

INDUSTRIAL COURT OF NEW SOUTH WALES

**Inspector Steven Jones v Walker Group Constructions Pty Ltd [2006] NSWIRComm 11 (30 March 2006)**

**CITATION** : Inspector Steven Jones v Walker Group Constructions Pty Ltd [\[2006\] NSWIRComm 11](#)

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HEARING DATE(S): 14/12/2005

DECISION DATE: 03/02/2006

**PARTIES:**

Prosecutor:

Inspector Steven Jones

Defendant

Walker Group Constructions Pty Ltd

**JUDGMENT OF:** Kavanagh J

**LEGAL REPRESENTATIVES**

Prosecutor:

Mr P.M. Skinner of counsel

Solicitors:

Ms H. Cameron

WorkCover Authority of NSW

Defendant:

Mr M. Shume of counsel

Solicitors:

Mr G. Phillips/Mr M. Selinger

Carroll & O'Dea

CASES CITED: Lawrenson Diecasting Pty Ltd v WorkCover Authority of NSW (Inspector James Swee Ch'ng) (1999) 90 IR 464

Markarian v R (2005) 215 ALR 213

R v Sharma (2002) 54 NSWLR 300

R v Thomson

R v Houlton (2000) 49 NSWLR 383

Tyler v Sydney Electricity (1993) 47 IR 1

WorkCover Authority of New South Wales (Inspector Patton) v Fletcher Constructions Australia Limited (2003) 123 IR 121

LEGISLATION CITED: Occupational Health and Safety Act 2000 [s8\(2\)](#)

[Crimes \(Sentencing Procedure\) Act 1999 ss21A 22 23 34](#)

JUDGMENT:

## INDUSTRIAL COURT OF NEW SOUTH WALES

**CORAM: Kavanagh J**

**Friday 3 February 2006**

**Matter No IRC 634 of 2005**

**INSPECTOR STEVEN JONES v WALKER GROUP CONSTRUCTIONS PTY LTD**

**Prosecution under s8(2) of the Occupational Health and Safety Act 2000**

### JUDGMENT

**[2006] NSWIRComm 11**

1 This prosecution is brought by Inspector Steven Jones of the WorkCover Authority of NSW against Walker Group Constructions Pty Limited (the defendant) and issued under [s8\(2\)](#) of the *Occupational Health and Safety Act 2000* (the Act).

2 It is alleged the defendant breached s8(2) of the Act on 4 November 2003 in that it failed to:

ensure that persons not in its employment and in particular, Jason Paziuk, Phillip Fleming, Gerard Cornish, and Peter Kroehnert, were not exposed to risks to their health and safety arising from the conduct of its undertaking while at its place of work, contrary to section 8(2) of the Act.

3 The relevant particular states:

d) The defendant failed to ensure that safe systems of work were provided with respect to the roofing work performed at the site in that the defendant failed to ensure that persons not in its employment were provided with and were using an adequate fall prevention system whilst working at heights on the roof of the building and whilst accessing the roof of the building.

As a result of the abovementioned failures, Jason Paziuk, Phillip Fleming, Gerard Cornish, and Peter Kroehnert were placed at risk of injury.

4 The particular therefore rely upon two elements to the charge namely: the failure to provide an adequate fall prevention system and a failure to provide safe access to a roof.

5 The defendant pleaded guilty to the charge.

6 An agreed statement of facts was tendered which relevantly reads as follows:

3. At all material times Walker Group Constructions Pty Ltd (“Walker Group”) was undertaking the construction of an industrial complex at the corner of Mamre Road and Erskine Park Road, Erskine Park (“site”).

4. At all material times Walker Group contracted JB Metal Roofing Pty Ltd (“JB Metal”) to undertake metal roof and wall cladding work on the industrial complex at the site.

5. Walker Group entered into the contract with JB Metal on 22 October 2003 and prior to this date Walker Group had contracted with Garry Denson Metal Roofing Pty Ltd (“Garry Denson”) to undertake the roofing work.

6. JB Metal employed the following persons to undertake the roofing work at the site:

- James Denson (“Denson”), 23 years of age, was the sole director of the company and supervised all its employees.

- Jason Paziuk (“Paziuk”), 29 years of age, was employed as a labourer.

- Peter Kroehnert (“Kroehnert”), 48 years of age, was employed as a leading hand/supervisor.

- Gerard Cornish (“Cornish”), 32 years of age, was employed as a labourer.

- Phillip Fleming (“Fleming”), 28 years of age, was employed as a roof plumber.

7. On 17 October 2003 Inspector Jones visited the site and issued the following Improvement Notices:

- Improvement Notice no. 39094 to Walker Group: “Employees/Persons may be exposed to risk of injury due to inappropriate access to roof area. Persons use Elevated Work Platform as point of landing.”

· Improvement Notice no. 39093 to Walker Group: “Principal contractor failed to ensure that a sub-contractor/s written safe work method statement for work to be carried out complies with clause 224 of the OHS Regulation 2001.”

· Improvement Notice no. 39092 to Garry Denson: “Employees/Persons may be exposed to risk of injury due to unsafe access/egress to roof work area. Persons access roof area using Elevated Work Platform as point of landing.”

8. On 4 November 2003 Inspector Jones attended the site to carry out a compliance inspection following the issue of the Improvement Notices.

9. On this date Inspector Jones introduced himself to Daniel Bacic, site manager, employed by Walker Group and an inspection was conducted.

10. During the site inspection, Inspector Jones observed the following:

- o An industrial warehouse under construction of approximately 15,000 square metres in size.

- o Various construction workers carrying out various construction activities.

- o A scaffold stair access to a roof known as the Main Office Roof.

- o Two persons (Cornish and Fleming) working near the edge of the Main Office Roof which was approximately 6 to 7 metres in height from the ground

- o Both persons were wearing a harness.

- o Both persons were not attached to an anchorage point.

- o Two persons (Paziuk and Kroehnert) working in close proximity to the edge of a roof known as the Transport Office Roof approximately 3 metres in height from the ground.

- o Both persons were wearing a harness.

- o Both persons were not attached to an anchorage point.

- o An access ladder to the Transport Office Roof.

- o Three persons working from an Elevated Work Platform (“EWP”). The EWP was extended to approximately 8 metres in height.

- o One person alighted from the EWP so as to gain access to the Main Roof.

11. On 4 November 2003, Inspector Jones took photographs of the site. A copy of 5 photographs taken by Inspector Jones on this date are attached and marked “A”.

12. At the time of Inspector Jones’ visit to the site, Paziuk and Kroehnert were fitting upstands and trays for the air-conditioning fans and were working approximately 2.5 metres from the edge of the Transport Office roof of the industrial complex.

13. Both Paziuk and Kroehnert had on harnesses and lanyards whilst working; however, they were not attached to an anchorage point on the roof. The parapet wall located on the edge of the roof adjacent to where Paziuk and Kroehnert were working was between 0.5 metres to 1.2 metres in height.

14. Paziuk and Kroehnert used a ladder to access the Transport Office roof which was tied off to prevent it moving or slipping. They did not use a fall prevention system whilst accessing the Transport Office roof. The Transport Office roof was approximately 3 metres high.

15. Paziuk and Kroehnert had been instructed on the basis of JB Metal's Job Safety Analysis that their harnesses were to be attached to an anchorage point whilst working within 1.8 metres of the edge of the roof.

16. At the time of the Inspector's visit to the site, Fleming and Cornish were installing flashings on a parapet wall situated on the edge of the Main Office roof at a height of approximately 6 to 7 metres. The parapet wall located on the edge of the roof where Fleming and Cornish were working varied in height from 0.44 metres to 1 metre.

17. Both Fleming and Cornish were wearing harnesses; however they were not attached to an anchorage point on the roof and no anchorage points had been installed on the roof.

18. Kroehnert had performed a risk assessment prior to Paziuk, Cornish Fleming and himself performing the work. He did not comply with the JB Metal Job Safety Analysis which required the use of fall arrestors when working in areas where you could fall more than 1.8 metres as he did not think it was necessary.

19. A representative of Walker Group instructed all the roof workers prior to the commencement of work that fall prevention systems had to be installed.

20. According to Fleming and Cornish, they had not been observed by any representatives of Walker Group working on the roof edge without being attached to a safety line prior to 4 November 2003.

21. Following the inspection Inspector Jones issued a Prohibition Notice to Garry Denson to prevent work continuing on the main office roof and warehouse roof until a safe system of work was provided for working at heights.

### **System of work**

22. Prior to the roofing work being carried out, Daniel Bacic, Walker Group's site manager accessed the Main Office roof to determine what work was required to be performed.

23. Walker Group required all subcontractors to provide them with copies of their safe work method statements prior to commencing work.

24. A copy of the General Conditions of Contract and Scope of Subcontract Works between Walker Group and JB Metal is attached and marked "B".

25. JB Metal provided Walker Group with a subcontractor safety pack which included a Safe Work Method Statement (“SWMS”) for the task of fitting roof accessories. The SWMS included the following instructions:

- All personnel to be trained in correct use of personal protective equipment.
- Anchor points must be in place.
- Ensure anchor points are inspected prior to use.
- Ensure harnesses connected to plant is worn.
- Fall protection system must be used.
- Harnesses and adjustable lanyard rope/inertia reel must be working at all times.

26. A copy of the Job Safety Analysis was kept in the site office for JB Metal’s employees and the Walker Group to view.

27. JB Metal did not provide anchorage points on the roof of the industrial complex for its employees to attach their lanyards to whilst working at heights.

28. The Walker Group Project Specific Safety and Injury Management Plan for the site (revision 1, last edited on 22 October 2003) provides that Walker Group will conduct regular inspections of the work areas to ensure uncontrolled hazards are eliminated or controlled. During the inspection the supervisor is to observe as a minimum, the status of company activities in relation to potential hazards including fall potential.

29. Walker Group did not identify that anchorage points had not been provided for persons to attach harnesses and lanyards to whilst working at heights on the roof of the industrial complex on 4 November 2003.

30. The Code of Practice “ Safe work on roofs – Part 1 Commercial and industrial buildings” provides in paragraph 3.1:

“Provision should be made to prevent persons falling if work is to be carried out within two metres of any edge on a new or existing roof from which any person could fall more than two metres or more.”

### **Events following the inspection**

31. In accordance with the Prohibition Notice issued, JB Metal prevented access to the roof following Inspector Jones’ inspection on 4 November 2003.

32. JB Metal enrolled 8 employees in a safety line system course with CompBase Training Services Pty Ltd. The supervisors employed by JB Metal have completed this course.

33. A revised Sub-Contractor Safety Pack including Safe Work Method Statements was produced by JB Metal on 9 November 2003. The Safe Work Method Statement for the task of fitting roof accessories included the following instructions:

“Fall protection must be used. An approved handrail system will be in place on the active work platform physically preventing roof workers from being within 3 metres of roof edge. For employees working within 3 metres from the edge shall (sic) be protected by the use of an approved individual fall arrest system in compliance with **AS 1891 & BS5062** which shall be constantly re-anchored to eliminating (sic) risk of a pendulum effect occurring in the case of an arrested fall. Anchor points must be in place and installed by qualified persons only. Ensure anchorage points are inspected prior to use. Roof workers not within this 3 metre perimeter will be protected by the presence of safety mesh...”

34. In February 2004 Inspector Jones was provided with a copy of the Walker Group Occupational Health and Safety Management System Manual (“Manual”) issued in February 2004. The manual provides for weekly site safety inspections to be conducted. The items on the checklist for the inspection include work conducted at heights greater than 1.8 metres, harnesses and cherry pickers.

35. The Manual details the site supervisor’s responsibilities which include:

“Ensure contractors comply with scope of works and safety procedures as documented in their Work Method Statement (WMS) in compliance with section 227 C/D of the *NSW OH&S Regulations 2001*.”

36. The Manual provides for the compliance and assessment of contractors’ safe work practices and requires that:

“Contractors will undergo regular assessment to ensure they comply with their identified Work Method Statement and Walker Group Constructions Pty Limited site safety procedures in compliance with the *OHS Act 2000 and OHS Regulation 2001*.”

37. The Site Occupational Health & Safety Audit checklist which forms part of the Manual provides for checks to be made of harness/lanyards, static line/arrester and ladder access where work is performed at heights on a roof. The checklist indicates that the area is to be barricaded off and signs used, a temporary hand rail is to be fitted and safety mesh laid prior to works commencing.

7 Mr P.M. Skinner, of counsel, appeared for the prosecution in the hearing as to penalty. An Agreed Statement of Facts was relied upon. The prosecution also tendered a number of photographs of the site taken on 4 November 2003 and a copy of the general conditions imposed on the sub-contractor.

8 Mr M. Shume, of counsel, appeared for the defendant. Mr Shume relied upon an affidavit with exhibits of Kevin Collins sworn 25 October 2005, National Occupational Health, Safety and Risk Manager of Walker Corporation Pty Limited and a document entitled “Tender Evaluation Questionnaire” which includes the following sub-headings: "General", "Contractual", "Program", "Occupational Health & Safety", "Preliminaries and Materials Handling" and "Quality Assurance".

## Principles

9 In considering penalty, I take guidance from the reasoning of the High Court in *Markarian v R* (2005) 215 ALR 213 and their Honours' view that the task of sentencing must acknowledge the effect of the applicable legislative provisions (in this case, s8(2) of the [Occupational Health and Safety Act 2000](#) with [ss21A](#), [22](#), [23](#), [34](#) of the [Crimes \(Sentencing Procedure\) Act](#) 1999) and the court, using the "instinctive synthesis" approach, would include the assessment of the objective and individual subjective factors, with the appropriate weight given to each factor, and could (but not should) give a degree of deduction in penalty to some element in the consideration, in circumstances where it better serves the interests of transparency, which element would be narrowly confined (for example, the utilitarian value of the plea).

10 Their Honours recognised the "*instinctive synthesis*" approach to sentencing gives rise to an inevitable tension between the need for transparency and adequate reasoning on the one hand, and the need to avoid a mathematical approach pursuant to which the sentencing Court engages in a "*staged sentencing process*" starting at the maximum penalty and then making deductions from it without adequately assessing (even in a provisional way) the sentence called for by the objective facts (see *Markarian*, at[32]).

11 The proper approach to sentencing as approved by the majority (Gleeson CJ and Gummow, Hayne and Callinan JJ) in *Markarian* was stated as follows:

[27] Express legislative provisions apart, neither principle nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence (*Pearce v The Queen* (1998) [194 CLR 610](#) at 624). And Judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies (*Johnson v The Queen* (2004) 78 ALJR 616 at 618, 624).

and the sentencing process should reflect the general obligation on a judge to reveal his/her reasoning:

[39] ...Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts and the public.

Their Honours reasoned further:

[39] . . . That is not to say that in a simple case, in which, for example, the circumstances of the crime have to be weighed against one or a small number of other important matters, indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden. An invitation to a sentencing judge to engage in a process of "instinctive synthesis", as useful as shorthand terminology may on occasions be, is not desirable if no more is said or understood about what that means. The expression 'instinctive synthesis' may then be understood to suggest an arcane process into the mysteries of which only judges can be

initiated. The law strongly favours transparency.....There may be occasions when some indulgence in an arithmetical process will better serve these ends. ....

12 In *Markarian*, the High Court endorsed instinctive synthesis approach to determine penalty, McHugh J saying:

[84] .... The synthesising task is conducted after a full and transparent articulation of the relevant considerations including an indication of the relative weight to be given to those considerations in the circumstances of the particular case. The instinctive synthesis approach does not prevent the use of adjectives or adverbs or indications that this or these factors makes or make the case more or less serious than other cases or are the critical features of the case. And judicial instinct does not operate in a vacuum of random selection. On the contrary, instinctive synthesis involves the exercise of a discretion controlled by judicial practice, appellate review, legislative indicators and public opinion. Statute, legal principle and community values all confine the scope in which instinct may operate. The judicial wisdom involved in the instinctive synthesis approach is therefore likely to lead to better outcomes than the pseudo-science of two-tier sentencing. At all events, I am not satisfied that two-tier sentencing is a better method or process than the instinctive synthesis method that has been the traditional approach of common law judges.

and:

[138] . . . Yet even this is not now absolute. Specification, in a staged or sequential approach, of the degree of reduction of what would otherwise have been the penalty for a plea of guilty is, it seems, sometimes permissible (see Joint reasons at [38]). So presumably is re-adjustment for any assistance to authorities. So indeed, by statutes in many parts of Australia, must now be specific reductions and adjustments expressed in terms of identified quantification or percentages. Even occasionally (albeit in unexplained circumstances) arithmetical indulgence will now, it seems, be overlooked. However, preferably that will happen only where the factors adjusted are comparatively few and the case is "simple"(see Joint reasons at [39]).

[139] ... Australian judges must now express their obeisance to an "instinctive synthesis" as the explanation of their sentencing outcomes. It might be prudent for them to avoid mention of "two stages" or of mathematics. ...

13 Spigelman CJ in *R v Thomson; R v Houlton* (2000) 49 NSWLR 383 correctly, given the consideration in *Markarian*, endorsed the "*instinctive synthesis*" approach to sentencing saying:

[57] The instinctive synthesis approach is the correct general approach to sentencing. This does not, however, necessarily mean that there is no element which can be taken out and treated separately, although such elements ought be few in number and narrowly confined. As long as they are such, their separate treatment will not compromise the intuitive or instinctive character of the sentencing process considered as a whole.

14 In *R v Sharma* (2002) 54 NSWLR 300, the Court of Criminal Appeal sitting five Judges (Spigelman CJ, Mason P, Barr, Bell and McClellan JJ) concluded specifying the "*discount*" allowed for the utilitarian value of a plea of guilty was both consistent with [s22](#) of the [Crimes \(Sentencing Procedure\) Act 1999](#) and the "*instinctive synthesis*" approach to sentencing.

## CONSIDERATION

15 This is a breach by a head-contractor who has obligations under [the Act](#) to ensure the elimination of a potential risk to safety. In consideration of penalty the Commission in Court Session must assess the nature and quality of the offence, that is, the objective seriousness of the offence. *As was held in [Lawrenson Diecasting Pty Limited v WorkCover Authority of New South Wales \(Inspector James Swee Ch'ng\)](#) (1999) 90 IR 464 (at 474) :*

*. . . the primary factor to be considered when a judicial officer is determining the appropriate sentence to impose is the objective seriousness of the offence charged. In case of prosecutions under the OH&S Act, this proposition has often been expressed by saying that the 'true measure of penalty lies in the nature and quality of the offence". see [Independent Cargo & Wool Services Pty Ltd v Mingare](#) (unreported, Fisher CJ, Glynn and Peterson JJ, CT92/1041, 10 March 1994) at 4; [Inspector Hannah v Wonar Pty Ltd](#) (at 9); [Inspector Mauger v P Ward Civil Engineering Pty Limited](#) (unreported, Fisher CJ, CT94/1212, 21 December 1995) at 8-9. ...*

16 This offence must be assessed in the context that on 17 October 2003, less than one month before the alleged breach, the defendant was put on notice by WorkCover that on its construction site there were unsafe work practices. The defendant by the date of the offence had been issued with two Improvement Notices, one related to access to the roof and the other a failure to ensure safe work procedures. The prior Improvement Notices were therefore directly related to the roofing task, the subject of this breach.

17 On the date of this breach, four employees were performing roofing work on two separate roofs, the first was six to seven metres high and the other three metres high. All the employees wore harnesses. However, there was no anchorage point for the attachment of the harness on either roof. JB Metal Roofing Pty Ltd was responsible for the installation of the anchorage points. JB Metal Roofing Pty Ltd was also responsible for ensuring those points were inspected before use.

18 The defendant was responsible for overall site supervision and, in a circumstance where it had been given an Improvement Notice as to the safety of work being conducted at heights on this construction site, it again failed to ensure the access to one of the roofs was made safe and failed to ensure that a safe system of work was conducted by its sub-contractor on this site for its roofing work. The existing ladder access remained unsafe and anchorage points were not made available on either roof for the four young men who wore harnesses and were working at height.

19 The defendant nonetheless had also placed obligations on its sub-contractor for safe working but it failed, in accordance with its own stated system, to ensure it met its own obligation to supervise the work of its sub-contractor.

20 The defendant, as to the objective seriousness of the offence, submitted in mitigation that two of the four employees on their worksite were not in breach of the code in that they were not, at the relevant time of the Inspector taking photographs, working too close to the edge of the roof. I do not accept that this proposition in any way mitigates against the objective seriousness of the offence which, as pleaded, is continuous in its nature, namely: the continuous failure on the said date to provide a safe system of work and safe access to the roof.

21 These young men were required to walk across roofing to install a metal roof and wall cladding. They had to work and put in place metal roof sheeting, galvanised wire safety mesh, colorbond ridge cappings, barge cappings, cappings to box gutters (support frame) and straps. In the performance of such duties, they were required to move about the roof on the said day. I cannot accept that because, in one moment of the day, two of the employees were not too close to the edge, it could be suggested such a fact would mitigate against the evidence that there was no anchorage for any harness and no safe access to one of the roofs.

22 In *WorkCover Authority of New South Wales (Inspector Patton) v Fletcher Constructions Australia Limited* (2003) 123 IR 121, the court relevantly commented on a similar submission:

[101] . . . the respondent extrapolated the fact that it was charged with an offence limited to a single day to an assertion that it could not be expected to "check on the actions . . ." on "a minute by minute basis". Such a submission (a) has no relevance to charges which prove failure to provide a safe system (a system necessarily being required on a continuous basis), (b) involves a serious misunderstanding of liability under the Act, particularly where a systems charge is laid ....

23 While it is relevant to consider the contribution to the risk of JB Metal Roofing Pty Ltd, I nonetheless find this was a serious offence. **Once a head-contractor determines to sub-contract out the particular tasks on its construction site its chief responsibility on site is quality control and safety. To perform such tasks it must perform its supervisory role with rigour. That is the failure this breach revealed: a failure of the head contractor on a construction site to supervise the required safety systems of its sub-contractor. That failure was reflected in unsafe work practices on the head contractor's building site for which it holds statutory responsibility.**

24 There was clearly an element of foreseeability to the offence. The system of work in place acknowledged that harnesses are only effective with the use of anchorage points. A "critical feature(s) of the case" (see *Markarian* per McHugh J at [84]) is that the defendant was already on notice of the elements of the breach and had not addressed them. I find there was a foreseeable element to this offence.

25 A level of deterrence must be factored into the assessment. As to the specific deterrence I accept the defendant has expended considerable endeavour to revise its system of work. While it inducted employees of JB Metal Roofing Pty Ltd onto its worksite, and required safe working procedure from its sub-contractor and while a few days beforehand, **on 29 October 2003, the employer, JB Metal Roofing Pty Ltd, performed a toolbox talk referring to "make sure harness worn + hooked up", nonetheless the obligation to supervise to ensure that stated safety principles were adhered to was neglected. The defendant was aware of the risk or potential risk to employees in the failure to attach harnesses while working at heights.** It was already on notice as to an inappropriate access to the roof area. I find an element of specific deterrence to the breach.

26 Elements of general deterrence must also be taken into account. It is relevant that the company continues to operate in the construction industry. Employers must know that notwithstanding they have a specific commitment to safe working and have designed appropriate safe work methods, it is in the implementation of these principles and methods that safe working is achieved. The supervision of its work site is an onerous responsibility to

be strictly undertaken. I allow a factor in my consideration as to penalty for general deterrence.

27 The words of Hill J in *Tyler v Sydney Electricity* (1993) 47 IR 1 (at 5) are apposite:

The gravity of the damage or injury actually resulting from breach does not, of itself, dictate the amount of penalty. However, the gravity or otherwise of the potential risk flowing from breach and its foreseeability are clearly relevant ....

It is the defendant's good fortune that no employee was seriously injured in the commission of this breach. **Working at heights is a perilous task. Such work must be rigorously supervised. Much thought has been given to the preparation of the construction codes and safe working methods for the roofing industry. Those methods have been designed to remove potential risk of injury.** In this case the risk to safety was real as the defendant had received Improvement Notices which notices were issued addressing the same, particular area of its worksite, namely, roofing work. The potential risk to safety flowing from this was within the defendant's knowledge.

28 I accept following the incident there has been a particularly thorough review conducted of the occupational health and safety procedures of the defendant. An entirely new document "Occupational Health & Safety Management Plan" was created in February 2004. The system is continually reviewed.

29 A National Occupational Health Safety and Risk Manager was appointed in October 2004. Significantly, his brief was to raise the profile of safety across all Walker sites and to introduce a new safety Management System. The aim was for the system to be equal to that of "best practice". The new Management System was then introduced. All personnel of the defendant have been inducted into the new system. All sub-contractors retained on the defendant's site have now had much more rigorous obligation placed on them to ensure training for all employees brought on site. The defendant now operates with a preferred tender system which ensures contracts are granted to companies with an expressed commitment to occupational health and safety standards. The defendant conducts professional audits to be used to review its procedures. There is now a safety database designed which records all incidents. There are monthly management meetings which monitor the outcome of those assessments.

30 The defendant has persuaded me that now its attitude to questions of workplace safety is rigorous and committed. I accept the defendant has not manifested, by the commission of those offences, a continuing attitude of disobedience to the law or a likelihood that an offence of like kind would be committed in the future.

31 The defendant is well known in the construction industry. A pre-existing former company operating in the same industry was sold to Australand in December 1999. Walker Group Constructions Pty Ltd, the defendant company, came into existence in 2001. It operates across the country as a construction organisation. It has in its employ up to 113 people but acknowledges up to 500 people could be working on its sites.

32 I accept the defendant is a first offender who has now in place proper safe practice and procedures. These procedures should ensure there is no risk of recurrence. I have accepted the defendant's expression of contrition and remorse.

33 It is a successful building company. Its industrial record in the circumstances must be perceived as a good one. It contributes significantly to employment in New South Wales. The company has a reputation as a fine corporate citizen. It supports the Odyssey House project, the Starlight Foundation and encourages its employees to adopt citizen responsibility.

34 I accept the defendant company fully co-operated with the prosecutor at all of the investigation stages including providing the appropriate documentation and assisting with the interviewing of witnesses. In accordance with the determination in *R v Thompson; R v Houlton*, I find there was an early plea entered which has a utilitarian value and should attract a 25 percent discount. No reliance is placed upon [s6](#) of the [Fines Act 1996](#) as to the financial status of the defendant.

**35 The contract between the JB Metal Roofing Pty Ltd and Walker Group Constructions Pty Ltd stated:**

**... Walker Group Construction's (sic) is not to be affected by charges - infringements if work is not carried out to WorkCover's satisfaction.**

**It must be emphasised no employer can contract out of its obligations under the Act. This clause was inserted in the defendant's past contract. It is in defiance of an employer's absolute statutory obligation under the Act. It has now been deleted.**

36 I make the following orders:

1. I find the offence proven. I find the defendant guilty.
2. The defendant is fined in the sum of \$90,000. There shall be a moiety to the WorkCover Authority.
3. I order costs against the defendant in the sum of \$9,962.30 (inclusive of GST) as agreed.