received. There were convictions there. But most importantly and critically, the relevant feature out of that judgment, although I was taken to a number of paragraphs, is really par 28, which says:

A safe system of work will only protect workers from risks to their safety if it is accompanied by the employer's active implementation of the safe work system in the workplace.

And this is what I'm really being asked to look at here, refuelling taking place contrary to the policy and smoking outside of the designated areas to ensure that the procedures and instructions are actively and positively complied with by employees.

And that's the employer's active implementation and duty that they're required to follow with ongoing supervision and constant monitoring to ensure the system is being applied in practice and that falls from a previous authority that entrenched that as a viewpoint.

And employers should recognise that it is common experience that human error will be encountered - and this circles right back to my original opening remarks - as to the protection against the inevitable instances of stupidity in their workplace which can range from inadvertent, inattention or haste through foolish disregard of personal safety to deliberate noncompliance with the prescribed safe system of work.

All told, given what's been put forward by the offender and having found the offence proven and there not being anything to cavil with, with the ultimate submission that we should be proceeding by way of a non-conviction and small fine, I will proceed in that manner.

There is no blemish in Tiger Contracting's previous work history. They have been in operation for close - at that time, for 12 years. They have been without blemish or challenge or criticism. They have come here and ultimately accepted responsibility for their failures, as I've described.

They have already made efforts to rectify their failures. They have paid compensation to their employee. There is little more that they could have done, in all the circumstances.

So without conviction, I proceed - and I must do this by reference to the penalties that have already been imposed, noting that I'm being asked to give a penalty between \$10,000 to \$15,000, I will fine Tiger Contracting \$10,000.

That can be arranged through the Fines Recovery process, a time to pay arrangements, so there isn't a significant impost that is immediately borne and leads to problems with cashflow and being able to maintain the business and maintaining a place of employment for their employees of which there are, quite obviously, a few.

I also make an order as to costs as agreed between the parties in the sum of \$13,750 to be paid within 30 days of today. All right, is there anything arising from the sentence that I've made today?

MR CREAN: Nothing, your Honour.

MR OFFICER: No, your Honour.

HIS HONOUR: I thank you both for your assistance.

Thank you, Mr Officer, in particular, for stepping me through those most important features that I had to address. I'll just write that out. All right, that's done.

Thank you all.

ADJOURNED