QUEENSLAND
COURTS

MAGISTRATES COURT OF QUEENSLAND

CITATION:	***Guilfoyle v Huckleberry Australia Pty Ltd*** [2023] QMC 1
PARTIES:	**Aaron John Guilfoyle** (Complainant) **v** **Huckleberry Australia Pty Ltd** (Defendant)
FILE NO/S:	BNE-MAG- 00025333/20 File No-MAGISTRATE-00151279/20(1)
PROCEEDING:	Criminal proceeding — Offence contrary to *Work Health and Safety Act* 2011, section 32 — Failure to comply with health and safety duty which arose under section 19(2) of Act — Nature of the duty — Uniform national workplace safety laws. Sentencing decision — Objective seriousness of offending — Aggravation and mitigation — Deterrence, General and Specific — Denouncing offending conduct — Rehabilitation — Capacity to pay a fine.
ORIGINATING COURT:	Brisbane Magistrates Court
DELIVERED ON:	8 February, 2023.
DELIVERED AT:	Brisbane
HEARING DATES:	24 November and 1 December 2022
MAGISTRATE:	Costanzo J

ORDERS, DIRECTIONS, and RECOMMENDATION:	1. The defendant is convicted and fined $250,000. 2. The conviction is not recorded. 3. The defendant Huckleberry shall pay costs in the sum of $1099.70 (being $1000 professional costs and $99.70 costs of court). 4. I direct that pursuant to section 34(2A) of the *State Penalties Enforcement Act 1999,* the Registrar give particulars of the fine and costs orders to the State Penalties Enforcement Registry for registration and collection. 5. I recommend that the Queensland Government undertake a review of the relevant Codes of Practice relating to the *Work Health and Safety Act* 2011 to at least include all swimming activities conducted by Australian and international tourists in tour groups.
REPRESENTATION:	Mr T Ward, Solicitor, Office of the Work Health and Safety Prosecutor, for the complainant. Mr Y Araki of Counsel, instructed by Austral Asia Law, for the defendant.
STATUTES	*Acts Interpretation Act* 1954; s 36, sch 1. *Crimes Act* 1914 (Cth); s 16C. *Criminal Law (Rehabilitation of Offenders) Act* 1986; s 11. *Penalties and Sentences Act 1992*; ss 4, 5, 9, 12, 48. *Safety in Recreational Water Activities Act* 2011; s 43. *State Penalties Enforcement Act* 1999; s 34(2A). *Victims of Crime Assistance Act 2009*; s 6. *Work Health and Safety Act 2011* (NSW); ss 17, 19, 32. *Work Health and Safety Act* 2011 (Qld); ss 3, 8, 13, 14, 15, 16, 17, 18, 19, 29, 31, 32, 33, 230.

CASES

Baiada Poultry Pty Ltd v R [2012] HCA 14.

Bennett Developments v Steward [2020] QDC 235.

Barbaro v R (2014) 253 CLR 58; (2014) 305 ALR 323; (2014) 88 ALJR 372; (2014) 236 A Crim R 116; [2014] HCA 2.

Bulga Underground Operations v Nash (2016) 93 NSWLR 338; [2016] NSWCCA 37.

Capral Aluminium Ltd v WorkCover Authority of NSW (2000) 49 NSWLR 610; [2000] NSWIRComm 710.

Carrington Slipways Pty Ltd v Callaghan (1985) 11 KR 467.

Edwards v National Coal Board [1949] 1 All ER 743.

Guilfoyle v Queensland Police-Citizens Youth Welfare Association, unreported decision of Magistrate Ho, 16 November 2020.

Jahandideh v R [2014] NSWCCA 178.

Markarian v R (2005) 228 CLR 357; (2005) 215 ALR 213; (2005) 79 ALJR 1048; [2005] HCA 25.

Nash v Silver City Drilling (NSW) Pty Ltd; Attorney General for NSW v Silver City Drilling (NSW) Pty Ltd [2017] NSWCCA 96.

R v Associated Octel Co Ltd [1996] 4 All ER 846.

R v Brisbane Auto Recycling Pty Ltd & Ors [2020] QDC 113.

R v lrvine (2009) 25 VR 7.

R v Karlsson [2015] QCA 158.

R v ZB [2021] QCA 9 at [10].

Reynolds v Orora Packaging Australia Pty Ltd [2019] QDC 03.

SafeWork NSW v All Cranes 4 Hire Pty Ltd [2020] NSWDC 738.

SafeWork NSW v Autocare Services Pty Limited (No 2) [2022] NSWDC 641.

SafeWork NSW v Buddco Pty Ltd [2022] NSWDC 549.

SafeWork NSW v Cincram Group Pty Ltd [2022] NSWDC 613.

SafeWork NSW v Confeta Pty Ltd; SafeWork NSW v Antoniou [2018] NSWDC 392.

SafeWork NSW v Jiang [2018] NSWDC 400.

Safe Work NSW v Rawson Homes [2016] NSWDC 237.

SafeWork NSW v Roadworx Surfacing Pty Ltd [2022] NSWDC 616.

SafeWork NSW v Tyne ACFS Pty Ltd [2022] NSWDC 609.

Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd [2018] QDC 020.

Thiess Pty Ltd v Industrial Court of New South Wales (2010) 78 NSWLR 94; (2010) 205 IR 263; [2010] NSWCA 252.

TTS v Griffiths (1991) 105 FLR 255.

Unity Pty Ltd v SafeWork NSW [2018] NSWCCA 266.

Williams v New Leaf Ag Pty Ltd, unreported decision of Magistrate Manthey, on 7 December 2018.

Williamson v Royal Agricultural Society of Queensland, unreported decision of Acting Magistrate Cridland, on 26 July 2019.

Williamson v VH & MG lmports Pty Ltd [2017] QDC 056.

WorkCover Authority of NSW (Inspector Beyer) v Cleary Bro (Bombo) Pty Ltd (2001) 110 IR 182; [2001] NSWIRComm 278.

WorkCover Authority of NSW v Kellogg (Aust) Pty Ltd [1999] NSWIRComm 453.

CATCHWORDS

CRIMINAL LAW — Work health and safety — Duty of persons undertaking business — Duty of employers — Risk of death or serious injury — Death of a customer.

SENTENCE — Mitigating factors — Aggravating factors — Fine — Capacity to pay — Objective seriousness — Denouncement — Specific deterrence — General deterrence — Appropriate penalty.

REASONS FOR JUDGMENT

GENERAL BACKGROUND

1. This is a reserved decision. Its purpose is to decide the appropriate penalty for the defendant corporation, whose failure to comply with the relevant law contributed to the risk of death or serious injury to its customers, including two 16 year old Japanese tourists who were in its care. The two deceased drowned in a lake to which they were taken by the defendant company and others.

The Charge

2. The defendant company, Huckleberry Australia Pty Ltd (Huckleberry) was charged with one category 2 offence that between the ninth day of May 2018 and the thirtieth day of March 2019, contrary to section 32 of the *Work Health and Safety Act* 2011 (the Act), it failed to comply with a health and safety duty which arose under section 19(2) of the Act to ensure, so far as was reasonably practicable, that the health and safety of other persons was not put at risk from the work carried out as a part of the conduct of the business or undertaking, and that its failure to comply with that duty exposed individuals to a risk of death or serious injury.

3. Pursuant to section 230(1AA) of the Act, prosecutions for category 2 offences are taken in a summary way under the *Justices Act 1886*.

Particulars of the Charge

4. The amended Particulars filed here, and to which the defendant pleaded, were as follows:

> "At all material times, Huckleberry Australia Pty Ltd was a company duly incorporated under the Corporations Act 2001 (Cth), which conducted a business or undertaking that operated study tours for foreign students in Australia.
>
> Huckleberry held a duty pursuant to s19(2) of the (*Work Health and Safety*) Act, to ensure, so far as was reasonably practicable, that the health and safety of other persons was not put at risk from the work carried out as a part of the conduct of the business or undertaking.
>
> The hazard in this (*case*) was the body of water at Lake McKenzie. This hazard exposed individuals to the risk of death or serious injury through drowning. That risk materialised when Masters Mizuno and Kimura drowned whilst swimming in Lake McKenzie.
>
> Huckleberry ought to have:
>
> a. Known of or identified the hazard;
>
> b. Known of or identified the risks;
>
> c. Implemented reasonably practicable controls to eliminate or minimise the risks.

Huckleberry failed in its duty to ensure, so far as was reasonably practicable, that the health and safety of other persons was not put at risk from the work carried out as part of the conduct of the business or undertaking, by failing to provide information or instruction that is necessary to protect all persons from risks to their health and safety arising from work carried out as a part of the conduct of the business.

The reasonably practicable control measure that Huckleberry could have implemented was advising participants that, whilst on their study tours, they were prohibited from engaging in the activity of swimming.

The failure of Huckleberry to comply with its duty exposed individuals, including Masters Taiki Mizuno and Shinnosuke Kimura, to a risk of death or serious injury."

(Italicised words in brackets were added above by me to assist with comprehension.)

Maximum Penalty

5. The maximum penalty for an offence contrary to section 32 of the Act, when committed by a body corporate, is a fine of $1.5 million (15,000 penalty units[1]). See the further discussion about penalties below.

THE FACTS

6. The parties tendered an agreed Statement of Facts[2]. The facts of the offence and particulars upon which this judgement must be based can be summarised as follows.

7. On 29 March 2019, during a guided tour of Fraser Island, two 16 year old Japanese students, Masters Taiki Mizuno and Shinnosuke Kimura, died because they drowned in Lake McKenzie. The two boys were part of a group of seven male and eight female students from Kanagawa University High School in Japan.

8. This court acknowledges that in September 2021 (well after the offence took place) the World Heritage Area within the Great Sandy National Park (which is centred on Fraser Island) along with the surrounding waters and parts of the nearby mainland, were renamed K'gari - the original Butchulla people's name for Fraser Island. [3]

9. The word *K'gari* means 'paradise' in the Butchulla language.[4] In this case that could be taken as either a tragic irony or as apt, befitting the fate of Masters Taiki Mizuno and Shinnosuke Kimura. Others can decide for themselves.

10. However, out of respect for the victims, their families, and for all cultures now concerned with the island this judgment will refer to the island with both names reversibly conjugated as '*K'gari* (Fraser Is)' unless the context demands otherwise— such as a direct quote from a document.

11. Six entities and five individual employees were involved in organising the tour to *K'gari* (Fraser Is). I have set out their roles in the following table:

[1] See the *Acts Interpretation Act 1954*, section 36, schedule 1, definition penalty unit; the term ***penalty unit*** has the meaning given under the *Penalties and Sentences Act 1992*, section 5. Section 5 (1)(d) of the *Penalties and Sentences Act 1992* states that for the *Work Health and Safety Act 2011*, the *Electrical Safety Act 2002*, the *Safety in Recreational Water Activities Act 2011* or an infringement notice for an offence against any of those Acts— the value of one penalty unit is $100.
[2] ***Exhibit 1*** is the agreed Statement of Facts upon which this judgment is based.
[3] See Ministerial Statement at https://statements.qld.gov.au/statements/93269; published Monday, 20 September, 2021.
[4] See above.

Entity	Individuals employed	Role
Kanagawa University High School (KUHS)	Mr Shinri **Minatoya** and Ms Mikiko **Kawamura** (Both were Teachers)	KUHS ran an international exchange program and had sent groups of students to Australia since 2003. In May 2018, KUHS prepared for a group of 15 students to travel to Australia in March 2019. That group included Masters Taiki Mizuno and Shinnosuke Kimura) and the two teachers. KUHS contracted the services of a Japanese tour company, JTB.
JTB, a Japanese tour company	Ms Michiyo **Kubo** (tour guide)	Ms Kubo was to accompany the group to Australia. KUHS and JTB ran several information sessions with students and parents, prior to departing Japan.
Huckleberry, the defendant company	Mr Hiroyuki **Hidaka** (sole Director) Ms Yuki **Yoshida** (A Manager, and tour guide)	JTB subcontracted to Huckleberry who operated school study tours, predominantly for Japanese schools and travel agents. Yoshida assisted in the arrangements for the KUHS study tour and accompanied them in Australia during their stay. Yoshida signed the "Partnership agreement" with the Kingfisher Bay Resort on 25 May 2018. Huckleberry booked a trip for the KUHS group to K'gari (Fraser Is) from 28 to 30 March 2019. The trip included ferry transfers, 2 nights at the Kingfisher Bay Resort, and the "Beauty Spots" tour (a full day Four Wheel Drive tour).

Entity	Individuals employed	Role
Caloundra Christian College (CCC)		Huckleberry liaised with CCC about homestay placement of the KUHS students.
Caloundra City Private School (CCPS)		Huckleberry liaised with CCPS about the student group members' academic placements.
Kingfisher Bay Resort	Mr Peter **Buchanan** (Bus driver)	The resort provided accommodation and the Four Wheel Drive "Beauty Spots" tour.

12. The agreed Statement of Facts also presented the following chronology.

13. **10 May 2018.** Kingfisher Bay Resort emailed a "Partnership agreement" to Yoshida. It included a quote and set out proposed details for the trip to the island including accommodation from 28 to 30 March 2019, and a "Full day 4WD island tour".

14. **25 May 2018.** Yoshida signed the agreement, on behalf of Huckleberry. The Resort issued an invoice to Huckleberry (dated 7 March 2019) and an itinerary for the KUHS trip, including a "Full 4WD Island Tour of Fraser Island" on Day 2.

15. Huckleberry had made arrangements for a similar study tour of students from KUHS in 2018, including a trip to the same island. However, a guide from a different travel company accompanied the students on that trip.

16. **7 December 2018.** "Group Study Tour Application forms" provided by Huckleberry were filled out for Master Mizuno and Master Kimura, and signed by their parents. The forms did not ask about swimming ability (nor, I note, about consent to go swimming), but included questions regarding allergies, medications and health issues.

17. **November 2018, January 2019 and March 2019.** Three known pre-trip meetings were held by KUHS (in Japan), and attended by participating students and their parents. Minatoya ran the meetings, while KUHS staff and JTB representatives were present.

18. **25 March 2019.** Yoshida met the group. They were taken on a tour in Brisbane, then driven to the Sunshine Coast to meet their homestay families.

19. **26, 27 March 2019.** The students attended CCPS.

20. **28 March 2019.** The students attended the University of the Sunshine Coast, then travelled to K'gari (Fraser Is) by ferry. That afternoon the group checked in to the Kingfisher Bay Resort.

21. **29 March 2019.** Approximately 8 am, the students departed Kingfisher Bay Resort on the "Beauty Spots" tour. Their bus driver was Peter Buchanan. The bus carried approximately 33 passengers. During the tour, Buchanan announced information to guests about locations they visited. He provided general safety briefings. At approximately 2:37 pm the tour bus (together with another bus conducting a "Beauty Spots" tour) arrived at the car park near Lake McKenzie on K'gari (Fraser Is).

22. Buchanan advised the guests they could swim at the lake, told them where the bathrooms were, and described how to get to the lake.

Lake McKenzie

23. Lake McKenzie is a freshwater lake near the middle of K'gari (Fraser Is). Its surface area is approximately 150 hectares and it is approximately 8 to 9 metres deep. The initial gradient of the lakebed is slight from the shoreline out to about 10 metres, before it drops away at an angle of approximately 30 to 35 degrees. The lake was not fenced and was accessible to members of the public. It was not patrolled. There were a number of visible signs in the area, including one sign with the following warning:

> "Safety around water. People have suffered serious injuries in water related accidents. The lake is not patrolled by lifeguards. Swimming is not recommended. Avoid tragedy — do not dive into the lake; always stay with children when near the water."

24. I note that it is obvious from the wording of the sign that it was targeted more to adults than it was to children.

25. I also note that this chronology shows there was plenty of lead time, ten months from May 2018 to March 2019, to plan the trip and therefore also for risk assessment and risk management planning and implementation, which never took place. That time was on top of the time it took for Huckleberry to be involved in a similar study tour of students from KUHS in 2018.

26. Photos of the sign (exhibit 17) as it stood in situ at the time of the offence are attached to this judgment in Appendix 1, together with an added closeup photo of the relevant wording quoted above.

27. Because of these fatalities a new sign was erected by the relevant Queensland Government authority. A photo of the new sign (exhibit 18) with clearer fonts and warnings is attached to this judgement in Appendix 2.

The Deaths

28. The investigations revealed the following uncontested facts.

29. The group of Japanese students walked to the lake, with Minatoya towards the front of the group and Yoshida towards the back. Kubo and Kawamura went to the bathrooms and arrived at the lake a couple of minutes later. The students left their belongings on the sand, with Minatoya. This appears to be where Minatoya stayed. The students all entered the water.

30. Buchanan attended at the beach at some point; remained a short time, but returned to the car park to prepare afternoon tea. The older guests remained at the car park.

31. The students formed male and female groups, and entered the water. At least some males discussed a change in water colour, assuming it meant a change in depth. Master Mizuno was heard to say, more than once, that he wanted to swim across the lake.

32. Master Mizuno and Master Kimura were seen playing in deeper water. and at one point Kimura was on Mizuno's back. Master Kato was nearby and saw them both go underwater. He presumed they were competing to see who could stay underwater longer and he attempted to pull Kimura up, so he would not win. Kimura grabbed at Kato, pulling on his shorts with force, which dragged Kato underwater several times. Kato panicked, believing he was going to drown. He was assisted back to the shallow water by two other students.

33. At 2:49 pm, a KUHS teacher, Kawamura, took photographs of the students from the water's edge. Some images appear to depict what is described in the preceding paragraph. Kawamura then realised two boys were missing and asked others where they were. She was told they may have been swimming to the other side of the lake.

34. Yoshida also took photographs, then noticed two boys were missing. She went to Minatoya to tell him and used his binoculars to try to locate them. Being unable to do so, Yoshida returned to the bus to advise Buchanan that the boys were missing.

35. After a brief search Buchanan contacted the Resort to advise them of the situation. He and others continued to search around the lake. Police were called to assist.

36. Police divers located the bodies of the two boys in the lake on the following morning.

37. The Queensland Police Service (OPS) and Workplace Health and Safety Queensland (WHSO) commenced investigations which also found as follows:

    (a) Yoshida (employed by Huckleberry) had not previously travelled to the island.

    (b) Yoshida's role on tour was to escort the children, assist in the smooth running of the tour, to translate and interpret. Yoshida was not a qualified interpreter and could not interpret instantaneously.

    (c) Yoshida became aware that swimming would take place at the lake when she was on the bus, approaching the lake. She did not communicate to the children that they could swim, and she did not know if they were allowed to swim. She presumed, upon arrival at the water, that the boy's teacher, Minatoya, gave permission to the students to swim.

    (d) Huckleberry commenced operation in Australia in 2005. In March 2019, their staff consisted of seven employees, namely Hidaka (Director), a General Manager, a Manager (Yoshida) and four others.

    (e) Huckleberry deals almost exclusively with Japanese students under the age of 18 (including children as young as 6 years old).

    (f) Huckleberry ran study tours for private schools as well as for public schools engaged by the Department of Education.

    (g) Huckleberry did not have any documented risk assessments in place and did not provide any formal training to staff with respect to health and safety or hazard and risk identification.

    (h) Huckleberry did not have any documented risk assessments or policies about the activity of swimming, or any other activities, on their study tours.

    (i) Hidaka had previously travelled to K'gari (Fraser Is) on several occasions and had visited Lake McKenzie as it was then known.

    (j) Under the Education Queensland International "Study Tours - Prohibited Activities" directive, tour operators, like the defendant, conducting study tours for state schools (as opposed to private schools) were required to specifically prohibit water activities, including swimming, on their tours.

38. The parties agreed this directive gave a hint to Huckleberry about what would be prudent practice in relation to students from private schools too.

Role of the Director

39. Mr Hidaka is Huckleberry's sole director, secretary and shareholder. He was the controlling mind and will of the corporation and the person with authority to enter the plea of guilty entered in this case.

40. Hidaka is not expected to run every single aspect of the business, let alone to know every detail of every aspect of the day to day operations of the business. It is expected and accepted that directors will engage managers, staff and experts as needed.

41. As Russell DCJ stated in *SafeWork NSW v Confeta Pty Ltd* [5] :

> "Mr … was the directing mind of the corporate business. A director cannot be expected to run every part of the operation, and for that purpose corporations employ managers and specialists, particularly in work health and safety matters. However, Mr … had an obligation to exercise due diligence to ensure that those under him were carrying out their duties properly."

STATUTORY LAWS

42. The provisions of the Act relevant to this proceeding, and crucial to this decision, are set out below.

Objectives

43. Section 3 of the Act states the objectives of the Act, a good starting point when interpreting any legislation:

> **Object**
> (1)The main object of this Act is to provide for a balanced and nationally consistent framework[6] to secure the health and safety of workers and workplaces by—
> (a) 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 particular types of substances or plant; and
> (b) providing for fair and effective workplace representation, consultation, cooperation and issue resolution in relation to work health and safety; and
> (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment; and
> (d) promoting the provision of advice, information, education and training in relation to work health and safety; and
> (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
> (f) ensuring appropriate scrutiny and review of actions by persons exercising powers and performing functions under this Act; and
> (g) providing a framework for continuous improvement and progressively higher standards of work health and safety; and
> (h) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in Queensland.
> (2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from particular types of substances or plant as is reasonably practicable.
> (My underlining)

44. The main objective of the Act is to provide for a nationally consistent framework to secure and protect the health, safety and welfare of not only workers, but also of other persons such as clients and customers.

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[5] *SafeWork NSW v Confeta Pty Ltd; SafeWork NSW v Antoniou* [2018] NSWDC 392 at [157].

[6] The Legislative Note contained in section 3 states that the numbering of this Act "closely corresponds to the same numbering in a model Bill prepared for and approved by the Council of Australian Governments." That is why, for example, section 32 of the Act is in identical terms to section 32 of the NSW Act. I must be cautious however about sentences imposed in other states under identical offence provisions because their sentencing laws are not identical to Queensland's *Penalties and Sentences Act 1992* .

45. The model Work Health and Safety laws approved by the Council of Australian Governments in 2009 have now been implemented in the Commonwealth and in every State and Territory, except Victoria.[7]

46. The Explanatory Notes to the *Work Health and Safety Bill 2011* (Qld) at page 1 stated:

> "The Bill sets out legal duties and operating requirements that are to be applied on a nationally consistent basis to all parties responsible for work health and safety and will be supported in the future by nationally consistent regulations and codes of practice."

47. Of particular note in the present case, the Act's objective is to be achieved, among other ways, through the elimination or minimisation of risks arising from work or from particular types of substances or plant. A body of water is such a substance. This body of water was an 8 or 9 metre deep, 150 hectare lake, and it became part of Huckleberry's workplace by taking child tourists there.

48. Specifically targeting how the objective in subsection (1)(a) is to achieved, subsection (2) mandates that "regard ***must*** be had to the principle that workers ***and other persons*** should be given the ***highest*** level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from particular types of substances or plant as is ***reasonably practicable***." (My emphasis)

49. Subsection 3(2) establishes that in order to achieve the objective, the defendant's application of the stated principle—

    (a) is not optional, and

    (b) is for the protection of workers, and non-workers such as customers too, and

    (c) is central to conducting an actual and deliberate risk assessment of the risks arising from work or from particular types of substances or plant, and

    (d) is one which should give (or provide) the highest possible level of protection as is reasonably practicable.

50. Logically, therefore, worse still would be a total failure to undertake the risk assessment at all; which is what happened in this case.

51. This law (in Queensland and wherever the uniform law exists) applies to any and every business undertaken in that jurisdiction. It would be prudent for every business person to actually read it.

52. Under section 8 a ***workplace*** is defined as a place where work is carried out for a business or undertaking and includes (so is not limited to) any place where a worker goes, or is likely to be, while at work, and it includes any waters. The parties here agreed that all locations particularised by the prosecution were workplaces.

The Offence Provision

53. The relevant offence provision is section 32 of the Act:

> **32. Failure to comply with health and safety duty—category 2**
> A person commits a category 2 offence if—
> (a) the person has a health and safety duty; and
> (b) the person fails to comply with that duty; and

[7] Some jurisdictions made minor variations to ensure their legislation remains consistent with their jurisdiction's drafting protocols, laws and processes. For example, in Queensland and in New South Wales in section 32 (and other offence provisions) from the uniform model law was varied only in so far as the reference to a fixed maximum fine in the model section was replaced by a number of 'penalty units' — which in each state carry a different (although similar) monetary value.

(c) the failure exposes an individual to a risk of death or serious injury or illness.
Maximum penalty—
(a) for an offence committed by an individual, other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—1,500 penalty units; or
(b) for an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—3,000 penalty units; or
(c) for an offence committed by a body corporate—15,000 penalty units.
(my underlining)

54. Therefore the maximum penalty Huckleberry could face is 15,000 penalty units, which at the time of writing equates to $1,500,000.[8]

55. By way of comparison, and to gauge the seriousness of this offending, the Act creates offences which, although similar, are either more serious or less serious. The maximum penalty for a corporation guilty of a Category 1 offence, a crime, under section 31 (**Reckless conduct—category 1**) is 30,000 penalty units or $3,000,000. On the other hand, the maximum penalty for a corporation guilty of a Category 3 (summary) offence under section 33 (**Failure to comply with health and safety duty—category 3**) is 5,000 penalty units or $500,000.

Risk assessment

56. Section 18 of the Act establishes that an actual and deliberate risk assessment must be conducted by the corporation. Section 18 clearly lists in plain English the matters which Huckleberry (and all companies carrying out any similar undertaking) had to take into account and weigh up in order to determine what reasonably practicable steps it could and should have taken to ensure the health and safety of the students, including Masters Taiki Mizuno and Shinnosuke Kimura

57. Section 18 states:

"**18 What is reasonably practicable in ensuring health and safety**
In this Act, reasonably practicable, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including—
(a) the likelihood of the hazard or the risk concerned occurring; and
(b) the degree of harm that might result from the hazard or the risk; and
(c) what the person concerned knows, or ought reasonably to know, about—
(i) the hazard or the risk; and
(ii) ways of eliminating or minimising the risk; and
(d) the availability and suitability of ways to eliminate or minimise the risk; and
(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk."

58. It may surprise lay people to learn that it was even necessary for the Parliament to enact such a common sense law.

59. In this twenty-first century any adult person of sound mind and in possession of a moral compass who accepts children into their care should not have to be told they have a duty of care towards, and to take such common sense steps for risk assessment and risk management for, the health and safety of those children; especially where the risk assessment would reveal a risk of death or serious injury to the child. But here we are not dealing solely with an individual human person's responsibilities. The defendant is a corporation and corporations need to be reminded that they are not in business only to

[8] See footnote *Penalties and Sentences Act 1992*.

make profit. They are granted a special (or deemed) person status and financial benefits not available to real individuals and sole traders so that, amongst many other purposes, they can provide employment and services for the benefit of society.

60. These requirements are not optional.

61. Corporations must make it their business to comply with these legal requirements.

62. Corporations need to be good corporate citizens if they want to keep their special status.

Section 19 and the Primary Duty of Care

63. Section 19 sets out the primary duty of care which applies in the offence provision, section 32 (above). I will omit the provisions which apply solely for the benefit of workers as opposed to 'other people':

"**19 Primary duty of care**

(1) …

(2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

(3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable—

(a) the provision and maintenance of a work environment without risks to health and safety; and

(b) the provision and maintenance of safe plant and structures; and

(c) the provision and maintenance of safe systems of work; and

(d) the safe use, handling and storage of plant, structures and substances; and

(e) …

(f) the provision of any information, training, instruction or supervision that is 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; and

(g) …

(4) …

(5) … ."

64. In *SafeWork NSW v Roadworx Surfacing Pty Ltd*[9] Strathdee DCJ held that the defendant's duty is:

> "… to "ensure" the health and safety of its workers, so far as reasonably practicable. The duty requires the identification of risks in the workplace and the adoption of measures to eliminate or minimise them, so far as is reasonably practicable (see Kirk v Industrial Commission of New South Wales [2010] HCA 1 at [34]). The duty is positive, non-delegable and requires duty holders to search for, detect and eliminate, so far as is reasonably practicable, risks to safety: WorkCover Authority (NSW) v Inspector Egan & Atco Controls Pty Ltd (1998) 82 IR 80 per Hill J at 85." (My underlining)

Further principles that apply to the duty of care

65. Part 2, Division 1, subdivision 1 of the Act sets out the principles that apply to all duties that persons have under the Act. Corporate officers need to know that their duty is non-delegable, or as the Act puts it— non-transferable. Obviously tasks can be delegated such as obtaining risk assessment reports, but at the end of the day their duty cannot be limited or removed or shed by any agreement or arrangement purporting to do so.

[9] *SafeWork NSW v Roadworx Surfacing Pty Ltd* [2022] NSWDC 616 at [33].

66. Sections 13 to 17 inclusive provide that the duties under the Act are "non-transferable." A person can have more than one duty. More than one person can concurrently have the same duty.

67. Section 16(2) states each duty holder must comply with that duty to the required standard even if another duty holder has the same duty. If duties are held concurrently, each person retains responsibility for their duty and must discharge the duty to the extent to which the person has capacity to influence or control the matter, despite an agreement or arrangement purporting to limit or remove that capacity.

68. When the Bill was introduced in Parliament the Explanatory Note stated:

> "In formulating these principles, the Act makes it clear that:
>
> • a person with concurrently held duties retains responsibility for the duty and must ensure that the duty of care is met,
>
> • the capacity to control applies to both 'actual' or 'practical' control
>
> • the capacity to influence, connotes more than just mere legal capacity and extends to the practical effect the person can have on the circumstances
>
> • where a duty holder has a very limited capacity, that factor will assist in determining what is 'reasonably practicable' for them in complying with their duty of care.
>
> The provisions of the Act do not permit, directly or indirectly, any duty holders to avoid their health and safety responsibilities. Proper and effective coordination of activities between duty holders can overcome concerns about duplication of effort or no effort being made." (My underlining)

69. Defence counsel's submissions about a hierarchy of responsibilities towards the students can not be accepted when the law in the Act expects every entity involved and every adult present and employed by them to have not only a legal capacity to act, but a practical capacity and duty to effect the circumstances before them. If there were multiple duty holders, then what was also required was the proper and effective coordination of activities between duty holders, before and during the tour.

70. The duty does not end with a risk assessment. It is an ongoing responsibility for the whole duration of the duty holder's dealings with any customer or worker.

What, duty of care did the students have, if any?

71. Section 29 also imposes on potential victims three duties of self-care.

"29 Duties of other persons at the workplace

A person at a workplace, whether or not the person has another duty under this part, must—

(a) take reasonable care for his or her own health and safety; and

(b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and

(c) comply, so far as the person is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person conducting the business or undertaking to comply with this Act."

72. Section 29 therefore imports the concept of contributory negligence from the Law of Torts and it imposed a duty on each of the boys to take reasonable care for his own health and safety. In my view the extent of that duty and how it applies to any individual person in any particular case must be a matter of weight. It must carry little weight where the person was a child (a person under the age of 18 years) who is placed by his parents into the care of the defendant company, a child who is a foreign national, whose first language was not English, who was in Australia temporarily as a tourist, who was told he could swim in the lake, and who was not told otherwise by any adult person present, including

an employee of the defendant company which (as well as others) had the duty under section 32.

73. In my view no weight can be given to the defendant's submission that the boys contributed to or caused their own deaths in circumstances where Huckleberry's duty (according to the agreed facts and particulars) was to simply tell the boys not to swim in the lake. Each victim's duty of self-care was immensely diminished by their age, lack of maturity, being away from home (i.e. away from parental care and supervision), their nationality and language barriers, and the fact that they were supposed to be under the care and watchful eye of 5 adults— including one employed by the defendant. Not one of them contradicted the bus driver who told them they could swim in the lake.

74. The victims, Masters Mizuno and Kimura, were both still children and needed to be told not to swim at all. I deal with this issue further below.

SUBMISSIONS BY THE PROSECUTION

75. As to antecedents, the prosecution points out that Huckleberry has no criminal history. Huckleberry was registered as a proprietary company on 26 November 2004.

76. The prosecution contends that the just penalty in the circumstances of this case is a fine in the order of $150,000 to $180,000.

77. The prosecution submission referred to the objects of the Act and how the Act contemplates their achievement, which I have referred to and dealt with above.

78. It was not contested that when a person conducting a business or undertaking fails to protect persons from an unacceptable level of risk, general deterrence is a paramount sentencing consideration. I agree with that general proposition.

79. The prosecution relied on *R v Brisbane Auto Recycling Pty Ltd & Ors* [2020] QDC 113 at [98], where Rafter DCJ adopted the following statement by the Victorian Court of Appeal in *R v Irvine* (2009) 25 VR 75 at [52].

> "Workplace safety requires employers to take the obligations imposed by the Act very seriously. The community is entitled to expect that both small and large employers will comply with safety requirements. General deterrence is therefore a significant sentencing factor when safety obligations are breached."

80. His Honour Rafter DCJ then stated:

> "The sentences imposed should make it clear to persons conducting a business or undertaking, and officers, that a failure to comply with obligations under the Work Health and Safety Act 2011 (Qld) leading to workplace fatalities will result in severe penalties."

81. A substantial penalty imposed by the Court in this matter would reflect the community's denunciation of the defendant's failure which lead to obvious risk to the members of the tour group.

82. There is nothing controversial in the prosecution's submission about deterrence and denunciation.

83. As for the objective seriousness of the offending, the prosecution submitted that the seriousness of the offence is illustrated by the significant maximum penalty of $1,500,000; and that apart from the maximum penalty, other indicators of seriousness were enunciated by the New South Wales Court of Criminal Appeal in *Nash v Silver City Drilling (NSW) Pty Ltd* ('Nash') [2017] NSWCCA 96 which was followed in Queensland. In *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd* ('Mac Plant') [2018] QDC 020, Her Honour Fantin DCJ adopted principles outlined in *Nash* and held that consideration needs to be given to:

(a) The potential consequences of the risk;

(b) The probability of the risk;

(c) The availability of steps to lessen, minimise or remove the risk;

(d) Whether those steps ore complex and burdensome or mildly inconvenient;

(e) The particular offence in the context of the penalties to be imposed by the Act.

84. The prosecution submitted that by reference to these principles the likelihood of the risk occurring here was not remote, the potential consequences of the risk were obviously catastrophic and were easily identifiable by the defendant. The steps to minimise the risk posed were available and could not be considered complex or burdensome. I agree, and they could not even be considered a mild inconvenience to the defendant.

85. Again, I note there was nothing controversial in that submission. The weight to be given to each submission is another consideration as I progress.

86. The prosecution submitted that in terms of objective seriousness, being a category 2 offence, this matter falls in the mid-range of seriousness. With respect to subjective seriousness, given the nature of the offending, and taking into account the ultimate outcome, being the fatality of two teenage boys, it was submitted that this matter falls at the mid to high end of the spectrum in terms of relative seriousness for offences under section 32 of the Act. Having examined each of the comparative sentences referred to me (see below) and all of the facts and circumstances in this case, I cannot fully reconcile that submission with the prosecution submission that the appropriate penalty here would fall in the range of $150,000 to $180,000.

87. The prosecution correctly submitted that those placed at risk by the defendant's offending were vulnerable young people. They were members of the public, patrons of a tour group, making them vulnerable in a way that workers are not. Workers may be conscious of risks or trained to mitigate them). These young people were still children.

88. It was accepted by the prosecution that, in mitigation, the defendant has assisted the administration of justice by pleading guilty without proceeding to a contested hearing.

89. The prosecution submitted that a penalty between $150,000 and $180,000 represents just punishment that adequately achieves the aims of deterrence and denunciation. Work health and safety prosecutions are often factually unique, making it difficult to provide precedent decisions of a like nature. I was told there is a small body of decisions (in Queensland and interstate) regarding sentencing for category 2 offences, but that the facts and circumstances of those cases vary greatly from this case; in particular when it came to decisions about a breach of the duty pursuant to section 19(2) of the Act (as opposed to breaches of a section 19(1)).

Comparative sentence decisions relied on by the prosecution

Bennett Developments v Steward [10]

90. l was told *Bennett Developments v Steward* is the most recent appeal decision in Queensland involving a plea of guilty to a category 2 offence, in circumstances where a fatality occurred.

91. Bennett Developments pleaded guilty to a section 32 offence. At a construction site fatal injuries were sustained by a worker (a painting contractor) who fell 3.2 metres through a void. The investigation revealed no protection was in place. A make-shift pallet barrier was initially used, rather than scaffolding which was due to be installed three days after

[10] *Bennett Developments v Steward* [2020] QDC 235.

the incident. At some point, prior to the death, that barrier was removed. Bennett Developments had poor systems in place and were said to have a "*laissez faire* attitude." Morzone DCJ agreed with the Magistrate at first instance, that the range in that particular case was a fine between $150,000 and $250,000 and determined that the $250,000 fine imposed at first instance was not manifestly excessive.

Guilfoyle v Queensland Police-Citizens Youth Welfare Association [11]

92. The PCYW Association pleaded guilty to a category 2 offence for breaching their s19(2) duty. An unaccompanied 15-year-old died after his neck was pinned under a weights bar on a Smith Machine. Their failure was in not enforcing a policy that 12 to 15 year year old patrons be accompanied by a parent or guardian. Capacity to pay a fine was not an issue. However, the PCYW Association was a not-for-profit organisation. It cooperated with the investigation, and like Huckleberry it took significant post-incident measures investing $800,000 to improve safety, entered a timely plea. Theses were all accepted as demonstrating remorse. Magistrate Ho also found of significance, among other factors, were:

(i) the lack of risk assessment, and

(ii) that the people attending the gym were members of the public who may not be as conscious of the risks present at the gym as workers there who could have been trained to mitigate the risks, and

(iii) that those who were exposed by the breach of duty to risk of death or serious injury were vulnerable children.

93. Magistrate Ho imposed a fine of $300,000. The conviction was not recorded.

***Williams v New Leaf Ag Pty* Ltd** [12]

94. New Leaf Ag Pty Ltd pleaded guilty to a category 2 offence, arising out of an incident on a rural property where a 14 year old worker was killed when he became dislodged from a trailer being towed behind a tractor. The deceased and his twin brother were working on the property during school holidays. Their task was to collect irrigation pipes as instructed by the leading farm hand. They were unsupervised while they performed the task. They did have an induction and some training about how to operate the tractor; however, ultimately, there was inadequate supervision, and no risk assessment (as in Huckleberry's case) or safe work procedure. Magistrate Manthey fined the defendant company $400,000.

Whether to record the conviction

95. Finally, the prosecution did not submit that the circumstances of this case would compel me to exercise my discretion in favour of recording the conviction. In *R v ZB*[13], the Court of Appeal held that the discretion conferred by section 12 of the *Penalties and Sentences Act 1992* (the PSA) ultimately requires a sentencing court to 'consider the potential benefits and detriments to the community of adopting either course', that is, whether to record a conviction or not.

96. The prosecution submitted that the suggested fine would achieve deterrence and denunciation without recording the conviction. For reasons stated below, I do not agree with that proposition.

97. However, I agree that in this case the imposition of an appropriate fine can achieve each of the permitted purposes of sentencing as stated in section 9 of the *Penalties and*

[11] *Guilfoyle v Queensland Police-Citizens Youth Welfare Association*, Decision of Magistrate Ho, 16 November 2020.
[12] *Williams v New Leaf Ag Pty Ltd*, Decision of Magistrate Manthey, 7 December 2018.
[13] *R v ZB* [2021] QCA 9 at [10].

Sentences Act 1992 without the need to record the conviction, which is not necessary or warranted given the mitigating circumstances in this case.

Costs of the prosecution

98. The costs orders sought by the prosecution totalling $1099.70 were not opposed by the defendant. I agree the defendant should be ordered to pay the modest sums sought.

SUBMISSIONS BY THE DEFENCE

99. Counsel for the defendant submitted that swimming was not part of the travel itinerary during the four-wheel drive tour on 29 March 2019, and therefore the two children drowned when the Defendant did not expect them to go swimming in Lake McKenzie and that the likelihood of the hazard or risk of drowning occurring at the lake was remote.

100. Huckleberry pleads guilty on the basis of amended particulars attached to the defence outline of submissions, and tendered to the court, on the basis that, by agreement of the prosecution:

(a) the breach of duty did not cause death of Masters Mizuno and Kimura; and

(b) the conviction is not to be recorded against Huckleberry.

101. Counsel accepted that, whatever the agreement was with the prosecution, this court would make the ultimate decision in its sole discretion.

102. After referring to some of the relevant legislation, which I have had regard to above, the defendant accepted that the Act imposes a 'safety duty' or duty of care with respect to persons other than workers[14] and that the duty is non-delegable.

103. The defence submission was helpful in providing definitions, and authorities for the meanings of terms used in the relevant sections of the Act.

104. The term "person" includes a "body corporate." Huckleberry was, and remains a body corporate, and accepts that it fell within the meaning of a "person" under section 19(2) of the Act. The term "business" includes the carrying on of "trade" or "commercial enterprise". The term "undertaking" has a broad meaning[15], and typically refers to an "enterprise", a "project" or "work undertaken or to be undertaken". A "business" or "undertaking" can be conducted alone or with others. Huckleberry accepts that it conducted a "business or undertaking" within the meaning of the Act; it is an inbound tour operator, travel agent and education agent.

105. However, it was submitted, Huckleberry conducted its business or undertaking with others during the guided four-wheel drive tour on K'gari (Fraser Is). That submission was expanded upon later (see below).

106. The words "must ensure" means "guaranteeing, securing or making certain".[16]

107. The term "health and safety" means "soundness of body" rather than merely "freedom from illness or infection."[17]

108. The words "put at" risk require sufficient proximity to the source of the risk at the relevant time or times for that risk to possibly impinge upon the relevant person's health and safety.[18]

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[14] *Safe Work NSW v Rawson Homes* [2016] NSWDC 237.
[15] *R v Associated Octel Co Ltd* [1996] 4 All ER 846 at 1547-1549 per Lord Hoffman
[16] *Carrington Slipways Pty Ltd v Callaghan* (1985) 11 KR 467 at 470 per Watson J.
[17] *TTS v Griffiths* (1991) 105 FLR 255 at 267.
[18] *Thiess Pty Ltd v Industrial Court of New South Wales* (2010) 78 NSWLR 94; (2010) 205 IR 263; [2010] NSWCA 252 at [67].

109. It was submitted that the words "not put at risk" have a narrower meaning than "ensure health and safety" but are sufficiently broad to capture any risk with sufficient proximity to the person which makes the possibility of danger real and not too remote or fanciful.

110. No controversy was raised with any of the definitions up to this point.

Reasonable practicability

111. Section 18 of the Act provides the meaning of "reasonably practicable." (See above).

112. It was submitted that "Reasonable practicability" does not mean doing "everything physically possible"[19] In *Baiada Poultry Pty Ltd v R* [20], the High Court of Australia (per French CJ, Gummow, Hayne and Crennan JJ) observed:

> "The words so far as reasonably practicable indicate that the duty does not require the employer to take every possible step that could be taken. The steps that are to be taken in the performance of the duty are those that are reasonably practicable for the employer to take to achieve the identified end of providing and maintaining a safe working environment. Bare demonstration that a step could have been taken and that, if taken, it might have had some effect on the safety of a working environment does not, without more, demonstrate that an employer has broken the duty imposed … . The question remains whether the employer has so far as is reasonably practicable provided and maintained a safe working environment."

113. It was submitted that "reasonable practicability" may imply some element of reasonable foreseeability, but that caution should be exercised before importing such common law concepts into the Act.

114. Further, it was submitted, it would not be "reasonably practicable" to take precautions against a danger which could not have been known to be in existence, citing the *Cleary Bros' Case* as authority for the proposition.[21] That submission, which reads more like a defence than as a plea in mitigation, has the effect of ignoring or obfuscating the agreed fact that performing the required risk assessment would be likely to make known the existence of risks and how they could easily be minimised or eliminated. The Act does not expect knowledge of risk to magically pop into someone's head or that a relevant risk will simply be an obvious one to be acted upon. Human beings in authority in the corporation have to actually think about it and do the work required to gain knowledge of risks the company is actually or possibly, and not merely theoretically, going to be exposed to, such as tourists drowning while swimming on tour.

115. As Huckleberry later discovered, a risk assessment commissioned from a risk assessor soon revealed the company's exposure to multiple risks. It categorised five levels of risk, and recommended how to manage each of the multiple risks, listed several control measures for each risk and how to enforce those control measures so as to eliminate or minimise identified risks. The report identified the risk of drowning from two potential hazards— planned activity near water and informal swimming, both in various locations, including in lakes.[22]

116. In any event, the *Cleary Bros* case is not authority for the proposition submitted here that it would not be "reasonably practicable" to take precautions against a danger which could not have been known to be in existence. Instead *WorkCover (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd* (2001) 110 IR 182; [2001] NSW IR Comm 278 at [80] (*Cleary Bros'* case) is authority for the proposition that knowledge or belief of a defendant (or absence thereof) is relevant to, but not determinative of, whether a specified measure is

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[19] *Edwards v National Coal Board* [1949] 1 All ER 743 at 747 per Lord Asquith.
[20] *Baiada Poultry Pty Ltd v R* [2012] HCA 14 at [15].
[21] *WorkCover Authority of NSW (Inspector Beyer) v Cleary Bro (Bombo) Pty Ltd* (2001) 110 IR 182; [2001] NSWIRComm 278.
[22] Exhibit 6, "*Risk Management, Matrix and Assessment*", 08/09/2020, at page 20 of 30.

reasonably practicable. After all, as counsel himself submitted, 'risk' means the mere possibility of danger, and not necessarily actual danger.[23] In *Cleary Bros'* case at [87] the Full Court was dealing with what constitutes a defence and noted that "if the happening of an event is not reasonably foreseeable then it will not generally be reasonably practicable to make provision against that event". However, at [147] the court went further, holding that reasonable foreseeability is "one consideration relevant to establishing a defence under s 53 and is not, of itself, conclusive".

Further Background Facts relied on by the defendant

117. The Defendant provided further background facts to explain the context in which it says it breached its health and safety duty pursuant to section 19(2) of the Act.

118. The Kanagawa University High School (the 'school') engaged a Japanese tour company JTB to help organise and operate a study tour of 15 students from the school in Japan. They arrived on 25 March 2019. JTB engaged Huckleberry to provide, amongst other things, English and Japanese translation services for the group participants while in Australia.

119. Therefore, I note, Huckleberry knew the students did not have full command of the English language and needed an interpreter. There is no evidence before me, one way or the other, to be able to draw any conclusions about whether the boys did see, or could have read, the warning sign at Lake McKenzie. In any case the prosecution submitted specifically that the signage is not relevant to the culpability of this defendant. The relevance of the student's need for interpreter services is more general, that is, that the company knew or ought to have known the children needed away from home care including assistance with the English language.

120. Huckleberry was also contracted to arrange homestay placements with Caloundra Christian College and booked accommodation and the four-wheel drive tour with Kingfisher Bay Resort at K'gari (Fraser Is).

121. Mr Shinri Minatoya was the teacher in charge of the tour, and he was assisted by another teacher from the school, Ms Mikiko Kawamura. Ms Michiyo Kubo from JTB in Japan accompanied the students as a tour guide.

122. Minatoya was charged separately with a category 2 offence contrary to section 31 of the Act. His criminal proceeding remains unresolved in the Harvey Bay Magistrates Court. No charges have been laid against Buchanan or JTB. Therefor, there are no 'parity in sentencing' issues.

123. The defendant submits that Minatoya managed and led the tour as the teacher in charge (or the person in charge). Minatoya held a number of information sessions about the tour at the school in Japan.

124. Huckleberry provided Ms Yuki Yoshida to accompany the students in Australia, assist in running the tour, and to provide translation assistance.

125. On 29 March 2019, the students participated in a guided four-wheel drive tour operated by Kingfisher Bay Resort, led by the driver and tour guide, Peter Buchanan. Yoshida from Huckleberry attended to provide translation assistance.

126. The defendant's submission relied heavily on the fact that swimming was not part of the travel itinerary.

127. Further, in relation to an Education Queensland international directive that 'water activities' were prohibited during study tours, it was submitted that Huckleberry believed

[23] *Thiess Pty Ltd v Industrial Court of New South Wales* (2010) 78 NSWLR 94; (2010) 205 IR 263; [2010] NSWCA 252 at [67].

it only applied to public schools, and that private schools made their own decisions about whether swimming was allowed. This study tour from the school in Japan was a private school study tour, as the home stay placement of the Japanese students took place with the Caloundra Christian College which is a private school. This submission was not disputed but the prosecution's point was that the known existence of this policy directive to the public schools, that are within Education Queensland's jurisdiction, provided a hint to Huckleberry and to the others that they should consider the risks of drowning and adopting a similar policy anyway.

128. Despite swimming not being part of the travel itinerary, Buchanan (the bus driver from the resort) advised the students that they could swim in the lake.

129. Counsel submitted that the warning sign erected in front of the lake stated that "swimming is not recommended." It did not say 'swimming is prohibited.' There were no visible warning signs at 'the beach' on the lake. The signs that were 'available' were small, and, so it was submitted, no one would have read or taken any notice of them.

130. When the tour group arrived at the carpark near the lake, Buchanan provided some general safety briefings, and attended the beach at some point, but only remained for a brief period. He returned to the car park to prepare afternoon tea. It was submitted this meant he did not stay with the students at the beach, and left it to the teachers, Minatoya and Kawamura, and the other two adults, Kubo from JTB and Yoshida from Huckleberry, to maintain a lookout. The business or undertaking of Huckleberry during the tour to Lake McKenzie was therefore conducted with others, including:

(a) Kingfisher Bay Resort— led by the driver/tour guide Buchanan who was in charge of the four-wheel drive tour;

(b) The school— led by Minatoya as the "person in charge" and was assisted by Kawamura; and

(c) JTB— assisted by Kubo as a tour guide, who accompanied the whole tour from Japan and within Australia.

131. It was further submitted that the Queensland Government, Department of Environment and Science was arguably involved in the duty as well, because the incident occurred on K'gari (Fraser Is) and the Department was responsible for providing warning signs to people who wished to enter Lake McKenzie.

132. It was also submitted that each of the "others" identified above held independent, but concurrent and overlapping, duties. Accordingly, whilst Huckleberry did conduct its own independent business or undertaking in the provision of translation assistance and ensuring that the tour proceeded according to the travel itinerary by its staff Yoshida, he says, during the four-wheel drive tour, it conducted its business or undertaking with others who held independent but concurrent and varying degrees of responsibilities.

133. It was submitted that the scope and level of responsibility by each person or entity during the four-wheel drive tour over the students from the school could be summarised in the following hierarchy:

Highest Level of Responsibility: Buchanan from Kingfisher Bay Resort was the leader or the person in charge of the four-wheel drive tour. The tour participants were the customers of Kingfisher Bay Resort. Buchanan was ultimately responsible for the health and safety of all participants during this tour, comprising the 15 Japanese students (8 male and 7 female 15 to 16 years olds) from the school and two teachers from the school (Minatoya and Kawamura), and a tour guide from JTB (Kubo), a translation assistant from Huckleberry (Yoshida, and twelve other tourists; totalling 31 people.

Second Highest Level of Responsibility: Minatoya from the school was the person in charge of the students. He was ultimately responsible for the health and safety of all students during their visit to Australia. He taught English at the school, and also provided translation assistance during the tour. As the teacher in charge of the students, he had authority to permit or prohibit swimming.

Third Highest Level of Responsibility: Kawamura from the school was the teacher who assisted Minatoya. She was second in charge of the tour and assisted Minatoya with the health and safety of all students during their visit to Australia.

Fourth Highest Level of Responsibility: Kubo from JTB was the tour guide of the whole tour. JTB was engaged by the school to arrange and operate the tour, and Kubo assisted Minatoya and his group during their visit to Australia by ensuring that the program operated according to the travel itinerary. She also provided translation assistance during the tour.

Also Fourth Highest Level or Lowest Level of Responsibility: Yoshida from Huckleberry was the translation assistant. She also assisted Minatoya and his group by ensuring that the program operated according to the travel itinerary. She had no authority to decide what students could do or not do. She had no authority to override Minatoya's decisions to permit the students to go swimming.

134. The defendant submitted that, therefore, whilst each person held a different level of responsibility during the four-wheel drive tour, each person's level of responsibility also overlapped in varying degrees with the other persons. In those circumstances, whilst each person held an independent and separate health and safety duty, the magnitude or gravity of any offending which exposed the two children to drowning was not caused by any one particular person.

135. As I have noted elsewhere here, at Lake McKenzie that day there were in fact five adults to the fifteen students; a ratio of 3:1.

136. It was submitted that Huckleberry, together with the other people during the tour, were all customers of King Fisher Bay Resort. They were all under the care of the tour guide Buchanan, and relied on and trusted his guidance, knowledge and expertise to ensure that the tour ran safely. It was submitted that all of these factors materially contributed towards the deaths or the risk of deaths occurring.

137. Thus the deft's argument progressed from naming the numerous entities involved in bringing the tour together, and each having independent, but concurrent and overlapping, duties to a hierarchical structure of diminishing responsibilities with Huckleberry at the bottom bearing the least responsibility of all.

138. In my view, with respect, this is an overly simplistic and overly technical argument which at its core strikes one true chord: Every adult present at the lake had to accept a duty of care towards these children. Common sense (as well as our laws) dictated that. Any one of the other adults present could have supervised the children. Any one of them could have told the children not to swim in the lake despite what they were told by Buchanan, especially when he didn't even remain there to supervise them after he told them they could swim there— despite the warning signs on display that he either did know, or ought to have known, were there. At the very least any one of them could have supervised and advised the boys not to go too far into the water, not to swim across the lake when one boy was heard to express that desire, and each adult could have remained with the children.

139. The submission is really merely telling me what happened on the fateful day because of the lack of appropriate risk assessments.

140. All of these arguments and submissions about hierarchy miss the point that the offence had already effectively occurred or was almost inevitable, that it was at least set in train, when the defendant Huckleberry failed to do a risk assessment, failed to identify the risk of drowning and failed to plan and manage the risk of children in their care drowning if they went swimming. It was those failures that resulted in the defendant's subsequent and consequent failure to tell the boys not to swim (the particulars of the offence to which they have pleaded guilty).

141. In Australia our laws commonly recognise or expressly state that the interests of children are paramount. In my view every adult present, and every entity they represented, bore an equal degree of responsibility for the care and safety of all 15 children. There were 5 adults to 15 children. It begs the rhetorical question: How hard can it be (to supervise the children or tell them not to swim)?

142. Putting it another way, and with the extreme benefit of hindsight, if Huckleberry had not failed to comply with its duty under sections 19 (2) and 32 of the Act before the lake tour was undertaken the boys would (barring extreme negligence) certainly have been told not to swim in the lake and they would therefore most likely be alive today.

143. A chain is only as strong as its weakest link. This case, and these defence submissions, simply serve to demonstrate why it is so crucially important for every person to whom, and every corporation to which, the Act applies, to comply with the Act, fully, and all of the time.

144. The defendant's submission went even further to suggest that despite those independent but overlapping duties, "*the boys were playing in the water by pulling and grabbing each other down*" and that "*Masters Mizuno and Kimura appear to have caused their own demise and drowned accidentally.*" I will have somewhat more to say about that submission. See below.

145. The defendant submitted that all of these factors materially contributed towards the death of the two boys at Lake McKenzie and that while none of such factors exculpate Huckleberry's responsibility in failing to discharge its own independent duty to advise the students that they were prohibited from swimming, the death of the two boys appears to have materialised due to actions and inactions of many other people. This is a true statement only to the extent that there was a collective failure to assess risk before the tour or to act on the day. To prevent these deaths, or to prevent or minimise the risk of these deaths, it would have only taken a simple risk assessment by Huckleberry (and by the others) before the tour or for one adult to speak up or to step up at the lake.

Antecedents of the defendant Huckleberry

146. Huckleberry was duly incorporated on 26 November 2004. The defendant initially operated its business as an education agent for Japanese students and arranged home stays with Australian schools.

147. Huckleberry submits that it is a small company. Mr Hiroyuki Hidaka is the sole director, secretary and shareholder.

148. In 2008 'Japan's largest travel agency', JTB, began contracting Huckleberry as the local tour agent in Brisbane to assist in the organisation of tours in South East Queensland. The business expanded into providing individual study abroad programs, group study tours, a retail travel agency and passenger transportation services.

149. Huckleberry's role in arranging study abroad programs generally involved:

(a) Operating as 'land operator' in Australia;

(b) Receiving inquiries from students directly or from various travel agents in Japan and education agents on behalf of interested students to come to Australia and participate in home stays with Australian families. Most of the inquiries came from agents in Japan;

(c) Collecting students from Brisbane Airport, holding information sessions, driving students to home stay families or other planned activities as per bookings, and returning students to the Airport for return flights to Japan.

150. Huckleberry also has two full time employees, one part-time employee and four casual employees (totalling 7 employees).

151. Huckleberry has no criminal history and it is a good corporate citizen that assists in the growth of goodwill, cultural exchange and shared experience between Australia and Japanese students. I accept Huckleberry provides important services and those services are mutually beneficial to our two nations and their people. Shared experiences help to build and secure bonds in any type of human relationship.

152. Since the deaths, to remedy any deficiency that Huckleberry had in not having written risk assessment manuals or policies, it has engaged an external consultant and it now has a written risk assessment policy. See references to this above.

Other mitigating factors

153. I was informed that Huckleberry's director, Mr Hidaka, has been suffering from depression and has had suicide ideation.

154. Huckleberry has voluntarily and fully co-operated with the investigation

155. There have been lengthy delays in bringing this matter to finalisation. But in my view the defendant is entitled to the full benefit of a timely plea of guilty because it seems one reason for the delay was that a charge against the director Hidaka was only discontinued once the plea was entered by Huckleberry.

Comparative Sentences relied on by the Defence

156. The defendant's counsel submitted there were 'no comparable cases that provide any useful guidance on the sentencing range to the circumstances of this case.' He did however provide a helpful examination of a few decisions.

Ian Williamson v Royal Agricultural Society of Queensland[24] (The RASQ case)

157. In the *RASQ case* a child died after falling off a trailer being towed by a tractor. Sentencing proceeded on the basis that death by falling off the trailer was an unlikely event. That defendant (like Huckleberry) was not charged with directly causing death. Magistrate Cridland stated at page 7 that the defendant's breach of duty was that it failed to implement easy and inexpensive control measures as simple as telling people not to ride on the trailer and then enforcing it, rather than recognising it is unsafe and then allowing people to continue to do so. That defendant was fined $100,000 and the conviction was not recorded.

158. It was submitted that in contrast Huckleberry failed to advise the students not to swim "which is a wholly different circumstance to telling a child not to ride on a trailer which was an activity far more dangerous than swimming."

159. In my view that distinction is illusory and mistaken. The boy on the trailer was on land and was breathing air. The risk of drowning in water is obviously at least as likely as the

[24] *Ian Williamson v Royal Agricultural Society of Queensland,* unreported decision of Acting Magistrate Cridland, on 26 July 2019.

risk of falling off a trailer. Humans cannot breath in water. Not all humans can swim or swim proficiently, just as not all humans could cope with riding unsecured on a trailer.

160. It was submitted that swimming *per se* is not inherently dangerous, and that no-one had been advised about the gradient in the water, or the lack of buoyancy in fresh water compared to swimming in sea water and being more able to stay afloat in briny sea water.

161. That may be so but, in any case, another important distinction between Huckleberry and the *RASQ case* is that the RASQ had actually conducted a risk assessment as a result of an earlier incident involving someone being injured 'on the back of a ute' and that it was recognised it was unsafe to ride on the backs of utilities or trailers, so 'as a general rule' people were not supposed to do so, yet it remained a common practice, and in that particular case the boy was not properly supervised by the tractor driver, nor by the groundsman who was specifically tasked to supervise the Work for the Dole participants. That defendant entity was let down by poor management. Here Huckleberry totally failed to conduct any risk assessment in the first place and deprived itself and its staff of relevant knowledge of risks it would have gained had it done so, and of the opportunity to communicate openly and productively with its business partners about the risks and management of them in the manner envisaged in the Explanatory Notes (referring to the non-transferability of the duty).

***Williamson v VH & MG Imports Pty Ltd*[25]**

162. In *Williamson v VH & MG Imports Pty Ltd* a worker died from an explosion when works were carried out to gas struts near a trailer at the back of a boat. A cylinder struck the employee's head penetrating his skull. An expert's reports identified that the cause of failure of the gas strut was a combination of the over-extension of the strut and the poor quality of the strut. However, there was no risk assessment on the work activity of designing, fabricating and attaching the boat rack to the camper trailer. On appeal, His Honour Dearden DCJ found that a fine of $90,000 imposed in the magistrates court was manifestly inadequate and fined the defendant $125,000, and the conviction was not recorded. At [74] to [77] Dearden DCJ held:

> "[74] The appellant submits the following decisions involving breaches of s 32 in respect of duties held under s 19 by corporate defendants provide appropriate assistance in respect of a penalty which should be imposed in this matter. Those cases are:
>
> 1. WorkCover Authority of NSW v Sarjame Storage Pty Ltd [2015] NSWDC 151 (fine of $250,000, costs of $22,500).
> 2. WorkCover Authority of NSW v Visy Paper Pty Ltd [2015] NSWDC 284 (fine of $412,500 plus costs as agreed or assessed).
> 3. Safe Work New South Wales v Waycon Bulk Pty Ltd [2015] NSWDC 254 (fine of $187,500 and costs as agreed or assessed).
> 4. Safe Work New South Wales v Austral Hydroponics Pty Ltd [2015] NSWDC 295 (fined $150,000).
> 5. SafeWork (NSW) v Romanous Contractors [2016] NSWDC 48 (fined $425,000).
> 6. Boland v Big Mars Pty Ltd [2016] SAIRC 11 (fined $240,000).
> 7. SafeWork (NSW) v JSN Hanna Pty Ltd [2016] NSWDC 117 (fine of $87,500 upheld on appeal).
>
> [75] These decisions have similarities to the appeal before me which include:
>
> (a) all the corporate defendants, other than the defendant Visy Paper, were small companies with small workforces in relatively discrete business undertakings;

[25] *Williamson v VH & MG Imports Pty Ltd* [2017] QDC 056.

(b) all, other than the defendant Visy, were first time offenders;

(c) all were acknowledged as cooperating with the investigation agency;

(d) remorse was noted as being displayed by all defendants;

(e) the decisions of Sarjame Storage, Visy Paper, Romanous Contractors and Austral Hydroponics involved a worker being fatally injured (although the prosecution acknowledged in Austral Hydroponics that the victim did not die from injuries sustained in his workplace fall);

(f) the decisions of Waycon Bulk, Big Mars and JSN Hanna resulted in workers receiving injuries (in JSN Hanna a relatively minor injury);

(g) general deterrence was an element in each penalty imposed;

(h) each offence was objectively serious when regard was had to the circumstances of the breach;

(i) each hazard was foreseeable and reasonably practicable measures were available to address the risk presented from the hazard;

(j) other than the matter of JSN Hanna, all the other defendants had insufficient or non-existent work procedures for the work activity being undertaken;

(k) in all but one (Romanous Contractors) an early plea of guilty was accepted as requiring a discount on the plea of guilty otherwise applicable;

(l) in all but one case (Romanous Contractors) good corporate citizenship was accepted as being present; and

(m) financial information (capacity to pay fine) was taken into account and considered in each case, with the defendants Austral Hydroponics and Romanous Contractors ceasing to trade at the time of the penalty being imposed.

[76] In exercising the discretion of this appellate court afresh on appeal, it is my view that a sentence, taking into account both the similarities and distinctions with the comparatives identified above, should be a fine in the order of $250,000, although an appropriate range could extend from $200,000 up to $400,000, depending on the circumstances of the case. The sentence actually imposed in this matter under appeal (a fine of $90,000) is, as I have indicated above, clearly manifestly inadequate.

[77] However, in the particular circumstances of the respondent company, the lengthy delays that have occurred in bringing this matter to finalisation, the issues involved with the Barbaro decision and its legislative over-ruling, and given that this is the first appeal to address the issue of the harmonised national work health and safety laws, it is appropriate to substantially ameliorate the penalty that would otherwise be appropriate. Accordingly, I consider the penalty on re-sentence should be a fine of $125,000."

163. It is important to note that except for the factors listed by Dearden DCJ at paragraph 75(e) and (f) of his Honour's judgment (quoted above) the mitigating and aggravating facts and circumstances in Huckleberry's case are similar to those listed there. I would only add that in Romanous Contractors the court found there was also the need for specific deterrence against the company (as well as the general deterrence his Honour listed).

164. It was submitted that, in contrast to *VH & MG Imports*, Huckleberry failed to tell the students not to swim "which is radically different from failing to have a safe system of work on the task of manufacturing and fabricating boat rack prototype for attachment to camper trailers."

165. In my view, on the other hand, Huckleberry also failed to do a risk assessment just like the defendant *VH & MG Imports*. Huckleberry's task in undertaking a risk assessment would also have been simpler, more obvious, less complex, less costly, and less inconvenient than for the complex processes being undertaken by *VH & MG Imports*. In

Huckleberry's case the work activity was simply taking students to a lake where they could swim, and drown.

166. The defendant's submission that the culpability of the defendant in each of the two cases referred to me "had to be greater than Huckleberry which merely provided Yoshida as a translation assistant and to assist in the smooth running of the four-wheel tour" is wrong footed, because the whole point here is that Yoshida should have also been there to tell the boys not to swim, and Yoshida would have been there to do so had Huckleberry complied with its statutory duty.

167. It is in that context that this court must also view the submission by the defendant that Huckleberry did not expect there to be any swimming activity. It should have had that obvious expectation.

Applying the *"instinctive synthesis"* approach to sentencing

168. Referring to the Court of Appeal (Qld) decision in R *v Karlsson*[26] (which simply followed and applied the High Court of Australia's decisions in *Markarian v R*[27] and *Barbaro v R*[28]) the defendant submitted that having regard to the "instinctive synthesis" approach and to the many distinguishing features from the cases highlighted above, the penalty for Huckleberry could not be greater than $100,000.

169. The "instinctive synthesis" approach to sentencing involves making a global judgment without attempting to state precisely how any given factor has influenced the judgment. Yet, the court must still identify all relevant factors, discuss their significance and then make a value judgment about what is the appropriate sentence given all the facts and circumstances in the case.

170. It was ultimately submitted that a penalty in the range of between $80,000 and $100,000 would be appropriate and that the conviction should not be recorded, in view of the foregoing, and in accordance with the sentencing principles under section 9 of the *Penalties and Sentences Act 1992,* as well as the added submissions under section 48 of the *Penalties and Sentences Act* about Huckleberry's financial position and its capacity to pay a fine

ANALYSIS

171. To avoid repetition here the reader will note that as typing these reasons progressed above I have already included my analysis of several key submissions. Some further analysis is also warranted.

The Director and Remorse

172. Originally, Mr Hidaka, the sole director of the defendant company, was also charged with one count. On day one of the hearing before me the prosecution offered no evidence to that charge. Therefore the particulars previously alleged against the Director played no part whatsoever in hearing this matter and play no part in reaching the decisions in this judgment.

173. However, the Director and his actions before and after the offence committed by the corporation are relevant. After all, he is the controlling mind and will of the corporation and is the person with authority to enter the plea of guilty entered in this case.

174. As Russell DCJ stated in *SafeWork NSW v Confeta Pty Ltd; SafeWork NSW v Antoniou*[29].

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[26] *R v Karlsson* [2015] QCA 158 at [48]-[53], [55].
[27] *Markarian v R* (2005) 228 CLR 357; (2005) 215 ALR 213; (2005) 79 ALJR 1048; [2005] HCA 25.
[28] *Barbaro v R* (2014) 253 CLR 58; (2014) 305 ALR 323; (2014) 88 ALJR 372; (2014) 236 A Crim R 116; [2014] HCA 2.
[29] *SafeWork NSW v Confeta Pty Ltd; SafeWork NSW v Antoniou* [2018] NSWDC 392 at [157].

"Mr Antoniou was the directing mind of the corporate business. A director cannot be expected to run every part of the operation, and for that purpose corporations employ managers and specialists, particularly in work health and safety matters. However, Mr Antoniou had an obligation to exercise due diligence to ensure that those under him were carrying out their duties properly."

175. In my view Mr Hidaka's actions are relevant in at least five ways—

(i) To explain the extent of the defendant company's culpability, and

(ii) Demonstrating remorse, and

(iii) Relevant remedial decisions taken since the offending occurred, and

(iv) Demonstrating other mitigating circumstances, and

(v) Establishing the defendant's capacity to pay a fine.

176. The attempt to explain the director's view of the extent of Huckleberry's culpability has been provided by its counsel, as outlined and commented upon above.

177. I accept that the director of the defendant company, and therefore the defendant, is remorseful. In this I have no doubt. The catastrophic consequences of this breach of duty have had a serious and genuine affect on Mr Hidaka personally. I am satisfied from his medical report[30] that Mr Hidaka suffered some degree of depression (although he was not clinically diagnosed with having any mental health issue), was medicated "for stress and to relax", and he had suicidal ideation after the deaths.

178. The victim impact statement of Mr Hiroshi Mizuno[31] (Master Taiki Mizuno's father) informed the court that "*Of those who were involved with the Program, only Mr Hidaka contacted us every year on the anniversary of our son's death but not one person at the School has visited us to offer their condolences for the loss of my son.*"

179. The letter from Mr Hidaka's General Practitioner, also sets out his medical history, and is a referral for six counselling sessions which he did commence on 10 December 2021.

Remedial actions

180. Soon after the non-assessed risk of death became fact, Huckleberry hired a risk assessor who soon revealed the company's exposure to multiple risks. It categorised five levels of risk, and recommended how to manage each of the multiple risks, listed several control measures for each risk and how to enforce those control measures so as to eliminate or minimise identified risks.

181. The "*Risk Management, Matrix and Assessment*", dated 8 September 2020, identifies the risk of drowning from two potential hazards— planned activity near water and informal swimming, both in various locations, including in lakes.[32]

182. A second document prepared by the risk assessor is headed 'Touring & Excursions'. It too is dated 8 September 2020. At paragraph 2.10.3 under the heading 'Bus Tours' it now clearly warns the tour operator that:

"While bus tours generally do not require many specialised skills of the leaders, they provide some situations which are unique to this type of excursion.

Although a bus tour operator may be contracted by a school, the person-in-charge is responsible for the overall program and supervision of students.

[30] See exhibit 15, letter by Dr Mayumi Yoshida, dated 23/11/21.
[31] See exhibit 4, victim impact statement of Mr Hiroshi Mizuno (Taiki Mizuno's father).
[32] Exhibit 6, a 67 page (in total) group of documents headed "*Risk Management, Matrix and Assessment*", dated 08/09/2020, at page 20 of 30,

183. And at 2.10.5, the following:

> "**2.10.5 Swimming — Not Permitted**
> Although Queensland offers attractions such as beach, rivers, and lakes.
> By and large the majority of Asians cannot swim or are poor swimmers, therefore all swimming activities are not permitted.
> **2.20.5.1 Safety and Security**
> Any activity or tour near water, is to be heavily supervised, to ensure that children and employees do not put themselves or others at risk (attempting a rescue)
> Contingency plans and safety preparations should include the possibility of students falling into the water."
> (My underlining)

184. The company's, and its Director's, good character and the remedial steps undertaken are also corroborated in the testimonials in Exhibit 20.[33]

185. Clearly, if these new policies are maintained and enforced, there will be a much greater chance of preventing or minimising the risk of such tragic deaths being suffered in future.

186. Huckleberry's director, Mr Hidaka, is to be commended for taking swift remedial action, and for his remorse and the empathy he demonstrated for the victim's families.

Did the victims cause their own demise?

187. Defence Counsel's written submission went so far as to suggest that despite the various people present, and the entities they represented having independent but overlapping duties, "*the boys were playing in the water by pulling and grabbing each other down*" and that "*Masters Mizuno and Kimura appear to have caused their own demise and drowned accidentally.*" I now have somewhat more to say about that submission.

188. In all the circumstances it is a baseless (let alone callous) and unnecessary submission to make.

189. Firstly, there was no evidence placed before me from which I can draw any conclusion, on any standard of proof, that the boys '*were playing in the water by pulling and grabbing each other down.'* That was merely one possible inference. Taking the evidence and submissions at their highest, my conclusion about the observation of the boys pulling one another must remain neutral. That is because, as the prosecution points out, the boy's actions, as apparently reported by eye witnesses, were equally consistent with the actions you would expect of someone who is drowning— on seeing someone or something above them in the water, perhaps a person or an object in or near the surface, the natural inclination of the person drowning would be to pull oneself up by grabbing onto the person or thing above. That part of the submission has no relevance. If it has any relevance at all it carries no weight. It can only be seen for its prejudicial value and must be ignored.

190. Secondly, and for the same reason I have just stated, there is no evidence capable, on any standard of proof, of establishing that the boys *caused their own demise.*

191. In any case, counsel tried to walk back from this part of his written submission, but did not withdraw it.

192. Counsel submitted that each adult present on the tour had some relevant knowledge to be able to minimise the risk of drowning. For example, he said, Minatoya and Buchanan had previously been to the lake many times. Counsel submitted that it was Minatoya who had the 'authority' to permit or prohibit swimming and that Yoshida had no authority to

[33] During the hearing of this matter I accidentally admitted and marked two separate documents as Exhibit 6. The first one was the Risk Management, Matrix and Assessment, considered above. The second one is a bundle of seven references about Huckleberry and Mr Hidaka. Under the Slip Rule I have marked the bundle Exhibit 20.

override Minatoya. It was submitted that had Huckleberry told the students not to swim they would have discharged their statutory duty and it then would have been up to the school, and others, to agree or not agree.

193. Counsel submitted that he was not in fact submitting that anyone held a higher duty than anyone else, but that what differed was the scope of their separate and overlapping responsibilities; that the magnitude of the offending was not something you could sheet home to one person. That submission can not stand on all fours with the written submissions about hierarchy of responsibility I have quoted above. In the end, counsel conceded that a better way of putting the submission would have been that each person and each entity had independant roles but they held a collective responsibility for the safety of the children.

194. Again, it is implicit in the revised submission that any one of the adults present could have spoken up and prevented the boys from swimming, including Ms Yoshida from Huckleberry. However, I can accept that Yoshida may have found it easier, or the need more obvious, to exercise such common sense had the company not failed to perform its duty in the first place to conduct a risk assessment and to have a policy in place to tell the boys there would be no swimming in the lake. That is consistent with the particulars pleaded and accepted. That breach of duty is the gravamen of the offence here.

195. There is **no** evidence that the victims caused their own demise.

Severity or seriousness of the risk exposed by the breach of duty

196. By its plea the defendant does not contest the ability of the prosecution to prove that an act or omission of the defendant was a significant or substantial cause of persons being exposed to the risk of death or injury.[34]

197. In *SafeWork NSW v Buddco Pty Ltd,*[35] while referring to the uniform provision in section 32 of the *Work Health and Safety Act 2011* (NSW), Russell DCJ stated:

> "[30] The word "risk" is not defined in the Act. Risk should not be interpreted in a complicated fashion. Safety cannot be ensured if a risk is present. The presence of a risk to the health or safety of a worker constitutes a breach of s 19 of the Act. It is not necessary that there be a particular accident, or that a person is actually injured. What is required is the creation of the risk. The relevant risk for the commission of the s 32 offence is a risk of death or serious injury — s 32(c).
>
> [31] An incident causing injury may be evidence of the presence of a risk and may be relevant in due course to sentencing as a measure of the severity of the harm suffered as a result of the risk. But a distinction must be drawn between the specific risk that manifested in the incident and the general class of risk that the analysis must focus on. Paying too close attention to the specific risk resulting in an incident can lead to error: Tangerine Confectionery Ltd and Veolia ES (UK) Ltd v R [2011] EWCA Crim 2015."

198. Here, the risk that was present was the risk of drowning if the students went swimming in the lake. The risk was created by taking the children to the lake in the absence of any risk assessment. The relevant risk was the risk of death or serious injury. One specific risk became manifest in the incident but it was also the same risk as the general class of risk that this analysis must focus on. The incident causing the death (swimming in the lake when no-one told the boys not to swim) assists to measure the severity of the harm suffered as a result of the risk. The relevant question is not whether the particularised failures of the defendant were the cause of the deaths, but rather whether there was a causal relationship between its act or omission and the risk to which the students were

[34] *Bulga Underground Operations v Nash* (2016) 93 NSWLR 338; [2016] NSWCCA 37, at [127].
[35] *SafeWork NSW v Buddco Pty Ltd* [2022] NSWDC 549 at [30], [31].

exposed: *Nash* (above) at [130]. Here there was a direct causal relationship between its omission and the risk to which the students were exposed.

199. The authorities clearly establish that an employer must have a proactive approach to safety issues. The question is not 'did the employer envisage a particular danger?', but rather 'should it have?' See *WorkCover Authority of New South Wales v Kellogg (Aust) Pty Ltd*.[36]

200. As Strathdee DCJ recently stated in *SafeWork NSW v Tyne ACFS Pty Ltd*[37]

> "The defendant had a duty … to "ensure" the health and safety of its workers, so far as reasonably practicable. The duty requires the identification of risks in the workplace and the adoption of measures to eliminate or minimise them, so far as is reasonably practicable: Kirk v Industrial Commission of New South Wales [2010] HCA 1 at [34]. The duty is positive, nondelegable and requires duty holders to search for, detect and eliminate, so far as is reasonably practicable, risks to safety: WorkCover Authority (NSW) v Inspector Egan & Atco Controls Pty Ltd (1998) 82 IR 80 per Hill J at 85."

201. Huckleberry should and could have envisaged the particular danger of drowning by swimming in the lake. Huckleberry did nothing to search for, detect and eliminate, so far as was reasonably practicable, risks to safety by swimming in the lake.

202. The existence of a reasonably foreseeable risk to safety that is likely to result in death or serious injury is one factor relevant to assessing the gravity of the offence. The level and type of risk is relative to the gravity of the offence.[38] The question of foreseeability of the risk must be determined objectively.

203. The Court of Criminal Appeal in New South Wales examined the sentencing process to be applied under the same provisions in that state as the one in Queensland that I am concerned with here— sections 19(2) and 32. In *Nash v Silver City Drilling (NSW) Pty Ltd; Attorney General for NSW v Silver City Drilling* (NSW) Pty Ltd Basten J held:

> "[34] The sentencing judge commenced his consideration with the proposition that 'greater culpability attaches to the failure to guard against an event the occurrence of which is probable rather than an event the occurrence of which is extremely unlikely'. However the truth of that proposition depends upon other considerations including (a) the potential consequences of the risk, which may be mild or catastrophic, (b) the availability of steps to lessen, minimise or remove the risk, and (c) whether such steps are complex and burdensome or only mildly inconvenient. Relative culpability depends on assessment of all those factors.[39]
>
> …
>
> [42] The culpability of the Respondent is not necessarily to be determined by the remoteness of the risk occurring, nor by a step-by-step assessment of the various elements. Culpability will turn upon an overall evaluation of various factors, which may pull in different directions. Culpability in this case is reasonably high because, even if the [event] which occurred might not be expected to occur often, the seriousness of the foreseeable resultant harm is extreme and the steps to be taken to avoid it, which were not even assessed, were straightforward and involved only minor inconvenience and little, if any, costs.

204. At [53] Basten J also addressed the correct approach when considering the objective seriousness of such offences:

> "It is important to note that the risk to be assessed is not the risk of the consequence, to the extent that a worker is in fact injured, but is the risk arising from the failure to take reasonably practicable steps to avoid the injury occurring. To discount the seriousness of the risk by

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[36] *WorkCover Authority of New South Wales v Kellogg (Aust) Pty Ltd* [1999] NSWIRComm 453.
[37] *SafeWork NSW v Tyne ACFS Pty Ltd* [2022] NSWDC 609 at [30].
[38] *Capral Aluminium Ltd v WorkCover Authority of NSW* (2000) 49 NSWLR 610; [2000] NSWIRComm 710, at [82].
[39] *Nash v Silver City Drilling (NSW) Pty Ltd; Attorney General for NSW v Silver City Drilling* (NSW) Pty Ltd [2017] NSWCCA 96 at [34] and [42].

reference to the unlikelihood of injury resulting is apt to lead to error. The conduct in question is the failure to respond to a risk of injury, conduct which will be more serious, the more serious the potential injuries, whether or not they are likely to materialize. The objective seriousness of the conduct will also be affected by the ease with which mitigating steps could have been taken."

(My underlining)

Other comparative sentences

205. There are many prosecutions for this offence in NSW and elsewhere, but the parties have not found many cases bearing similarity. In the end, no two cases will ever be 'on all fours' with each other or with this case, and this case, like all cases, must be judged according to law and according to the individual facts and circumstances.

206. I am also aware that while the Act is now part of a national scheme of uniform legislation, the cases decided in other states may have more relevance in terms of interpreting the sections as opposed to being helpful comparative sentences. That is because the sentencing legislation in each state is far from uniform, unless a court is applying the Commonwealth's *Crimes Act* to a Commonwealth offence; see *Reynolds v Orora Packaging Australia Pty Ltd,*[40] followed and applied by Morzone DCJ in *Bennett Developments v Steward* [2020] QDC 235 at [23]. At [24] Morzone DCJ then held:

"[24] It seems to me that comparative cases under the nationally harmonised workplace health and safety legislation are an appropriate consideration to ascertain a penalty range as a benchmark against which the appropriateness of the sentence can be gauged. However, that must not usurp, overwhelm or divert the proper exercise of the sentence discretion in accordance with the sentencing guidelines and principles prescribed in the relevant State's jurisdiction. Here, the Penalties and Sentences Act 1999 (Qld)."

207. Three further cases are worth mentioning.

SafeWork NSW v All Cranes 4 Hire Pty Ltd[41] **(All Cranes)**

208. In *All Cranes*, a 76kg unsecured wall panel being lifted by a crane fell onto construction workers. It struck one subcontractor on the head and shoulder and then fell onto another's head. Both workers were knocked down. The first person sustained an injury to his left shoulder, including injury to his rotator cuff and an abrasion, an injury to his left knee, including tenderness and abrasion to his left cheek. He was seen in an Emergency Department and was discharged that same day with a diagnosis of strain of 'rotator cuff capsule.' The other worker suffered no significant injuries. All Cranes pleaded guilty to an offence that as a company that had a work health and safety duty pursuant to s 19(2) of the *Work Health and Safety Act 2011 (NSW)* it failed to comply with that duty and thereby exposed other persons, to a risk of death or serious injury contrary to s 32 of that Act. The company had a sole director and employed a dogman. Russell DCJ found that the level of culpability in that case was midrange after taking into account the following factors:

1. The risk was known to All Cranes. It was a risk covered by the All Cranes Pallet Lifter Safe Work Method Statement (SWMS). There was also ample guidance material identifying such a risk.
2. The risk was likely to occur. Allowing an unqualified labourer to do the high risk work of a dogman was inviting trouble.
3. The potential consequence of a heavy object falling from height was serious injury or death. The outcome could easily have been so much worse.

[40] *Reynolds v Orora Packaging Australia Pty Ltd* [2019] QDC 03, per McGill DCJ, at [12] to [15].
[41] *SafeWork NSW v All Cranes 4 Hire Pty Ltd* [2020] NSWDC 738.

4. There were readily available steps to eliminate or minimise the risk. There was a dogman on the Site and there was equipment available which could have been used to strap the load securely. If All Cranes had simply followed its own SWMS, the risk would have been eliminated or minimised. An exclusion zone should have been set up and enforced.
5. There was effectively no burden or inconvenience in implementing those steps. The costs of a dogman and strapping were already factored into the job. An effective exclusion zone could have been set up with little expenditure of cost or time.
6. Fortunately the injuries suffered by one worker were relatively minor, considering what could have happened.
7. The maximum penalty for the offence is a fine of $1,500,000, which reflects the legislature's view of the seriousness of the offence.
8. Operating a crane is high risk work, and others in the vicinity are extremely vulnerable if proper practices are not employed.
9. The actions of others present may have contributed to the risk, but All Cranes was the specialist contractor on site and it supplied the crane, ticketed crane operator and dogman. The person in charge was the principal of All Cranes. There was no explanation provided as to why All Cranes did not follow its own SWMS on that occasion.

209. Russell DCJ held the appropriate fine was $200,000 but that it be reduced by 25% to reflect the plea of guilty and ordered the defendant to pay a fine of $150,000.

210. The main point of distinction in Huckleberry's case is that before March 2019 it did nothing to comply with the Act at all (at least in terms of taking students to places where they could swim).

SafeWork NSW v Autocare Services Pty Limited (No 2)[42] (Autocare)

211. *Autocare* is a very recent decision. The case is helpful in the context of having a case for comparison or contrast, where the court assessed the level of culpability to be in the upper half of the mid range. A transport driver was performing running repairs to the air lines of a vehicle transportation trailer when the deck of the trailer descended and crushed the driver. Russell DCJ found that the beach of sections 19(2) and 32 did caused the death of the worker (whereas in Huckleberry's case the cause of death is indirect). That defendant failed to enforce its own policy of prohibiting drivers from carrying out running repairs on trailers, where it already knew there was such a risk. The drivers were not mechanics. Most air line repairs to the well deck were performed by qualified mechanics because of a known danger that the well deck could not be supported by locking pins when work was carried out on it. Autocare actually had qualified mechanics who could have carried out repairs to air line leaks. There was no practical burden or inconvenience involved in taking appropriate steps, as Autocare already employed mechanics to repair trailers. The court assessed the level of culpability to be in the upper half of the mid range, and warranting a fine of up to $600,000. In the end the fine was reduced by 25% to reflect the plea of guilty and the defendant was ordered to pay a fine of $450,000.

SafeWork NSW v Tyne ACFS Pty Ltd[43] **(Tyne)**

212. In *Tyne, w*hile surveying 12 metre containers weighing 4.8 tonnes, two workers entered a narrow passageway approximately 50-60cm in width, between a container stack and the container to be surveyed. The victim inspected the container. As he went to exit via the passageway, a third worker was operating a specialised forklift to lift and move a

[42] *SafeWork NSW v Autocare Services Pty Limited (No 2)* [2022] NSWDC 641.
[43] *SafeWork NSW v Tyne ACFS Pty Ltd* [2022] NSWDC 609.

container and while he reversed the laden forklift, the container struck the inspected container, caused it to shift with force towards the stack of containers and closed the passageway. The victim was crushed and died.

213. The court ruled that the likelihood of the risk materialising was reasonably high given the large volume of container movements in the yard every day in a 24/7 operation.The defendant's pre-incident systems of work were dated and inadequate to manage the risk. The controls were limited to pedestrians (the surveyors) wearing high visibility clothing and for surveyors on foot to remain aware of forklift operations in the vicinity of the container being surveyed and to move away when forklifts entered working areas. The documented procedures did not set out adequate means for separating pedestrians from the risk or collisions between pedestrians and forklifts generally. There were simple, straightforward steps which could and should have been taken to avoid the risk. The concept of separating pedestrian work activities from areas in which forklifts are operating was not new, and was addressed by relevant pre-incident industry guidance material. Even though Strathdee DCJ did not find that the defendant's conduct disclosed any disregard for public safety Her Honour found in all the circumstances that the appropriate fine for the offence was $400,000 but to reflect the plea of guilty ordered the defendant to pay $300,000.

Sentencing Range gleaned from all comparative sentences

214. From reading all of the comparative sentence judgments referred to in these reasons, and what the judges actually said about the appropriate range of penalties before discounting for mitigating circumstances, I have concluded the appropriate range for a fine in Huckleberry's case is from $200,000 to $450,000. There is yet more to consider

Final Assessment of Culpability and Objective Seriousness

215. Firstly, to aid in the assessment of the objective seriousness of this offending, there is a helpful summary of principles in the recent decision by Strathdee DCJ in *SafeWork NSW v Roadworx Surfacing Pty Ltd* [2022] NSWDC 616 at [50] to [60]:

> "**Objective Seriousness of the Offence**
>
> [50] The duty of the defendant requires that it ensure the health and safety of workers as far as reasonably practicable. This duty is not delegable, and the defendant had control and influence over the workers at the site. The duty requires the identification of risks in the workplace and an assessment of measures to address such risks.
>
> [51] The primary factor to be assessed is the objective seriousness of the offence. Subjective factors play a subsidiary role: Lawrenson Diecasting Pty Ltd v WorkCover Authority (NSW) (1999) 90 IR 464 , 474–5.
>
> [52] The gravity of the offence is determined by the extent of the duty holder's failure to ensure, so far as was reasonably practicable, that its workers were not exposed to risks to their safety: Orbit Drilling v R (2012) 35 VR 399 at [62] (Maxwell P, Bongiorno JA and Kyrou AJA); Veen v R (No 2) (1988) 164 CLR 465 .
>
> [53] The objective degree of foreseeability is a matter for the Court to have regard to when considering the gravity of the offence: Capral Aluminium Ltd v WorkCover Authority (NSW) (2000) 49 NSWLR 610 (Capral Aluminium at [81].
>
> [54] An offence will be serious where there is an obvious or foreseeable risk to safety against which appropriate measures were not taken even though such measures were available and feasible: Morrison v Powercoal Pty Ltd (No 3) (2005) 147 IR 117 .
>
> [55] Subjective factors should not be permitted to produce a sentence which fails to adequately reflect the seriousness of the offence: WorkCover Authority (NSW) v Profab Industries Pty Ltd (2000) 49 NSWLR 700 at [31] .

[56] The Court of Criminal Appeal examined the sentencing process with regard to the Act in the matter of Nash v Silver City Drilling (NSW) Pty Ltd [2017] NSWCCA 96(Nash v Silver City). Justice Basten at [34], under the heading 'Assessment of Risk' said:

> The sentencing judge commenced his consideration with the proposition that '[g]reater culpability attaches to the failure to guard against an event the occurrence of which is probable rather than an event the occurrence of which is extremely unlikely.' However, the truth of that proposition depends upon other considerations, including (a) the potential consequences of the risk, which may be mild or catastrophic, (b) the availability of steps to lessen, minimise or remove the risk and (c) whether such steps are complex and burdensome or only mildly inconvenient. Relative culpability depends upon an assessment of all those factors.

[57] His Honour further observed at [42]:

> The culpability of the respondent is not necessarily to be determined by the remoteness of the risk occurring, nor by a step-by-step assessment of the various elements. Culpability will turn upon an overall evaluation of various factors, which may pull in different directions. Culpability in this case is reasonably high because, even if the pressure event of the force which occurred might not be expected to occur often, the seriousness of the foreseeable resultant harm is extreme and the steps to be taken to avoid it, which were not even assessed, were straightforward and involved only minor inconvenience and a little, if any, cost. That assessment will involve both objective considerations and a consideration of what the respondent's responsible officers knew or ought to have known.

[58] I accept that s 3A of the Sentencing Act is generally regarded as a codification of the common law principles of sentencing: R v MA [2004] NSWCCA 92 . The purposes of punishment in the section are constrained by the sentencing principles that exist under the common law such as the principles of proportionality and totality: R v MMK [2006] NSWCCA 272 .

[59] The Court is obliged to make an assessment of where on the scale of criminality the offence lies referable to the maximum penalty prescribed by the legislature: R v Cage [2006] NSWCCA 304 at [17] –[18] (Latham J).

[60] The defendant's duty required it to identify risks at the site and to adopt measures to eliminate or minimise them: s 17 of the Act: Kirk v Industrial Court (NSW) (2010) 239 CLR 531 at [34] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ)."

216. Secondly, In Queensland, *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd* [2018] QDC 020 Fantin DCJ, followed and applied *Nash v Silver City Drilling* (above) and, after considering relevant principles, identified five relevant considerations to determining the objective seriousness of the offending according to those principles:

(a) the potential consequences of the risk;

(b) the probability of the risk;

(c) the availability of steps to lessen, minimise or remove the risk;

(d) whether those steps are complex and burdensome or mildly inconvenient; and

(e) the particular offence in the context of the penalties imposed by the Act

217. The risk and potential consequence of the risk here was that children in the care of Huckleberry could drown if allowed to swim in the lake. For reasons stated above, the probability of the risk being materialised was very high. There were simple steps available to identify and to eliminate the risk. The children could simply be told swimming was not permitted. If permitted then the children could and should have been more closely supervised. It is the simplest step imaginable, devoid of all the complexities, expenses and other issues associated with the risk assessments in the comparable cases where the work activities were much more complex. Here Huckleberry was a travel agent, tour guide and interpreter service, and intermediary and coordinator with other participants. The risk assessment and the steps available were not anywhere near as complex, burdensome or even mildly inconvenient. They were common sense steps and

would have had a zero or near zero cost to Huckleberry. They just had to say NO to swimming in the lake.

218. The objective seriousness of offending, in this case is relatively high. In my assessment it is at the high end of mid range offending.

Denouncement and Deterrence

219. In my view, offences committed under section 32 should not usually be considered to be trivial offences, or low to midrange, offences when the circumstances of the offending are such that the real potential of failing to comply with the duty under section 19(2) is either death or grievous injury. This view still takes into account an agreed basis for the plea: the fact that Huckleberry did not cause the deaths of Masters Mizuno and Kimura, but that their breach of duty exposed the children to the risk of death by drowning.

220. In reaching this, and any other view about the seriousness of the offence, it is necessary to put aside common human biases, emotional issues, and prejudices which could influence decision making where the deaths of children are involved. However, the court is expected to apply the law and commonly accepted current community values, including the need to denounce the offending. Section 9(1)(d) of the PSA specifically states that one of the only five purposes for which sentences may be imposed on an offender (or a combination of two or more of them) is "to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved." That is necessary for the attainment and support of a safe, healthy, law abiding, orderly, peaceful, and respectful community and society or, as is often referred to in constitutional law, the "peace, welfare and good government" of the State.[44]

221. Another of the permitted purposes for sentencing offenders is stated in section 9(1)(c): "to deter the offender or other persons from committing the same or a similar offence". This is a reference to the legal and socially desirable aims of achieving deterrence at two levels; personal or specific deterrence for an individual, and general deterrence in the community of like-minded offenders and potential offenders.

222. In all the circumstances I have outlined above, this is not a case calling for any special or serious personal or specific deterrent sentence against this defendant. The first two permitted purposes for sentencing offenders will adequately cater for any specific deterrence needed here: See section 9(1)(a) and (b) namely, for the purpose of punishing an offender to an extent or in a way that is just in all the circumstances and to provide an order that will help the offender to be rehabilitated (or as in this case, to continue its rehabilitation).

223. Nor do I see any current need to specifically and directly "protect the Queensland community from the offender," which is the fifth permitted purpose for sentencing offenders under section 9(1)(e) of the PSA. Huckleberry, through its director, has demonstrated adequate and appropriate remorse and took immediate remedial steps to avoid this type of offending in future. It was, and wants to remain, a good corporate citizen, contributing not only profits to its sole shareholder, but to the good relationship Australia has with Japan.

224. That leaves the need for general deterrence.

225. The fine I impose for this offence must provide for general deterrence. All employers must be encourage to take the obligations imposed by the Act very seriously. The community is entitled to expect that all employers, whether large or small, will comply

[44] See, for example, section 2 of the Constitution Act 1867 (Qld), which establishes the Legislative Assembly and empowers it "to make laws for the peace welfare and good government of the colony in all cases whatsoever."

with their safety duties. General deterrence is a significant factor when safety duties and obligations are breached, see *Bulga Underground Operations Pty Ltd v Nash.*[45]

226. This issue of general deterrence is unavoidably linked to the issue of capacity to pay a fine, as is highlighted by relevant case law to which I will refer. Therefore, to avoid duplication, I will consider that issue next and draw conclusions about the need for general deterrence at the end of that consideration.

Capacity to pay a fine

227. It was submitted that after Huckleberry was charged, Huckleberry has been in the media here and abroad and has sustained significant damage to its reputation because no-one else has been convicted and only Huckleberry has been blamed in public.

228. On the evidence presented to this court there is no way for me to be satisfied as to the true extent of any financial downturn due to reputational damage.

229. It was also submitted Huckleberry has sustained significant financial damage due to the COVID-19 pandemic, arising out of the border closure which prevented the arrival of Japanese students to Queensland.

230. On the evidence presented to this court there is no way for me to be satisfied as to the true extent of any financial downturn due to COVID-19 or border closures.

231. However, I can be satisfied that there has been some degree of loss due to publicity and COVID-19. Therefore it is relevant to take this into account under section 48 of the *Penalties and Sentences Act 1992*, which states:

> **"Exercise of power to fine**
>
> (1) If a court decides to fine an offender, then, in determining the amount of the fine and the way in which it is to be paid, the court must, as far as practicable, take into account—
>
> (a)the financial circumstances of the offender; and
>
> (b)the nature of the burden that payment of the fine will be on the offender.
>
> (2) The court may fine the offender even though it has been unable to find out about the matters mentioned in subsection (1)(a) and (b).
>
> (3) In considering the financial circumstances of the offender, the court must take into account any other order that it or another court has made, or that it proposes to make—
>
> (a) providing for the confiscation of the proceeds of crime; or
>
> (b) requiring the offender to make restitution or pay compensation.
>
> (3A) In considering the financial circumstances of the offender, the court must not take into account the offender levy imposed under section 179C.
>
> (4) If the court considers that—
>
> (a) it would be appropriate both to impose a fine and to make a restitution or compensation order; and
>
> (b) the offender has not enough means to pay both;
>
> the court must, in making its order, give more importance to restitution or compensation, though it may also impose a fine.
>
> (5) In fixing the amount of a fine, the court may have regard to, among other matters—
>
> (a) any loss or destruction of, or damage caused to, a person's property because of the offence; and

[45] *Bulga Underground Operations Pty Ltd v Nash* (2016) 93 NSWLR 338; [2016] NSWCCA 37 at [180].

(b) the value of a benefit received by the person because of the offence."

232. Similar legislation is found in many Australian States, and in section 16C of the *Crimes Act 1914 (Cth)* (the Commonwealth Crimes Act) in the following terms:

> (1) Subject to subsection (2), before imposing a fine on a person for a federal offence, a court must take into account the financial circumstances of the person, in addition to any other matters that the court is required or permitted to take into account.
>
> (2) Nothing in subsection (1) prevents a court from imposing a fine on a person because the financial circumstances of the offender cannot be ascertained by the court.

233. A defendant's financial circumstances, and capacity to pay a fine, so far as it can be ascertained and accepted by a sentencing court, is a mandatory consideration. It is an important consideration, but is not the dominant one.

234. The seriousness of the offence and the need for general deterrence may still call for the imposition of a substantial fine. See *Jahandideh v R*[46] There the Court of Criminal Appeal (NSW) (per Rothman J, with Hoeben CJ at CL and Beech-Jones J agreeing) held:

> "[15] … First, s 16C(1) of the Commonwealth Crimes Act requires a sentencing judge to take financial circumstances into account. It does not dictate that the financial circumstances will determine the fine that is to be imposed.
>
> [16] The financial circumstances of the offender is a mandatory consideration, but, expressly, there are other considerations. In Darter v Diden [2006] SASC 152 ; (2006) 94 SASR 505, Doyle CJ said:
>
> > [29] I consider that a substantial fine was called for, even after making allowance for the loss of the vessel and the period of detention. A substantial fine was called for because, in particular, of the seriousness of the offence and its prevalence. Deterrence remains a factor, even if it is attenuated by the unlikelihood of recovery of the fine in future like cases.
> >
> > [30] Treating the offender's capacity to pay as relevant, but not decisive, is consistent with the approach at common law. In Flego v Lanham (1983) 32 SASR 361 at 365–367 Wells J considered this issue. He said at 366:
> > But the offender's capacity to pay should always be kept in mind as a factor worthy of consideration; it cannot be decisive (see generally Reid v Liersch unreported, Walters J, 23 September 1970), but it is likely to be of some moment.
> >
> > Legoe J came to a similar conclusion in Winkler v Cameron (1981) 33 ALR 663. This approach is consistent with the view of Finlay J in Rahme (1989) 43 A Crim R 81 at 86–88, although that case was complicated by the fact that the sentencing Judge had been urged to impose a substantial fine rather than a sentence of imprisonment. In Smith v R (1991) 25 NSWLR 1 Kirby P (at 21) expressed opposition to the imposition of a fine which was beyond the means of the person fined. That case also was complicated by its particular circumstances. It was a case involving contempt of court by a prisoner serving life imprisonment, the response of the Judge having been to impose a very substantial fine. The matter was complicated by the life sentence being served, which rendered other forms of punishment impractical, but likewise made the prospect of payment of the fine illusory. Nevertheless, Mahoney JA (at 23–24) and Meagher JA (at 24) both upheld the fine, recognising that it was unlikely ever to be collected.
> >
> > [31] I have considered these cases and remain of the view that the defendants 'capacity to pay was a relevant consideration, but not decisive. There is nothing in the Crimes Act to suggest that it is a decisive factor. Nor, in my opinion, does ordinary sentencing principle require that it be so treated.
> >
> > [32] The impact of s 16C of the Crimes Act was considered by Mullighan J in Chief Executive Officer of Customs v Rota Tech Pty Ltd & Ors [1999] SASC 64; (1999) 201 LSJS 390. He considered a number of the reported cases and (at 397) said:
> > It follows that the capacity of the offender to pay cannot be the dominant factor when fixing the fine to be imposed. It is an important factor along with the other matters which the Court must take into account pursuant to s 16 A. Where the offence involves large scale drug importation for the illicit drug trade in this country, the financial circumstances of the offender, whilst relevant, should not

[46] *Jahandideh v R* [2014] NSWCCA 178 at [15] to [18].

assume prominence in the exercise of the sentencing discretion.

I agree with his approach."

[17] I also agree with the foregoing approach and add only that consideration of the financial circumstances may increase, rather than decrease, a fine in order for it to be a deterrent for the offender."

(My underlining)

235. On that last point I am not influenced by what a larger corporation would need to suffer to be adequately punished or deterred in similar circumstances to these. I am well aware that a fine that could cripple a small business might have virtually no impact as a deterrent or on the financial operations of a larger corporation. A court sentencing a larger corporation will take into account the size and scope of the operations of the corporation. The maximum penalty for the offence of $1.5 million is undoubtedly set having regard to such matters.[47]

236. However, larger corporations which are not complying with these laws must still get the message (from this case and others like it) that they should not assume or expect to receive the same monetary penalty as a small company receives. After-all, a large corporation is much more likely to have a substantial capacity to pay a substantial fine. The amount of the fine would need to be larger and relative to the size and finances of the large corporation if it is going to act a deterrent. All corporations and their officers need to get the message that the occasional death of a customer or worker must not come to be viewed simply as a cost of doing business and, as recent hacking events have demonstrated, even the largest corporations are as prone as a small corporation is to suffer severe reputational and financial damage.

237. I also agree with Acting Magistrate Cridland in ***Ian Williamson v Royal Agricultural Society of Queensland***:

> "The Royal Agricultural Society of Queensland is in dire financial circumstances. It is a proper matter to take into account under section 48 of the Penalties and Sentences Act and it is consistent with authority. It does not mean that an inappropriately low fine should be imposed. The fine still needs to reflect the seriousness of the offending. The court must ensure that any reduction does not result in a sentence as an affront to community standards. To do otherwise would not meet the purposes of of sentencing, of general deterrence and denunciation."[48]

238. Obviously, defendants do not get to nominate how much they are to be fined. It is not a commercial negotiation.

239. Huckleberry did provide some evidence about its current capacity to pay a fine but less about its future prospects. No-one can accurately predict the future, but we can plan for it and the court can assume Huckleberry is planning for its own economic future.

240. There is some evidence before the court that Huckleberry went from enjoying a profit of $102,000 in 2019, to a loss of $371,000 in 2020 and loss of $262,000 in 2021. This is evidenced by supporting material including Annual Reports, Balance Sheets, Income Statements, Reconciliations and other documents prepared by Huckleberry's accountant and tax agent.[49] I have examined the documents and the outlays that lie ahead.

241. The accountant does say that Huckleberry is slowly coming out of its financial difficulties.

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[47] See *Unity Pty Ltd v SafeWork NSW* [2018] NSWCCA 266 at [79].

[48] *Ian Williamson v Royal Agricultural Society of Queensland* (per Acting Magistrate Cridland, unreported decision on 26 July 2019) at page 8.

[49] Exhibit 14 contains the financial data and records.

242. Although the court did not get to see recent Huckleberry company tax returns or Mr Hidaka's PAYG payment summaries for recent years, they are each referred to in a decision provided to the court made in 2020 by the Administrative Appeals Tribunal (AAT).[50] On its face, the information in the AAT Decision Record tends to corroborate the submission made here but it is no substitute for direct, original evidence. The findings of the AAT (made for an entirely different purpose) are not conclusive before me and I had no opportunity to assess that evidence or to analyse it myself.

243. In *SafeWork NSW v Cincram Group Pty Ltd*[51] [2022] NSWDC 613, at [101], Russell DCJ held:

> "As has been said before, it is not enough for a defendant to tender selected documents which only tell part of the financial story: SafeWork NSW v Meixing Jiang [2018] NSWDC 400 at [62]."

244. Huckleberry's accountant offered the opinion that, if a fine of $100,000 or more is imposed then, based on 2019 figures, the company is likely to go into insolvency or at least cause other losses including loss of jobs, reputation, and loss of rental space in the Brisbane CBD. However, it is still difficult to assess how the company will fare now that it is making renewed progress. For instance, this court was not given any detail about any steps taken by Huckleberry to reinvigorate or change its business model, or any detail about its clientele and the monetary values and timings of contracts, past, present or locked in for the foreseeable future. The world having now entered the year 2023 the opinion appears to be based on a somewhat dated status quo even allowing for any carrying forward of losses from previous years.

245. Counsel submitted that I should exercise my discretion in favour of referral of any fine to SPER. I can infer from that submission that the company is not likely to become insolvent if given adequate time to pay.

246. I accept that because any fine to be imposed will necessarily be substantial it will likely have a detrimental effect on the company's bottom line, but not that it would cause insolvency.

247. If a fine of $100,000 or an amount approximating it is assessed as being inadequate then it would be wrong in law to reduce the fine to that, or below that, level and fail to achieve deterrence and denunciation. Furthermore, if a manifestly inadequate penalty and a just and more substantial penalty would each cause insolvency the court must choose the later. As in the cited decision in *Jiang* (above) where the defendant had failed to satisfy that court that the fine should be reduced due to financial hardship, Huckleberry's is a case where 'a substantial fine is warranted, as a result of the seriousness of the offence and the need for general deterrence for accidents of this kind.'

248. Finally, I do accept that the continued operations by Huckleberry would be desirable for the economy and for continued employment of its staff and it would be beneficial for the relationship between Australia and Japan. The subject matter of Huckleberry's successful review in the AAT is not relevant to my decision, but the AAT did make an observation with which I agree:

> "Japan has long been a valued Pacific ally for Australia. While much government to government diplomacy takes place between Japan and Australia it is the goodwill, cultural exchange and shared experience of young Japanese and Australian students learning together which will help shape the future partnership of Australia and Japan at a grassroots level. The

[50] *Re Huckleberry Australia Pty Ltd*, AAT decision on 7 January 2020, by Member De-Anne Kelly. Like the comparative sentence decisions this document was not given an exhibit number for this hearing because it is a public record.
[51] *SafeWork NSW v Cincram Group Pty Ltd* [2022] NSWDC 613, at [101].

endeavours of Huckleberry Australia Pty Ltd greatly assist the growth of this goodwill, cultural exchange and shared experience between Australian and Japanese students."

VICTIM IMPACT STATEMENTS

249. The prosecution tendered four victim impact statements. They are each signed and dated 3 May 2022 and certified by a translator.

250. The offence of 'Failure to comply with health and safety duty—category 2' in this case is not defined as a crime under the Act. Nor is it a crime within the meaning of a crime for chapter 2 of the *Victims of Crime Assistance Act 2009* (section 6). Therefore the offence is not subject to the sentencing regime in Part 10B of the *Penalties and Sentences Act 1992* which permits a victim of the crime to give the prosecutor details of the harm caused to the victim by the offence, for the purpose of the prosecutor informing the sentencing court. Also, the provisions gave victims the right to elect whether to read their impact statement aloud in court for its therapeutic benefit for the victim.

251. In any case, here the four victim impact statements were tendered by consent and section 9(2)(c)(i) of the *Penalties and Sentences Act 1992* requires that in sentencing an offender, this court must have regard to the harm done to, or impact of the offence on, the victim anyway. Under section 9(2)(c)(i) the court is not limited to receiving the information via a victim impact statement under section 179K of that Act.

252. I will also state at the outset of this section of my judgment that I will not let emotion sway my ultimate decision. The aim of the law is to allow the court to be told what actual harm was caused to the victim by the offence. This will assist the court to determine the objective seriousness of the breach of duty by the defendant company.

253. Although the defendant is not charged with directly causing the deaths, the breach of duty clearly was a substantial indirect cause because it had not done any risk assessment at all thus depriving itself and its staff or agents of crucial knowledge. Therefore, it is relevant to consider the victim impact statements. But, I accept that to arrive at a proper penalty for Huckleberry 'it is the risk that I am assessing the seriousness of, and not the manifestation of it.'[52]

Mr Mizuno's victim impact statement[53]

254. Mr Hiroshi Mizuno is Taiki Mizuno's father. His statement begins and ends with the fact that he charges his son's phone everyday so that the battery does not go dead. Time has stood still for this gentleman and his family. Mr Mizuno last saw his son alive as he departed happily for Australia, giving his father 'a cheerful wave, his eyes filled with hope'. Mr Mizuno attests to the extreme difficulty he then endured when he saw his son's body 'cold and motionless … vacuum packed and transported back to Japan, not on the seat of the plane, but in the plan'e cargo hold.' Taiki wanted to become a doctor one day because of the painful experience at age 13 of losing his mother to cancer and he studied hard to achieve that goal, having a strong desire to save as many people as possible from cancer. Mr Mizuno regrets trusting the school and apologises to his son everyday because as a father he was not able to save his son's life. His son was gentle, polite, serious and followed rules. He was 'not the sort of boy was silly, played pranks or got up to no good. He could not understand why his son went swimming in the lake 'when there are signs all around that swimming was not recommended.' The sudden loss of his son was 'a huge and unimaginable shock' to Mr Mizuno and after the funeral his mental health suffered. He would find himself bursting into tears, would sob and have palpitations, and he was unable to sleep. Mr Mizuno 'saw a counsellor on a number of occasions and received

[52] per Strathdee DCJ in *SafeWork NSW v Tyne ACFS Pty Ltd* [2022] NSWDC 609 at [53].
[53] Exhibit 4 is the victim impact statement made by Mr Hiroshi Mizuno.

therapy.' It is also extremely hard for him witnessing the impact of his son's death on Taiki's paternal grandmother who at 80 lost the will to live and hardly leaves the house, sleeping and saying 'if I dream then I'll be able to see Taiki.' Mr Mizuno also explains his belief that the death of his son also caused health issues for the paternal grandfather and to the family's finances. He has also been distressed about school and media reports that implied his son 'drowned as a result of thoughtless behaviour.' He wants to defend his son's reputation. Finally, as I have mentioned elsewhere, Mr Hiroshi Mizuno informed the court that 'Of those who were involved with the Program, only Mr Hidaka contacted us every year on the anniversary of our son's death but not one person at the School has visited us to offer their condolences for the loss of my son.' Mr Mizuno signed off declaring he would charge the phone again that day when he was writing his statement knowing that the owner of it will never come back.

255. Mr Mizuno's victim impact statement is raw and candid. It is written in grief and as only a grieving father could. He and his family have clearly suffered emotional, mental and financial harm as a result of Taiki's death.

256. I offer the court's condolences to the Mizuno family.

Yoshihiro Kimura's Victim Impact Statement [54]

257. Yoshihiro Kimura is Shinnosuke Kimura's father. At the time of the accident, he was assigned to a job in Kobe and was living away from his family in Yokohama. After the accident, he went back home, a distance of 400 kilometres from Kobe, because he was so worried about his family. The commuting 'continued for around a year and was a huge physical, mental, and financial burden. The ravel expenses alone exceeded one million yen.' He used to surf for the last 30 years but gave it up because his wife became fearful that he 'would drown, just as Shinnosuke did.' Mr Kimura had heard that dreams are easier to control by keeping a Dream Diary. He tried it for a year to see if he'd be able to see Shinnosuke one more time in his dreams, but 'it only made the reality of the absence of Shinnosuke even harder to bear.' He also misses the interests he shared with Shinnosuke in building plastic models and off-road bike riding, and now Shinnosuke's off-road bike is 'sitting quietly' in their garage.

Shoko Kimura's Victim impact Statement [55]

258. Shinnosuke Kimura's mother describes her feelings of dread and hopelessness when she heard her son was missing, and the glimmer of hope she was clinging to. Since the accident her days have continued to he mentally extremely challenging. Ms Kimura was unable to work and resigned from her job. She is still 'unable to cook meals that Shinnosuke used to like', or meals that they used to cook together, and remains 'unable to go to locations with memories of Shinnosuke.' She is 'unable to talk about Shinnosuke's death even to close friends.' Ms Kimura regrets placing her son in the school program which she thought 'would be of benefit to his future.' She stated she wishes she 'could turn back time and bring the two back. I want to hold my son once again. I want to put him in a warm bath, and then serve him freshly cooked rice.'

Taro Kimura's Victim impact Statement [56]

259. Taro Kimura is Shinnosuke's older brother. Shinnosuke, his only sibling, died just three days before Taro was due to enter university. Instead, the family immediately flew to Australia. The suit he bought for the university entrance ceremony was worn instead to his brother's funeral. He states that dealing 'with everything related to the accident played out over an incredibly long time' and put pressure on him 'both in terms of time and

[54] Exhibit 5 contains the victim impact statement by Mr Yoshihiro Kimura.
[55] Exhibit 5 also contains the victim impact statement by Ms Shoko Kimura.
[56] Exhibit 5 also contains the victim impact statement by Mr Taro Kimura.

mentally.' He couldn't do any casual work, and this affected him financially. It wasn't until a year and half after the accident that he was able to properly engage in casual work. He said 'It wasn't just the fact that a member of my family had died. This incident ended up being taken up by the national media' where the family suffered criticism and commentary. He suffered a lack of time, finances and mental stability. He struggled to socialise. He was unable to speak about his brother's death for fear of criticism and ended up with depression and insomnia. He states that for a long time, while under the pressure of dealing with the accident, he could only see Shinnosuke as 'the victim' and had not had 'the time or space to accept and grieve the death of my 'family.' Losing your only sibling is so hard and can't be expressed in words, Why does everyone in my family, including myself, have to spend every day without hope and why do we have to continue living like this. I think about this a lot, but I still haven't found an answer.'

260. I offer the court's condolences to the Kimura family.

261. The consequences of the offending, though not the direct cause of death, were still catastrophic. Two 16 year old boys died. The ripple effect of the consequences of the offending are broad, span two nations, and detrimentally affected multiple families and their communities in both nations. The consequences of the offending also had the potential to bring undone all of the good work previously undertaken by the defendant to build cultural and economic ties between Australia and Japan.

IN THE FINAL ANALYSIS or SYNTHESIS

262. Having weighed up all the law, comparative decisions, and all facts and circumstances discussed herein my firm decision is that no fine less than $250,000 would be just in this case.

WHETHER THE CONVICTION SHOULD BE RECORDED

263. The prosecution did not seek a recording of the conviction.

264. I agree with the defence submission that the conviction should not be recorded, having taken into account all of the following factors:

(i) There was a timely plea of guilty once the charge against the director was discontinued, although that was a long time coming.

(ii) The plea of guilty averted the need for a trial at great public expense and spared witnesses from being called to testify or to be cross-examined, and from travelling from Japan. The plea also helped to demonstrate that the defendant company and its director are taking responsibility for the offending.

(iii) Huckleberry and its director also demonstrated taking responsibility by swiftly engaging risk assessment experts

(iv) The defendant company has demonstrated that in other respects it has been a good corporate citizen, to the benefit of Japanese/Australian relations.

265. I am satisfied, after having regard to section 12 of the *Penalties and Sentences Act 1992,* that there are no grounds for recording the conviction.

266. However, what I have to say about convictions in the next 6 paragraphs is not a mere lecture. Defendants should view it as a an educative warning.

267. Huckleberry's officers (and all defendants) need to be made aware that under the law in Queensland no order can be made against a defendant unless they are first convicted of an offence. Huckleberry, like any defendant convicted and consequently penalised, will still have a conviction for this offence. The correct terminology to use is that 'the conviction is not recorded.' See section 12 of the *Penalties and Sentences Act 1992* which

literally states: 'A court may exercise a discretion to record or not record a conviction as provided by this Act.' The section goes on to deal with the consequences of having 'a conviction without the recording of a conviction.'

268. The word 'conviction' is defined in section 4 of the *Penalties and Sentences Act 1992* to simply mean (for the purposes of that Act) 'a finding of guilt, or the acceptance of a plea of guilty, by a court.' In this case, by the court's acceptance of the guilty plea, and then proceeding to impose a sentence, the defendant is convicted by law. It now has a conviction.

269. Contrary to reports in the media, and elsewhere, there is no such thing as having 'no conviction' in Queensland under Queensland state law, unless what is being referred to is a conviction that has expired at the end of a relevant rehabilitation period under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (and under section 11 of that Act even some of those convictions can be revived by reoffending).

270. A defendant can benefit from not having a conviction recorded in at least two ways. First, it gives the defendant an opportunity or incentive to learn from the experience, to learn from its mistakes, and achieve rehabilitation. It is an incentive because of the second benefit and its consequences. So, secondly, a defendant can benefit because when a conviction is not recorded the defendant does not usually have to declare the conviction to any person or entity permitted by law to ask if you have any convictions recorded against you. There are some statutory exceptions. However, the consequence of having this benefit is that if a defendant reoffends in future and is convicted for that future offending, this conviction today (though not recorded) will still be on the person's criminal history and placed before the future court to be taken into account when sentencing the defendant for the fresh offence.

271. This is in part how both general and personal deterrence are meant to work, but people (including corporations) need to know how it is meant to work.

272. Thus the incentive to learn from ones mistakes, and from the mistakes of others because you don't have time to make them all yourself, is made apparent.

A FINAL WORD ABOUT CODES OF PRACTICE AND ABOUT AVAILABLE RESOURCES

273. I was not referred to any applicable Code of Practice. There do not seem to be any Codes in existence to directly address the issues in this case, not even since this tragic event occurred.

274. However, one of the extant Codes is illuminating and would have been applicable to Huckleberry had the students been using snorkels. It was already in existence and operational for over one year before the events of the 29 March 2019.

275. The *Recreational Diving, Recreational Technical Diving and Snorkelling Code of Practice 2018* (the Code of Practice) was approved under section 43 of the *Safety in Recreational Water Activities Act 2011* (and not under the *Work Health and Safety Act 2011*). The Code of Practice commenced operation on 8 February 2018.

276. Of note, however, in general terms, paragraph 1.2 of the Code of Practice states:

> "**1.2 Who has health and safety duties in relation to these activities?**
>
> A person conducting a business or undertaking (PCBU) has the primary duty under the SRWA Act to ensure, as far as reasonably practicable, that people for whom recreational water activities are provided are not exposed to health and safety risks arising from the provision of the recreational water activities.

Officers, such as company directors, have a duty to exercise due diligence to ensure that the business or undertaking complies with the SRWA Act and Regulation. This includes taking reasonable steps to ensure that the business or undertaking has and uses appropriate resources and processes to provide and maintain a safe work environment.

277. Also, in terms of managing risk, at paragraph 1.3 the Code of Practice cross references the Work Health and Safety Act 2011."

"**1.3 Risk management**

The WHS Act and Regulations require people who have a duty to ensure health and safety to manage risks by eliminating health and safety risks so far as is reasonably practicable, and if it is not reasonably practicable to do so, to minimise those risks so far as is reasonably practicable.

Guidance on the general risk management process that must be followed is available in the Work Health and Safety Act 2011 and the How to Manage Work Health and Safety Risks Code of Practice 2011.

To properly manage risks, a person must:

- identify hazards—find out what may cause harm
- assess risks that may result because of the hazards—understand the nature of the harm that could be caused by the hazard, how serious the harm could be and the likelihood of it happening
- decide on control measures to prevent, or minimise the level of, the risks and implement control measures
- monitor and review the effectiveness of the measures. …"

278. This summary of Codes simply shows that there are, and in 2018/2019 there were, plenty of helpful resources available to all corporations to assist and guide them in the performance of their health and safety duties. They are there for the looking. Corporate office holders need to actually read what their duties are if they are to ever actually understand what those duties are. These duties are non-delegable[57]. In this regard a director can't merely direct.

279. The need for such Codes of Practice is obvious. At paragraph 1.1 that Code states that recreational snorkelling in Queensland is usually conducted during tours or from vessels at reef or island locations and that, tragically, more snorkelers than divers die in Queensland.

280. Other reliable reports are easily accessible for directors and other corporate officers who are conducting risk assessments. In the 12 months to 30 June 2021, 294 people drowned in Australian waterways; of those 27 (9.2%) died in lakes and dams.[58]

281. In the 12 months to 30 June 2019 (the year in which this offence happened) there were 276 deaths by drowning.[59]

[57] ***Sections 13 to 17 inclusive*** provide that the duties under the Act are 'non-transferable.' A person can have more than one duty and more than one person can concurrently have the same duty.
[58] Royal Life Saving National Drowning Report 2021, page 18; https://www.royallifesaving.com.au/__data/assets/pdf_file/0007/50110/RLS_NationalDrowningReport2021_LR.pdf
[59] Royal Life Saving National Drowning Report 2019.

282. The Royal Life Saving National Drowning Report 2021 at page 56, even has a page devoted to "Comparing Rivers to Lakes: Implications for drowning prevention[60]. It states:

> "Researchers from Royal Life Saving, UNSW Sydney and James Cook University compared drowning deaths in lakes with rivers nationally, over o five-year period between 1 July 2013 and 30 June 20l8, to inform targeted water safety measures.
>
> The study found that 342 children and adults drowned in a river or lake during the study period. One in five (n=61) people drowned in a lake, 90% were males' Children under 18 years and Aboriginal and Torres Strait Islander peoples were more likely to drown in lakes than in rivers, and, when swimming or boating. In comparison, adults were more likely to drown at rivers, and drowning in a river was more likely to occur after a fall into water and involve alcohol.
>
> The study found that swimming and boating at lakes represent significant dangers. The recreational nature of lakes where multiple activities are taking place like swimming, powered boats and unpowered watercraft means that people need to be cautious, especially with children about.
>
> These findings tell us that drowning prevention programs for lakes and rivers need to be different. For river safety, a specific focus on adults and alcohol should be considered, whereas lake safety interventions should focus on children aged 0 to 17 years, Aboriginal and Torres Strait Islander peoples and recreational users.
>
> This study highlighted that water authorities, tourism operators, local councils and parks and wildlife authorities all have a role to play in promoting water safety around lakes and rivers." (My underling)

283. A ten-year study of drowning deaths in Australia to 2014/15 by the Royal Life Saving Australia showed that 762 people, or 27 per cent of those who drowned during that time, were born overseas.[61]

284. Finding all of the codes, reports, statistics and recommendations I have referred to under this heading merely involved spending 2 minutes of my time with a common search engine. No corporate officer can have any excuse for not conducting any appropriate risk assessments for swimming (or similar) activities carried out as part of their business or undertaking when such resources are so freely and easily obtained.

285. Also, as presently advised, I see no reason why any Code touching upon water sports should not include all water sports, including any swimming activity.

286. To this end I will **recommend** that the Queensland Government undertake a review of the relevant Codes of Practice to at least include all swimming activities conducted by Australian and international tourists in organised tours.

ORDERS, DIRECTIONS and RECOMMENDATION

287. I make the following orders, directions and recommendation:

1. The defendant is convicted and fined $250,000.
2. The conviction is not recorded.
3. The defendant shall pay costs in the sum of $1099.70 (being $1000 professional costs and $99.70 costs of court).

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[60] The source of the research quoted in the 2021 Royal Life Saving Report at page 56 was: Peden AE, Willcox-Pidgeon SM, Franklin RC, Scarr, JP (2020) Comparing rivers to lakes: Implications for drowning prevention. Australian Journal of Rural Health https://onlinelibrary.wiley.com/doi/abs/10.1111/ajr.12679

[61] See A 10 Year National Study of Overseas Born Drowning Deaths 2005/06 to 2014/15; https://www.royallifesaving.com.au/__data/assets/pdf_file/0004/37525/RLS_OverseasBorn_10YearReport_FINAL_single_page_LR.pdf

4. I direct that pursuant to section 34(2A) of the *State Penalties Enforcement Act 1999,* the Registrar give particulars of the fine and costs orders to the State Penalties Enforcement Registry for registration and collection.

5. I recommend that the Queensland Government undertake a review of the relevant Codes of Practice relating to the *Work Health and Safety Act* 2011 to at least include all swimming activities conducted by Australian and international tourists in tour groups.

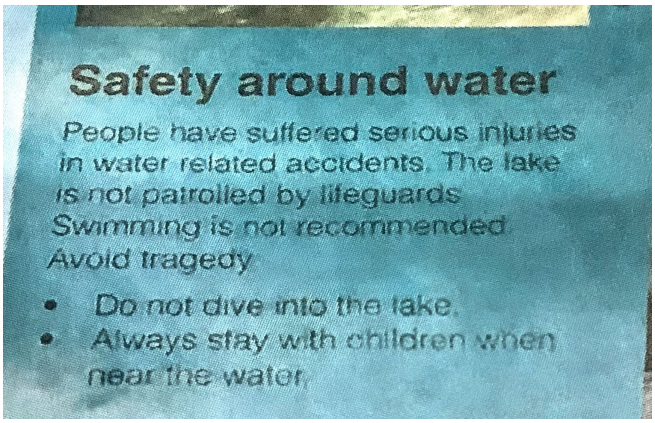
J Costanzo
Acting Magistrate
8 February, 2023

Appendix 1 — Exhibit 17 — Sign at Lake McKenzie, K'gari (Fraser Is).

Photo of one of the warning signs in situ at the time of the offence.

Photo of the same warning sign as above, taken closer:

My enhanced enlargement of the relevant part of the sign in Exhibit 17:



Appendix 2 — Exhibit 18 — Replacement sign erected after the offence happened.