



Industrial Relations Commission New South Wales

Medium Neutral Citation: *Inspector Walker v On Track Community Programs Limited* [2013] NSWIRComm 87

Hearing Dates: 19 March, 12 and 14 June 2013

Decision Date: 27/09/2013

Before: Walton J, Vice-President

Decision: In all the circumstances, the Court makes the following orders:

- (1) The defendant is convicted of the offence as charged.
- (2) The defendant is fined the sum of \$115,000 with a moiety to the prosecutor.
- (3) The Court further orders that the defendant shall pay the costs of the prosecutor for these proceedings as agreed or, in default, as assessed.

Catchwords: OCCUPATIONAL HEALTH AND SAFETY - prosecution under s 8(1) of the Occupational Health and Safety Act 2000 - guilty plea - sentencing - defendant non-government, not-for-profit organisation - sources of funding - HASI program - other programmes by defendant - policies and procedures of defendant - Home Visiting Policy - HASI workers - murder of HASI worker during home visit to mentally ill client - evidence - psychiatrist's report - nature of risks - capacity to eliminate, avoid or minimise - admission of mental patient to hospital - failure to obtain discharge summaries - relevant principle - objective factors - nature of risk - whether risk could have been eliminated - duty to control and minimise risk - mitigating factors re failure to obtain discharge summaries - moderate impact on objective seriousness - mitigating or exculpating factors - defendant not responsible clinical assessments under program - no observation of psychotic behaviour - risk unpredictable - need for additional measures - defendant knew of violent history - risk reasonably foreseeable - Consumer Safety Audit - simple remedial measures available - steps taken after incident demonstrate flaws in system - defendant had systems in place - not just paper systems - seriousness of injuries - maximum penalty - aggravation - HASI worker acts contrary to policy in home visit - contribution of third parties - failure to prosecute certain entities - deterrence - offence serious - subjective features strong - applications under ss 10 and 10A of Crimes Sentencing Procedure Act refused - verdict - penalty imposed - moiety - costs - orders made

Legislation Cited: Crimes Sentencing Procedure Act 1999
Fines Act 1996
Mental Health (Forensic Provisions) Act 1990
Mental Health Act 2007
Occupational Health and Safety Act 2000

Cases Cited: Alcatel Australia Limited v WorkCover Authority of New South Wales (Inspector Clyant) (1996) 70 IR 99
Cahill v State of New South Wales (Department of Community Services) (No 4) [2008] NSWIRComm 201
Capral Aluminium Limited v WorkCover Authority of New South Wales [2000] NSWIRComm 71; (2000) 49 NSWLR 610; (2000) 99 IR 29
Corinthian Industries (Sydney) Pty Ltd v WorkCover Authority of New South Wales (Inspector Wilson) [2000] NSWIRComm 46; (2000) 99 IR 159
Department of Mineral Resources of NSW (McKensy) v Kembla Coal & Coke Pty Ltd (1999) 92 IR 8
Inspector Howard v Baulderstone Hornibrook Pty Ltd [2009] NSWIRComm 92; (2009) 186 IR 128
Inspector Jennifer Searle v Baptist Community Services - NSW & ACT, unreported, Matter No IRC 1520 of 2001, 19 December 2003
Inspector Lai v Rexma Pty Ltd and Another [2008] NSWIRComm 78; (2008) 172 IR 210
Inspector Lancaster v M L Colturi Sawmills Pty Ltd [2011] NSWIRComm 47
Inspector McColl v Combined Crane Rigging & Arthur Didovich [2004] NSWIRComm 48
Inspector Mason v Graham Allen Chapman & anor [2013] NSWIRComm 71
Inspector Middleton v Cafe C Pty Ltd [2012] NSWIRComm 131
Inspector Nicholson v Gallagher [2012] NSWIRComm 121
Inspector Yeung v Donald Edwin Wilson t/as Wilson's Tree Service [2005] NSWIRComm 158
JT & LC Tippet Pty Limited and RD & LF Tippet Pty Limited v WorkCover Authority of New South Wales [2008] NSWIRComm 177; (2008) 184 IR 1
Maxwell v The Queen (1996) 184 CLR 501

Morrison v Powercoal Pty Ltd & Another (2004) 137 IR 253
Morrison v Powercoal Pty Ltd & Anor. (No. 3) [2005] NSWIRComm 61; (2005) 147 IR 117
Newcastle Wallsend Coal Company Pty Limited and others v McMartin (No 2) [2007] NSWIRComm 125
O'Sullivan v The Crown in the Right of the State of New South Wales (Department of Education and Training) [2003] NSWIRComm 74; (2003) 125 IR 361
R v Mauger [2012] NSWCCA 51
R v Wilhelm [2010] NSWSC 378
R v Zhang [2004] NSWCCA 358
The Crown in the Right of State of New South Wales (Department of Education and Training) v O'Sullivan [2005] NSWIRComm 198; (2005) 143 IR 57
WorkCover Authority (NSW) (Inspector Jones) v Challita [2006] NSWIRComm 207; (2006) 153 IR 409
WorkCover Authority of NSW v Atco Controls Pty Limited (1998) 82 IR 80
Workcover Authority of New South Wales (Inspector Ankucic) v McDonald's Australia Limited and Anor [2000] NSWIRComm 277; (2000) 95 IR 383
Workcover Authority of NSW (Inspector Kelsey) v University of Sydney (Unreported, Industrial Relations Commission, NSW, Matter No. CT 1280 of 1995
WorkCover Authority of New South Wales (Inspector Mayell) v D J Gleeson Pty Ltd [2006] NSWIRComm 363

Category: Sentence

Parties: Inspector Joanne Maree Walker (Prosecutor)
On Track Community Programs Limited (Defendant)

Representation: WorkCover Authority of New South Wales (Prosecutor)
Thynne and Macartney (Defendant)

B G Docking of counsel (Prosecutor)
B D Hodgkinson SC (Defendant)

File Number(s): IRC 1136 of 2011

JUDGMENT

- 1 These proceedings involve a prosecution instituted by Inspector Joanne Maree Walker ('the prosecutor') against On Track Community Programs Limited ('On Track'). Inspector Walker is an inspector of the WorkCover Authority of New South Wales and is authorised by s 106(1)(c) of the *Occupational Health and Safety Act 2000* ('the Act') to institute the proceedings.
- 2 Since 2010, On Track has been a company limited by guarantee, having previously merged (in 2007) with two local health providers, the Lismore- based Mental Health Accommodation Rehabilitation Service ('MHARS') and Moomba Accommodations Services, based in Coffs Harbour.
- 3 On Track is a non-government, not-for-profit organisation. It is partly funded by grants from the New South Wales and Commonwealth Governments to provide community-based programs to assist persons who are experiencing mental illness, disability and homelessness as well as persons who require social housing or are unemployed.
- 4 On Track discharged these functions through three branches located in Lismore, Tweed Heads and Coffs Harbour. It had, during the charge period, namely, 23 to 27 June 2009, approximately 99 full time equivalent employees (a total staff of 189) and, by the date of the sentencing hearing, 179 full time equivalent employees.
- 5 Since July 2007, On Track operated programs or activities corresponding with three sources of funding.
- 6 First, On Track received funding through the New South Wales Government (via the Department of Health and the Department of Housing) to provide services as part of the 'Housing and Support Initiative' program ('HASI' or 'HASI program').
- 7 The HASI program was one of the key initiatives under the New South Wales Government's "Interagency Action Plan for Better Mental Health" published in July 2005. The HASI program is a joint partnership arrangement between the NSW Department of Health, the NSW Department of Housing and the non-government sector which provided housing linked to clinical and psychosocial rehabilitation services for people with various ranges or levels of psychiatric disability. It is the largest funded Mental Health Community Care program in New South Wales; the key driver of which is to help break the cycle of hospitalisation and unplanned readmission, and the associated high costs of care.

- 8 The nature, scope and operation of the HASI program received substantial attention in the proceedings. HASI was described by the parties in significant detail in an Agreed Statement of Facts. That Statement, absent the substantial annexures thereto, is attached to this judgment and marked 'Annexure A'. Further, evidence as to the HASI program was provided in the affidavit of Ms Leone Crayden, Chief Executive Officer of On Track, whose evidence was adduced by the defendant.
- 9 It will suffice, for the purpose of this introduction, to refer to a number of salient, uncontentious facts about the program before later returning to some detailed analysis bearing more directly upon issues relating to sentencing.
- 10 The role of HASI is to assist people with mental illness access stable housing and the appropriate treatment and support to maintain their tenancy. The support was provided to people in their homes and in the community.
- 11 Paragraph 9 of the Agreed Statement of Facts identifies a number of documents which specify the nature and scope of the HASI program together with the key responsibilities for the HASI Mental Health Support Workers. Three of those documents require particular mention: the Housing and Accommodation Support Initiative for people with mental illness ('the HASI Resource Manual'); the HASI Service Level Agreement dated July 2007 ('the Service Level Agreement') and the Stage 4A Agreement between the North Coast Area Health Service ('NCAHS') and On Track ('the 4A Agreement').
- 12 On Track received government funding to provide "HASI 4A services". It receipted the HASI 4A NSW Government Funding Grant into its general operating account. The funds could, however, only be used for the specific purpose of the grant. Its business or undertaking in relation to HASI 4A was specified in the HASI Resource Manual, the Service Level Agreement and the 4A Agreement.
- 13 The New South Wales Government introduced different stages of HASI to meet different needs of mental health consumers. Each stage provided a range of support from low (up to five hours a week) to very high (up to eight hours per week).
- 14 The criteria for eligibility for HASI high support needs packages is found in section five of the HASI Resource Manual, section three of the Funding and Performance Agreement with the NSW Department of Health (NCAHS) dated June 2008 to July 2011 and section four of the Service Level Agreement. High level support was established to increase the independence of clients of health services and their capacity to live in the community, improve their housing stability and enable inpatients, considered capable of residing in the community, with appropriate housing and accommodation support.
- 15 In order to be eligible for high support HASI, a client of the Area Health Services must be between 16 and 65 years of age, have a diagnosis of severe mental disorder and a moderate to severe level of psychiatric disability. Any application for such support is assessed by the Area Health Services.
- 16 The HASI program was not intended to be a full 24 hour service program, but, rather, provided a service for the integration of "clients" back into the community. The HASI program operated by On Track did, however, provide for home visits (which will be discussed further below).
- 17 The NCAHS was responsible for the provision of clinical based risk assessment and clinical case management for HASI clients. The NCAHS provided treatment and rehabilitation, crisis intervention and urgent psychiatric assessment, where required, and a Mental Health Care Coordinator ('the coordinator') who was responsible for coordinating clinical mental health care to HASI clients.
- 18 In contrast, under the HASI program, On Track was not retained to provide clinical service. On Track's responsibility for HASI clients consisted of non-clinical support for day-to-day living in the community.
- 19 Secondly, On Track provided mental health support services in Lismore under a New South Wales Government Grant Program. Part of those services involved On Track operating an organisation known as 'The Refuge' since 1999 (it is now closed).
- 20 The type of support provided under the NGO Grant Program related to skill development in the areas of budgeting, activities of daily living, community re-engagement through social and recreational activities and support to attend clinical and allied health appointments.
- 21 At The Refuge, On Track operated a 24 hour residential service. The role of The Refuge was to provide short term, crisis accommodation for homeless clients with mental illness (or persons at risk of homelessness) as well as providing assistance to people to obtain longer term accommodation and short term respite. The program at The

Refuge may be contrasted with the HASI program, in that The Refuge is not an outreach service. Refuge workers did not carry out home visits.

- 22 Thirdly, On Track provided community development by increasing the communities' capacity to provide support and services of its own accord. This aspect of On Track's operations was funded through a range of activities including donations, fund raising and social enterprise.
- 23 As at 27 June 2009, On Track employed Michael Corkhill, Roberta Brooks and Peter Mitchell as Mental Health Support Workers under the HASI program. They also undertook shifts at The Refuge. Mr Corkhill was employed through the HASI program three days per week and through the NGO Grant Program one day per week (timesheets delineated the respective areas of work). Prior to being employed by On Track in July 2007, Mr Corkhill had a diverse work experience, most recently with MHARS.
- 24 Clients were referred to the HASI program through the coordinator who was appointed to a particular client by the relevant Area Health Service. As at 27 June 2009, On Track had four HASI 4A clients in the Lismore, Richmond network. One of those clients was Mr Rodriguez. (It may be noted that the order and spelling of Mr Rodriguez's first and middle names varied across the documentary evidence and between the charge and the Agreed Statement of Facts, where his full name is given as Reagan David Rodriguez.) Mr Rodriguez was referred to On Track for inclusion in the HASI program by Damian Cleary (since deceased). He was accepted into the HASI 4A high support program. As at the charge dates, Mr Rodriguez was 28 years of age and had a history of mental illness which extended back to about May 1998 when he was admitted to Lismore Base Hospital.
- 25 Shortly before the charge period, Mr Rodriguez was twice voluntarily admitted to the Lismore Adult Mental Health Unit ('LAMHU') at Lismore Base Hospital. These admissions occurred from 16 to 26 May and 27 May to 23 June 2009, although in both cases the admissions later converted to involuntary detentions. These two admissions represented the eleventh and twelfth psychiatric admissions of Mr Rodriguez, the first occurring, as noted above, in 1998.
- 26 On 22 May 2009, Mr Rodriguez was placed under a six month Community Treatment Order ('CTO') by his Honour, Magistrate J Andrews. The order was made in accordance with a treatment plan submitted by Mr Cleary. It might be noted that On Track was not in receipt of the Order prior to 27 June 2009.
- 27 A CTO is made pursuant to the provisions of Div 1 Pt 3 Ch 6 of the *Mental Health Act 2007* and sets out the terms under which a person must accept medication and therapy, counselling, management, rehabilitation and other services whilst living in the community. It is implemented by the mental health facility that has developed an appropriate treatment plan for the person. Thus, the CTO authorises compulsory care for a person living in the community.
- 28 On 5 June 2009, during the period of further voluntary admission by Mr Rodriguez, his Honour Magistrate R Denes made an order adjourning a mental health enquiry concerning Mr Rodriguez under the *Mental Health Act*. The documents produced in the proceedings do not identify what steps were taken with respect to the CTO issued on 22 May 2009 when the matter was adjourned.
- 29 The last purely involuntary psychiatric admission of Mr Rodriguez (whilst under the HASI program), prior to his two admissions in May/June 2009, occurred between 1 September and 9 October 2008.
- 30 During the latter stages of his admission in June 2009, Dr Thorburn assessed Mr Rodriguez's mental state as stable and, in accordance with provisions of the *Mental Health Act*, authorised him to take leave of absence from the hospital in the company of a sole On Track Mental Health Worker on a number of occasions. No conditions were placed on his leave. On 23 June 2009, Ms Roberta Brooks, who was employed by On Track as a Mental Health Worker and had worked for 10 years in the mental health sector, met with Mr Rodriguez's nurse prior to his discharge. Ms Brooks was informed that Mr Rodriguez "was well" and would need a follow up appointment with his treating psychiatrist, Dr Igor Petroff. Ms Brooks was not provided with a discharge summary.
- 31 Ms Brooks left the hospital with Mr Rodriguez after a preliminary assessment in which she formed the view that he was in a fit state to participate in the HASI program (having played a game of pool with him). She stayed with Mr Rodriguez during the day. Later in the day Ms Brooks dropped Mr Rodriguez to his flat in East Lismore ('the premises') in the company of Ms Zeeta Kennedy, a client of The Refuge. Ms Kennedy had been living between the premises and The Refuge but from 23 June, the date of the discharge of Mr Rodriguez, she lived at the premises. Between 23 and 27 June 2007, Ms Brooks and Mr Mitchell, a fellow Mental Health Support Worker employed by On Track, had various interactions with Mr Rodriguez and/or Ms Kennedy which are described in the Agreed Statement of Facts. On 27 June, Mr Mitchell took Mr Rodriguez and Ms Kennedy on a day trip and on returning to the premises assisted Mr Rodriguez

erect a clothes line and hang up a load of washing before leaving late in the afternoon. The only adverse observation of Mr Rodriguez during this period was that he was noted to be "a bit anxious" on 25 June.

- 32 On 27 June, Mr Corkhill was rostered to work at The Refuge. He was not engaged as a HASI worker and was not required to have any interaction with HASI clients away from The Refuge. He was working alone on that day at The Refuge.
- 33 Mr Corkhill received a handover of the day's events in relation to The Refuge clients but there was no discussion of Mr Rodriguez because he did not fall into that category of client. There was no discussion in the report of Ms Kennedy because, although she stayed at The Refuge from time to time, she had not been there on that day.
- 34 For some part of the balance of the evening, Mr Corkhill had interactions with Ms Kerry Smith who was a Mental Health Support Worker employed by On Track rostered to work at Mandara House. This included Mr Corkhill collecting Ms Smith and four clients from Mandara House at approximately 7.15 pm and taking them to Video Ezi where DVDs were selected. Mr Corkhill returned Ms Smith and the clients to Mandara House at approximately 7.30 pm. No indication was given that he may visit Mr Rodriguez at the premises that evening.
- 35 Shortly after returning to The Refuge at approximately 7.30 pm, and after a Skype telephone call with his brother, Mr Damian Corkhill, Mr Corkhill left The Refuge and travelled alone, in his own vehicle, to the premises. He had not been working on the preceding two days as a HASI worker, as he was not rostered to work in that capacity on a Thursday or Friday. He did not advise Ms Smith or his On-Call Manager, Ms Brooks, or anyone else of his intention to leave The Refuge or go to the premises. Nor did he telephone Mr Rodriguez or Ms Kennedy to advise them of his intended visit.
- 36 There was no reason associated with Mr Corkhill's work in The Refuge requiring him to leave there and visit Mr Rodriguez or Ms Kennedy on 27 June 2009. The visit was made without authorisation or notice to any On Track staff or client of The Refuge.
- 37 In the prosecutor's "Additional Facts" filed with the prosecutor's bundle, which was marked as an exhibit in the proceedings, the following was stated in relation to the reasons for Mr Corkhill's visit to the premises on 27 June:

It is unable to be determined beyond reasonable doubt or on the balance of probabilities why Mr Corkhill went to the Premises on the night of the incident. According to what Ms Kennedy told the police, Mr Corkhill went to the Premises in order for Mr Corkhill to give Zeeta her medication. However, this is only a possibility that cannot in the present proceedings be established beyond reasonable doubt. Some of the available information is inconsistent with that possibility.

- 38 Mr Corkhill did, in fact, attend the premises. Shortly before 8 pm, neighbours heard Mr Rodriguez's and Ms Kennedy's voices raised.
- 39 Mr Corkhill was punched in the face and body by Mr Rodriguez, who continued to assault him on the front verandah of the premises. Mr Rodriguez punched Mr Corkhill with his fist and stomped on him whilst he lay on the ground. He stabbed Mr Corkhill with a broom handle and a knife and then wrapped a wire coathanger around Mr Corkhill's lower face. New South Wales Ambulance paramedic officers were unable to resuscitate Mr Corkhill. He died at the premises. A post mortem examination revealed the cause of death as "blunt trauma to the head and stab wounds to the chest".
- 40 Mr Rodriguez was arrested and charged with the murder of Mr Corkhill, but was found not guilty by reason of mental illness in accordance with s 38 of the *Mental Health (Forensic Provisions) Act 1990* following a trial in the Supreme Court before his Honour Justice Johnson.
- 41 Before turning to the charges, some preliminary further observations might be made:
- (1) The risks associated with home visiting may increase where a Mental Health Support Worker makes an unannounced home visit, attends upon clients after hours and fails to advise On Track's On-Call Manager of whereabouts when leaving On Track premises.
 - (2) Prior to and at the time of the incident, On Track had in place a policy in relation to home visiting, entitled "Residential Services - Home Visits". The policy applied only to the home visiting services. The policy did not apply to The Refuge or Mental Health Workers whilst working in The Refuge.
 - (3) The policy required employees to complete an Off-site Safety Checklist at the beginning of each shift outlining details of any home visits to be conducted. The offsite safety checklist would be destroyed upon an employee's return to the office.

- (4) The policy indicated that, where at all possible, all home visits should be carried out during normal business hours by previously arranged appointments. There were possible exceptions to that requirement: doorstep visits for a brief exchange of messages or information; if the visit is undertaken at the express invitation of the client; and, genuine emergencies or crisis calls.
- (5) On Track's OHS Policy Manual dated February 2009 stated that all home visits would be undertaken (aside from first time visits): during normal hours by a previously arranged appointment with the permission and at the convenience of the client and by placing certain details in an internal email calendar. Home visits should have a risk assessment undertaken before premises are entered and after enquiries are made as to whether other persons would be present and their relationship with the client. This Manual also specified conditions for entering premises. This aspect of the policy provided that, where at all possible, unannounced visits should be avoided.
- (6) The Home Visiting Policies did not proscribe employees from conducting home visits alone. The policies did not require employees to conduct home visits in the company of another employee or appropriate person.
- (7) On Track did not have a policy that prohibited employees from being alone with mental health clients who had been discharged from a mental health facility without a discharge summary or mental health clients who had a history of violence or aggressive behaviour. On Track did, however, have a Consumer Safety Audit form that was required to be completed by HASI Mental Health Support Workers which, in certain cases, required a client to be visited by two workers.
- (8) On Track workers were prohibited from visiting clients alone if the client's behaviour was "deemed" or "could be considered" aggressive or violent.
- (9) On Track's procedures for visiting HASI clients included a requirement that the client be telephoned before the visit took place so as to give the client the option of an alternative time for the visit and to allow the HASI worker to undertake a 'phone-based' assessment of the client. HASI services are only performed after hours in prearranged exceptional or emergency circumstances.
- (10) Mr Corkhill was diligent in the way he complied with On Track's policies but was in breach of those policies in his home visit to Mr Rodriguez on 29 June 2009, in particular, by failing to: use an On Track vehicle, notify the On-Call Manager or any other member of staff as to his intention to make the visit and the timing associated therewith; make a pre-visit telephone call which would have, among other things, allowed an assessment of the client to be made; and, complete an Off-Site Safety Checklist.

The Charge

42 On Track was charged, in an Amended Application for Order with one breach of s 8(1) of the Act.

43 The charge was set out in the Amended Application for Order in the following terms:

I, Inspector Joanne Maree Walker of the Workcover Authority of New South Wales, c/- Level 1, 60-70 Elizabeth Street, Sydney in the State of New South Wales, an Inspector duly appointed under Division 1 of Part 5 of the *Occupational Health and Safety 2000* and empowered under section 106(1)(c) of the said Act to institute proceedings in the within matter allege that On Track Community Programs Limited ACN 136 602 376 of 141 Minjungbal Drive Tweed Heads South in the State of New South Wales (defendant) did between 23 June 2009 and 27 June 2009 at 1/18 Marlyn Avenue, East Lismore did fail by its acts and omissions particularised below to ensure, in the case of their dealings with David Regan Rodriguez, the health, safety and welfare at work of Michael John Corkhill, Roberta Brooks and Peter Mitchell ("the employees") contrary to section 8(1) of the Act.

44 The particulars of the charge were specified as follows:

- (1) There was a risk of the client David Regan Rodriguez becoming violent and assaulting the employees.
- (2) The defendant failed to articulate that the employees were prohibited from dealing with David Regan Rodriguez without first obtaining and considering a written Discharge Summary prepared by the Lismore Adult Mental Health Unit. (previously the Richmond Clinic) ("LAMHU") when David Regan Rodriguez was discharged on 23 June 2009. .
- (3) In the case of David Regan Rodriguez, the defendant should have required that either:
 - (a) two of the employees be present upon re-accepting David Regan Rodriguez into the HASI Program at the time of his discharge from LAMHU on 23 June 2009, until they were able to obtain a discharge summary from LAMHU; or
 - (b) the defendant should have refused to re-accept David Regan Rodriguez into the HASI Program until a written Discharge Summary from LAMHU was obtained.
- (4) That the defendant failed in the case of David Regan Rodriguez to recognise that, in the absence of obtaining the said Discharge Summary and a previous Discharge Summary prepared by Dr Thorburn, psychiatric registrar

from LAMHU on 26 May 2009, it was not possible to undertake an adequate risk assessment.

45 The defendant pleaded guilty to the amended charge.

The Evidence

46 As previously mentioned, Mr B G Docking of counsel, who appeared for the prosecutor, tendered a Sentencing Bundle. The bundle contained an Agreed Statement of Facts which attached seven substantial annexures and, as previously referred to in this judgment, a document described as "Prosecutor's Additional Facts".

47 The prosecutor's tender bundle contained reports from Professor David Mace Greenberg. Professor Greenberg is a forensic psychiatrist who held the positions of Clinical Director of the New South Wales Court and Community Liaison Service and Professor of Forensic Psychiatry Conjoint Appointment at the University of New South Wales.

48 Professor Greenberg prepared two sets of medicolegal forensic psychiatric reports. First, he prepared such reports for the Lismore Local Court after conducting a psychiatric assessment of Mr Rodriguez on 12 August 2009 at the Long Bay Prison Hospital. (There was a primary report dated 17 August 2009 and a supplementary report provided on 19 January 2010.) Secondly, Professor Greenberg prepared further medicolegal forensic psychiatric reports at the request of the WorkCover Authority of NSW (a primary report of 14 June 2011 and a supplementary report of 12 September 2011).

49 Mr B D Hodgkinson SC, who appeared for the defendant, as previously noted, relied upon the affidavit evidence of Leone Crayden, sworn on 12 March 2013. The defendant also relied upon two references. The first was from Mr Tony Davies, Chief Officer of the Northern Rivers Social Development Council based in Lismore, and the second was from Mr Geoff Provest MP, State Member for Tweed, both dated 11 June 2013.

Evidence of Professor Greenberg

August 2009 Report

50 In his first medicolegal forensic psychiatric report, Professor Greenberg notes that he conducted a psychiatric assessment of Mr Rodriguez on 12 August 2009 in Ward F of the Long Bay Prison Hospital, Long Bay Correctional Complex. He indicated that, at the time, he had reviewed some documentation concerning Mr Rodriguez but did not have records from Lismore Base Hospital, Bloomfield Hospital or Southport Hospital. He formed the view that there were reasonable grounds to believe that Mr Rodriguez required a comprehensive psychiatric assessment of his mental state at the time surrounding the offence.

January 2010 Report

51 Professor Greenberg prepared a further report for the office of the Department of Public Prosecutions on 19 January 2010. He noted that he was supplied with the mental health records of Mr Rodriguez and various extracts from the police brief of evidence. The mental health records included notes from the records of HASI, NCAHS, Lismore Base Hospital and community mental health.

52 In the conclusion of his 2010 report, Professor Greenberg recorded that Mr Rodriguez had a history of a major psychiatric illness, namely, Schizoaffective Disorder, dating back to 1998. He also noted that, since 1998, Mr Rodriguez had been admitted on at least 13 occasions to various psychiatric hospitals, 11 of which had been to Lismore Base Hospital. After tracing the history of the circumstances giving rise to those admissions, Professor Greenberg observed:

Mr Rodriguez has severe psychiatric illness (disease of mind), which has been treatment resistant at times and become chronic in nature. He is at a turbulent course with his mental illness and has required electroconvulsive therapy (ECP) on occasions to stabilise his mental state. He has a history of non-compliance with psychiatric medication and a prior history of reported illicit substance abuse including amphetamines, datura, LSD and cannabis.

It is noted that Mr Rodriguez has previously made unprovoked assaults on various individuals in the Community, which resulted in him being repeatedly admitted to various psychiatric hospitals. Several of these relapses are noted to have been likely caused by a decrease in his dosage of medication, non-compliance with his psychiatric treatment or a consequence of the severity of his mental illness.

It is also note[d] that in Community Mental health records that in September 2008, Mr Rodriguez made derogatory statements about homosexuals and expressed concerns about a HASI worker, whilst in a psychotic state.

I am of the opinion that Mr Rodriguez suffered from chronic delusional beliefs which at times appeared to have

improved with psychiatric treatment. He has reportedly had residual paranoid beliefs, which have not been completely responsive to psychiatric treatment.

June 2011 Report

53 On 14 June 2011, Professor Greenberg provided a report to Ms Brigid Callanan, Solicitor, Criminal Law Practice, Legal Group, WorkCover.

54 In this report, the Professor refers to various documents provided to him for the purpose of preparing reports, including the HASI Resource Manual. By reference to that report he records:

The key aspect of the HASI model is the commitment of the partner agencies to actively monitor and review the client's progress. It is a requirement that the client allow disclosure of relevant information between parties.

55 Professor Greenberg also refers to an "On Track Customer Safety Audit" dated 1 February 2009. By reference to that document he notes that Mr Rodriguez was rated as having no history of violence for the past five years or more and as not having any history of having had psychotic symptoms or antisocial behaviour in the past five years or more. He also observed that:

This consumer audit informed the number of points which determined how many staff or security personnel would be needed to make visits to the client. Mr Rodriguez was rated as a total of 3, which meant that he did not have to have two staff members present when visiting Mr Rodriguez.

56 Further, in the June 2011 report, Professor Greenberg records his observations from "HASI Case Notes from On Track Community Services". The prosecutor referred to a number of pages of this aspect of the report in support of particular (1) of the charges, namely, there was a risk of "client David Regan Rodriguez becoming violent and assaulting the employees". The pages referred to by the prosecutor contained summaries of observations made about Mr Rodriguez's behaviour. A number of entries may be referred to:

- (1) In December 2008, the notes record aggression by Mr Rodriguez to the public.
- (2) In February 2009, it was noted Mr Rodriguez was reluctant to allow "Zeeta" to leave on her own with staff and he was physically aggressive, even though he did permit staff to take Zeeta to an appointment.
- (3) On 23 March 2009, Mr Rodriguez's girlfriend reported that she was fearful of Mr Rodriguez and that he "may use a rope to tie her up next". She reported she felt imprisoned and the manager arranged for Mr Rodriguez to come to a meeting on Monday week to discuss re-engaging Mr Michael Corkhill as his support worker.
- (4) It was noted, on 24 March 2009, that the staff were aware of possible domestic violence in the relationship.
- (5) On 9 April 2009, Professor Greenberg recorded that Mr Rodriguez reportedly hit a customer at Wal Murray Real Estate with a cricket bat. He also allegedly spent \$90 on a taxi to Nimbin. (It should be noted it was the affidavit evidence of Ms Crayden that, in fact, having spoken to the customer the subject of the complaint, Mr Rodriguez swung at the real estate customer with the bat but did not hit him.)
- (6) A record was made that there should be an increase in Mr Rodriguez's intramuscular medication on 19 April 2009 and that he was admitted to Lismore Base Hospital on 24 April 2009.
- (7) Over the period 12 to 14 May 2009, Mr Rodriguez was observed being in various states of elation. He was discharged on 25 May 2009 according to Professor Greenberg's summary.
- (8) On 27 May 2009, two days after discharge, he reportedly assaulted a resident at The Refuge; he readmitted himself to the Lismore Base Hospital.
- (9) On 25 June 2009, it was noted that the staff discussed a few issues including better ways for Mr Rodriguez and his girlfriend, Ebony, to share the flat together. It was noted that Mr Rodriguez was "anxious".

57 Professor Greenberg also referred to an "Incident Report" authored by Peter Mitchell, Support Worker, dated 11 April 2009, in which observations were made about the incident concerning a cricket bat. In part, the report states as follows:

The customer was sitting in his parked car in Merryland Avenue waiting for the real estate agent to arrive. Mr Rodriguez claimed "you broke my cricket bat, so give me 15c". The man handed him 50c. Mr Rodriguez then took a full swing of the cricket bat to the man's head but fortunately the victim was able to deflect the bat away from his head.

Mr Rodriguez was then noted to be pacing up and down the grounds of the University students' flats behind Mr

Rodriguez's flat.

- 58 Professor Greenberg's June 2011 report then gave a detailed summary and description of records derived from "Mid-Coast Area Health Service Mental Health Inpatient Records" as to 12 involuntary psychiatric admissions of Mr Rodriguez. Professor Greenberg describes the length of each admission, the circumstances giving rise to it and the reported actions of Mr Rodriguez whilst in hospital.
- 59 The first of those admissions occurred on 5 May 1998 to Lismore Base Hospital. Mr Rodriguez was discharged on 22 June 1998. He was approximately 17 years of age.
- 60 The ninth involuntary psychiatric admission occurred on 28 June 2007 wherein Mr Rodriguez was again admitted to Lismore Base Hospital. He was discharged on 9 August 2007. He was readmitted (on the tenth occasion) for a 39 day period to Lismore Base Hospital from 1 September 2008 to 9 October 2009. He was diagnosed on that occasion with Schizoaffective Disorder. The admission was originally voluntary, but due to his deterioration, was altered to an involuntary admission. It was during this admission that Mr Rodriguez referred to rejecting a HASI worker because he was a "homosexual person". He indicated that he wanted to "cancel his HASI due to the perceived sexuality of his case worker but later recanted and stated that he didn't want to cancel HASI".
- 61 According to Professor Greenberg's notes, Mr Rodriguez's eleventh admission occurred to Lismore Base Hospital on 16 April 2009 and was involuntary. The discharge occurred on 26 May 2009. This admission corresponds with the first of two admissions referred to in the introduction of this judgment immediately preceding the incident of 27 June 2009. The apparent inconsistency between the Agreed Statement of Facts, describing the admission as 'voluntary', and Professor Greenberg's summary, describing the admission as 'involuntary', may be accounted for upon the basis of other information provided in the notes prepared by Professor Greenberg. Those entries indicated that Mr Rodriguez initially sought voluntary admission, however, after being brought to the hospital on 17 April 2009, Dr Thorburn "filled out a Form 1 under Section 27 of the Mental Health Act 2007".
- 62 This admission occurred soon after Mr Rodriguez swung at a stranger with a cricket bat, a fact recorded in the medical notes in consultation between a Dr Petroff, Mr Rodriguez's psychiatrist, and a Mental Health Worker, Mr Cleary.
- 63 The closing entry for the eleventh involuntary psychiatric admission was from a nurse describing Mr Rodriguez as a "Mess. Teary, feeling anxious, can't process his thoughts. Begging me to come back in (hospital) and I think it reasonable to acquiesce". This entry followed a review by Dr Thorburn, on 26 May 2009, which noted that Mr Rodriguez had no psychotic symptoms and an entry for 25 May which noted that Mr Rodriguez was settled and sociable around the ward but anxious about the discharge.
- 64 The last admission referred to in Professor Greenberg's notes concerned an admission to Lismore Base Hospital on 27 May 2009 and subsequent discharge on 23 June 2009 (corresponding with the admission referred to in the introduction of this judgment). This admission was described in the Agreed Statement of Facts as 'voluntary', no doubt deriving from Mr Rodriguez's request for readmission. However, it would appear that the admission became involuntary in much the same way as the eleventh admission, as at the point of that admission Mr Rodriguez was "diagnosed with an acute exacerbation of his Schizoaffective Disorder, secondary to query emotional stress, query sleep deprivation".
- 65 After dealing with Community Mental Health records, Professor Greenberg turned to his conclusions and recommendations which, in part, addressed various questions put to him by the WorkCover Authority.
- 66 In the preamble to this section of his June 2011 report, Professor Greenberg made the following observations:
- There is a link between violence and mental illness.
- However it is known that there is only a moderate increase in the level of risk of violence in mentally ill individuals compared with the general population.
- A much greater risk of violence is posed by the usage of drugs and alcohol.
- Mental illness only accounts for a very small percentage of all the homicides.
- Factors associated with criminal history show a stronger association to future offending than clinical risk factors.
- Risk prediction is not an absolute prediction. The a [sic] prediction that a violent act will occur in an individual[s] future cannot be predicted with any certainty. Risk cannot be eliminated and at best, mental health professionals can only engage in responsible risk taking.
- Risk fluctuates and changes continually. Risk assessment is not a single event but a recurrent process.
- In any risk assessment, there should be an assessment of the static or historical risk factors which are unchangeable risk factors, as well as dynamic factors which are subject to change and can be amenable to treatment and interventions.

No single factor alone predicts outcome.

Risk assessment begins with identification of the known risk factors and specific individual risk factors. The assessment ends with an implemented Risk Management Plan to manage those risk factors.

The higher the base rate of the violent act, the better the prediction. For example, base rates of homicide are low and therefore thought to be too low to enable accurate prediction; whilst violence and aggression on the other hand are much broader concepts and have higher base rates and therefore [one] not as difficult to predict.

67 The first question considered by Professor Greenberg was: "Taking into consideration the history of Mr Rodriguez prior to 27 June 2009, can you say whether, as at June 2009, Mr Rodriguez was at risk of committing future acts of serious violence?".

68 Professor Greenberg answered that question by reference to his previous clinical assessment, a review of records and by undertaking an assessment of "Static Historical Risk Factors". Those factors included: previous violence; the age of the first violent incident; relationship instability; employment problems; substance abuse problems; major mental illness; early maladjustment; personality disorder and prior supervision failure.

69 Under the heading "Previous Violence", Professor Greenberg made the following observation:

Following his involuntary admission to these psychiatric hospitals there are numerous repetitive incidents within the hospital of violence towards staff and patients. Again these incidents were noted to be associated with Mr Rodriguez suffering from a relapse of his mental illness (schizoaffective disorder).

The type of violence was broad and included actual, attempted or threatening harm to person or persons.

...

70 Professor Greenberg referred to the eleventh admission as being precipitated by an acute psychotic episode and the attack with a cricket bat, and the twelfth admission being precipitated by Mr Rodriguez's verbal aggression with his neighbour.

71 Professor Greenberg then provided an "Overview" as follows:

Based on Mr Rodriguez's static or historical longitudinal factors prior to 27 June 2009, in my view, he was at risk of committing future acts of serious violence. He had significant previous violence and was known to be first violent at the age of 17 years old. He has a major psychiatric illness with a history of psychotic symptoms. On most of his psychiatric admissions, he

presented with violent behavior and whilst in hospital also presented with further acts of aggression and violence. There was also some relationship instability with his girlfriend and he had been unemployed and on a Disability Support Pension since year 2001. He also had a history of prior supervision difficulties with mental health services. There is no significant history of him

having early maladjustment and severe personality problems.

These factors would suggest that, based his historical static risk factors, my view id [sic] that this would placed him in the high risk category for further acts of violence, relative to other psychiatric patients but only whilst in a relapsed psychotic state. His risk of violence would be primarily related to episodes of relapses in his mental state where he presented with acute psychotic symptoms such as paranoid delusions, thought disorder and elevated mood amongst other symptoms.

His static factors are usually fixed and unchangeable. However with his regard to dynamic cross sectional risk factors (too be discussed below), namely his clinical and management interventions, his risk of committing future acts of serious violence would in my view be diminished when his mental state was stabilized.

In summary therefore I am of the opinion that Mr Rodriguez was in the higher risk category of committing future acts of violence whilst in an acute psychotic state relative to other psychiatric patients. However this risk of committing future acts of serious violence was dependent on the stability of his mental state, abstinence from all illicit substances, compliance with psychiatric medications and close monitoring by the Mental Health Services and other allied support workers (clinical state and management interventions).

72 Professor Greenberg was asked the question, as to the various factors or measures referred to in "Overview" (above): "In your opinion, would these control measures (or any control measure if put in place) reduce or eliminate the risk of Mr Rodriguez committing future serious acts of violence?". Professor Greenberg answered that question as follows:

If these control measures were put in place prior to 27 June 2009 it is unknown and speculative to suggest that they would have changed the outcome on that date.

However, in theory, developing a more comprehensive and formal risk assessment and risk management plan incorporating the patient, health provider, support and allied providers or carer's, enables responsible risk taking which in theory could possibly reduce future acts of violence.

73 Professor Greenberg then turned to a range of other questions raised by the WorkCover Authority before looking at "Dynamic Clinical Risk factors" which included: lack of insight; negative attitude; active symptoms of major mental

illness; impulsivity and being unresponsive to treatment. He also looked at "Dynamic Risk Management Items" before giving a further overview in the following terms:

Therefore during [the] last 3 months prior to 27 June 2009, there were some dynamic risk factors which indicted periods of instability in his mental state.

Mr Rodriguez had been admitted to the Lismore Base Hospital on 15 April 2009. On the 9 April 2009, he had reportedly swung a cricket bat at the head of a stranger outside a real estate agent for no apparent reason. It was noted he was non-compliant with his oral psychiatric medications. He was anxious,

thought disordered and had pressure of speech. During the hospitalization, he was intimidating towards other patients. He was challenging and standing over other patients. He was threatening in his demeanor [demeanour]. He was noted to be irritable and misinterpreted information. He also made inappropriate comments of a sexual nature; he was grandiose and elevated in his mood and was noted to be punching walls and standing over and intimidating other clients. It was noted that he was arguing with other patients and very abusive and threatening at times on the phone. He threatened a resident on the phone with a gun and believed that his girlfriend was having an affair. However he appeared to be settled in his mental state in the last week of May 2009 and on

26 May 2009 was thought to have no psychotic symptoms. He went on leave with his HASI support worker. However, one day later on 27 May 2009, Nurse Coney noted that Mr Rodriguez was "in a mess, feeling anxious and can't process his thoughts. He was begging to come back into hospital."

During periods of instability in his metal state during 2009, Mr Rodriguez was noted to have holes in his doors and screws removed from door hinges (14 February; 26 May); controlling behaviour with girlfriend (17 February; 23 March) or with support worker (11 March); assaultive [sic] behaviour (9 April); On the hospital ward he reportedly was intimidating, standing over co-patients, threatening, making inappropriate comments, had elevated and grandiosed [sic] mood (April: May).

Mr Rodriguez had a major psychiatric illness, namely Schizoaffective Disorder which had a fluctuating coarse [course]. On 1 June he was noted to be paranoid; on 4 June he wanted to buy hat to protect himself from cosmic rays; on 11 June his behaviour was reported as slightly disorganized; on 12 June he had reported poor insight; on 21 June he intimidated a female patient and was using stand over techniques and thumping fists on table.

Mr Rodriguez was treated with psychiatric hospitalization, anti-psychotic and mood stabilizing medication, linking him to appropriate support services and psychiatric assessment noting that he was "well" prior top [to] his discharge on 23 June 2009.

In summary Mr Rodriguez[s] risk of harm to others was a thorough assessment of these static and dynamic factors and the stability of these risk dynamic factors. While the list is not a comprehensive list of all possible factors, these were some the more pertinent risk factors.

A comprehensive formal clinical risk assessment and risk management process needs be conducted whenever there is a concern of risk of potential serious violence. Formal risk assessment and risk management needs to be undertaken prior to prior to discharge (amongst other pertinent times which will be addressed in below paragraphs).

- 74 Professor Greenberg was asked the question: "If you are of the opinion that Mr Rodriguez did pose a risk of serious violence, would you expect that his interaction with a homosexual person would expose that person to a greater, lesser or same risk as anyone else?". In answer to that question, Professor Greenberg stated:

Having the benefit of hindsight, in my view, his homophobic attitudes during periods of relapse of his acute mental illness, would have increased his risk to Mr Corkhill relative to the persons in the larger general community. However, no single factor predicts outcome so that the degree of that increased risk cannot be quantified. Risk assessment and risk management is a process

which needs to be re-evaluated with whenever there is concern about aggression or violence.

September 2011 Report

- 75 In his final report of September 2011, Professor Greenberg was asked to consider whether there should be prohibitions placed upon staff working with clients such as Mr Rodriguez, unless accompanied by other employees.
- 76 The Professor referred to the On Track Consumer Safety Audit dated 1 February 2009. He noted that the form had not been scored correctly and that Mr Rodriguez would have required more than one staff present when home visits were to be made by staff. He stated:

I am of the view that had a second staff member been present, that staff member may have provided assistance to Mr Corkhill at that time period and may or may not have led to a different outcome.

I am therefore supportive of prohibitions working with high risk clients provided comprehensive Risk Assessment and Risk Management Policies and Procedures have been followed.

- 77 The Consumer Safety Audit of February 2009 shall be further discussed in the context of Ms Crayden's evidence.

Oral Evidence of Professor Greenberg

Cross-Examination

- 78 Professor Greenberg was also questioned as to whether a change in Mr Rodriguez from a normal state to a psychotic and potentially violent state may happen as the result of immediate circumstances or whether it was a time impacted

change. The Professor gave evidence that whilst Mr Rodriguez could slip very quickly into a psychotic state, he was, due to his past behaviour, always a risk. That evidence was in the following terms:

Q. Can the change in an individual happen as a result of immediate circumstances or is it a time impacted change?

A. It can be either. In this case we have a situation where a man had a severe mental illness, a psychoeffective disorder with frequent relapses of his mental illness, and with almost all of them associated with violence during periods of relapse. So in times of relapse where he developed delusional beliefs, which are false beliefs, often paranoid beliefs, he has a documented history of aggression and violence or threatening violence.

...

Q. and that comes back to the proposition that I asked you about earlier; in a case of Mr Rodriguez, he might go into that psychotic state very quickly and without necessarily providing an opportunity to be observed as to early warning signs?

A. Yes.

Q. That's one of the reasons why you say you're unable and it's speculative to suggest that even with all those control measures in place it would have changed what happened on the 27th?

A. What, what I'm saying is one can't predict the future with any certainty. So, at best, what one does is assess all the risk factors and manage them as best one can to reduce that risk.

Q. And you in your next paragraph on the same matter say there's a consequence process of thinking, just described slightly in a different way but consistently, that enables responsible risk taking?

A. Correct.

Q. By that do you mean that dealing with Mr Rodriguez was always a risk?

A. Yes, because of his, his past, past behaviour predicts future behaviour. We have here an individual with a past history of repetitive acts of violence and threatening violence.

- 79 Professor Greenberg gave further evidence that Mr Rodriguez could slip into a psychotic state at any time, and this was the case no matter what his treatment regime was. Further, whilst Mr Rodriguez's behaviour and speech may have indicated that he was unwell, there was no record of any bizarre or delusional behaviour or speech. He also deposed that it was quite obvious when Mr Rodriguez was not behaving normally and his mental illness was having some impact on his personality. That evidence was as follows:

Q. As you say you have noted this in your report, but when Mr Rodriguez was in this delusional state that you have recorded from your reading of the clinical notes and he had thought disorders, how would a person know that that was happening?

A. From his behaviour and from his speech. Both those symptoms would indicate that he was unwell.

...

Q. There is no recording of delusional behaviour in any of those notes, is there? If you want to see the notes again, Professor, please tell me and I will make them available?

A. I can see from my report on page 18 that there is no record of any bizarre or delusional behaviour or speech.

...

Q. This is a man who when he was in a psychotic state, it was quite obvious to anybody who understood him at all that he was not behaving normally and that his mental illness was having some impact on his personality?

A. Absolutely.

...

Q. I want to ask you this professor: Given that it was only four days later that he had moved from being able to be discharged from hospital to a psychotic state, is it the fact that with Mr Rodriguez he could slip back into that psychotic state at any time?

A. Yes.

Q. And no matter what his treatment regime is?

A. Yes.

Q. And unless he was exhibiting delusional signs, signs of behavioural change, a person who wasn't dealing with him clinically for the purpose of assessment may not know that he was moving back into the psychotic state?

A. Yes.

- 80 Professor Greenberg gave evidence, in cross-examination, that the behaviour of Mr Rodriguez as recorded in the HASI workers' notes for the period 23 to 27 June 2009 did not indicate that he was slipping into a psychotic state. That evidence was as follows:

Q. The observations made of Mr Rodriguez in that period after his discharge from hospital and before the incident with Mr Corking don't show any behaviour, don't record any behaviour of the kind that would indicate that he was slipping back into a psychotic state as a consequence of his mental illness?

A. That's correct.

...

Q. So, Professor, Mr Rodriguez on the 23rd is released on the basis that we have earlier discussed, that is 23

June and up until the afternoon of 27 June has not indicated by his behaviour or the expression of delusional thought or any other indicator that he is suffering from any further psychotic problems as a result of his mental illness?

A. There is no recording of that, yes.

Q. In that sense up until the time Mr Mitchell leaves in the afternoon of the 27th, there is nothing that would indicate to a person that has been recorded that Mr Rodriguez was starting to slip into a psychotic state?

A. From the workers' point of view, no.

...

Q. That afternoon, when Mr Mitchell was in Mr Rodriguez's company, Mr Mitchell notes no symptoms of that psychotic state and, indeed, is comfortable enough to go into his house and assist him with the clothes line and has no trouble that he records in doing so?

A. Yes.

...

Q. So, up to the afternoon of the 27th there's nothing in the dealings with Mr Rodriguez that indicate that he had and is likely to become psychotic within a matter of hours, is there?

A. Well, there's, there's, there's no information to suggest that, that he was, to the workers anyway, outwardly displaying bizarre or psychotic behaviour.

...

Q. Well then, if I put it in a slightly different way: To a non clinically trained person, from the records that you have been able to observe, there were no symptoms that would have indicated that he was moving towards a psychotic state?

A. It appears not, no.

- 81 Further evidence was given by Professor Greenberg that the reference in the HASI workers' notes on 25 June 2009 to Mr Rodriguez being "anxious" was not a clinical sign of relapse into a mental disability:

Q. The only thing that you might even suspect was out of the ordinary at all is the reference on 25 June to being anxious?

A. Yes.

Q. That of itself is not a clinical sign of a relapse into mental disability, is it?

A. No.

- 82 Evidence was given to the effect that, in order to discharge Mr Rodriguez on 23 June 2009, the clinicians treating him would have had to be of the view that he was not a risk to himself or others:

Q. In order to discharge him at 23 June the clinicians treating him had to form the view that he was able to go back and function in the community setting with the assistance that he had?

A. They would have had to have had that view, yes.

Q. They would have had to have had that view that he was not a risk to himself or others at the time of discharge?

A. Yes.

Q. That is the standard that has been applied for a long period of time in the treatment of mental health patients in order to get the backing for these community settings?

A. Yes.

...

Q. But professor, we have to deal with the circumstances of this case and, in particular

A. Yes.

Q. those circumstances so far as On Track is concerned between 23 and 27 June. In that time, On Track, because of the discharge by the clinicians, were entitled to believe that the clinicians had formed a view that Mr Rodriguez was not a risk to himself or others in the community, weren't they?

A. Yes.

- 83 Professor Greenberg also gave evidence that, when not in an acute state, Mr Rodriguez presented a lower risk:

Q. So he was not showing any signs of an acute phase, there is no indication to say that he was at the level of risk he was?

A. Well because of the nature of his illness he is always going to be at risk because of the instability of his mental state. It is all the other factors that I have mentioned in my report. It is not just one factor that predicts future acts of violence. There is a whole host of factors. That is why it is unpredictable because the multitude of factors changes and fluctuates. What is important is that he always remains at risk but at times when he is acutely unwell his risk obviously is exaggerated and heightened.

Re-Examination

- 84 In re-examination, Professor Greenberg was asked to explain the difference in factors which are sometimes characterised as historical or static factors as opposed to dynamic factors. He gave the following evidence, in that respect:

Q. You were asked by Mr Hodgkinson on one occasion about there being any recorded symptoms, this is for Mr Rodriguez, and I do not have a transcript, I have only got notes, you gave an answer to the effect "It is not a here and now. You also look at historical static factors, also there is an acute mental state with the current issues where there has been alcohol or drugs used and also the feasibility."

A. Yes.

Q. What I wanted you to explain is what you mean by historical static factors that one has to look at even if there are no recorded symptoms at a given time?

A. In order to, as stated you cannot predict the future effect in terms of behaviour, future acts of violence but what one can do is categorise people into whether their needs, whether they are high risk, low risk, medium risk or other types of those standard categories and to provide services to manage their risk accordingly, in other words response to risk taking behaviour.

What I mean by static factors is as part of an assessment of a client one has to look at historical factors which are listed in my report on p 45. In other words factors such as previous history of violence, past behaviour predicts future behaviour so in a man who has got 12 admissions, 11 of which are associated with acts of violence, there is a history of violence going back ten or more years. Factors such as age when one first presents with violent behaviour, obviously the earlier a person presents with violent behaviour the more likely you are going to see violence in the future. Relationship, quality of relationships, employment capacity and issues, substance abuse, alcohol and drugs, having a mental illness, having early emotional adjustment in one's life, physical abuse, sexual abuse or having difficulties at school, interacting with people and of course personality factors and prior supervision failure. The person has a history of non-compliance with intervention. Those historical factors assist one in predicting what he is likely to be like in the future in terms of his future behaviour. There is no guarantee that they will give you an indication.

Q. Your report also uses the expression dynamic factors, can you just explain the distinction between the historical static factors and the dynamic factors?

A. Yes static factors are historical because they have occurred. One cannot change them largely anyway. What one can change is present and future so dynamic factors are really looking at factors in the here and now such as his level of insight into his mental illness and need for treatment. Obviously being on the community treatment order his level of insight was poor and that is why it required a community treatment order.

His attitudes towards HASI or towards the Health Service whether he had active symptoms of mental illness current at this present time at the here and now, whether he was responding to treatment appropriately and then future factors, factors like a variable plan for his treatment in the community, whether there were any destabilisers in his life, you know stresses or factors which would increase his instability of his mental illness, whether he had support in the community and then other specific factors such as homophobic attitudes, whether he had underlying homophobic tendencies or historical factors but also current factors and factors dealing with providing treatment and rehabilitation in the future.

85 The Professor was also questioned about On Track's Occupational Health and Safety Manual, in particular, the part of the Manual which reads: "[d]ue to the sometimes unpredictable nature of On Track's clients there is a potential for behaviour becoming unsafe on occasions with On Track". The following evidence was given:

Q. I want in particular to take you to the opening sentence of that section, para 1 reads "Due to the symptoms unpredictable nature of On Track clients there is a potential for behaviour to become unsafe on occasions within On Track." Is that policy statement which you can presume pre-existed this incident consistent with your view of how you have to treat clients?

A. Yes.

Q. You have to assume it is unpredictable when they will become unsafe?

A. Correct.

Q. And therefore I think as you said in answer to Mr Hodgkinson, I am talking about from the health and safety perspective, you are to assume that there is always a risk?

A. Yes with the particular client, yes.

Evidence of Leone Crayden

Affidavit Evidence of Ms Crayden Sworn 12 March 2013

86 After giving her current position, functions and detailing her work history, Ms Crayden described the functions of On Track and The Refuge, the background to HASI, arrangements for HASI funding and the stages of HASI. Much of this evidence underpinned the introduction to this judgment.

87 Ms Crayden also referred to passages from the the HASI Resource Manual referring respectively to the key philosophies underpinning the HASI program and responsibilities of Area Health Services through Mental Health Care Coordinators in that respect (see section 7.3).

88 Ms Crayden gave evidence regarding the HASI referral process, as follows:

36. The Funding and Performance Agreement sets out protocols and procedures for the referral and assessment process. Clause 3.1.2 required NCAHS to complete assessment forms including undertaking a risk assessment and D1 discharge summary, and providing these to On Track. Appendix 3 of the Funding and Performance Agreement (at page 8) contains a declaration in support of the Application that 'the referrer and the applicant

agree that no information has been withheld and that all information provided is accurate, correct and necessary ..."

...

38. On Track does not have access to, nor is it permitted to have access to, the clinical information relevant to individual clients that is collected by the NCAHS during assessment and treatment of those clients. On Track relies upon the NCAHS to volunteer all necessary clinical information which is reflected in the agreements referred to above.

39. Unfortunately, significant clinical information concerning Mr. Rodriguez's history and status was not provided at the time of discharge (in May and June of 2009) or at any relevant time by Mr. Cleary.

89 As to the particular circumstances of the referral of Mr Rodriguez, Ms Crayden stated:

41. Damian Cleary had, or had access to, all clinical information relating to Mr. Rodriguez that had been collected by the NCAHS up to the time of the referral, including any out of area admissions within NSW. Damian Cleary was assigned as Mr. Rodriguez's case manager in 2006 after Mr. Rodriguez had been admitted to LAMHU (known then as the Richmond Clinic).

42. According to the notes I have read in the Prosecutor's brief following the incident, prior to Mr. Rodriguez's admission to the HASI Program there had been a history of violence. It is apparent to me that Damian Cleary referred Mr. Rodriguez to the HASI program but failed to provide On Track with this history.

...

45. Michael Corkhill completed a Consumer Entry Checklist and a Consumer Intake Summary which included a risk assessment of Mr. Rodriguez on entry into the HASI program on 28 August 2007. A Consumer Safety Audit was completed by Michal Corkhill on 7 February 2009 which also assessed risks in relation to Mr. Rodriguez. Copies of these documents are annexed hereto behind Tabs 7, 8 and 9 respectively. The information contained in these documents is derived from information provided by Damian Cleary and Mr. Rodriguez.

90 The reference to a Consumer Safety Audit correlates to a discussion of that document in the case of Mr Rodriguez by Professor Greenberg. A copy of the Consumer Safety Audit of February 2009 is attached to this judgment and marked Annexure B.

91 Ms Crayden gave evidence as to the discharge policies of NSW Health which applied to the LAMHU at the time of the incident and information (or lack thereof) provided at the time of and subsequent to the discharge of Mr Rodriguez on 23 June 2009. That evidence was as follows:

46. NSW Health does not provide to On Track (or so far as I am aware other charities with which it deals) its internal operating policies. On Track is very often not informed by NSW Health of the policies it applies to the provision of its services. Even in circumstances where we become aware that there is a policy operating On Track is not in a position to enforce compliance by NSW Health with its own policies.

47. At the time of the incident, the NSW Health Policy Directive - Discharge Planning for Adult Mental Health Inpatient Services dated 16 January 2008 was in place ('the Discharge Policy Directive'). We had not been provided with a copy of this Policy prior to the incident involving Mr. Corkhill. A copy is annexed hereto behind Tab 10. It applied to LAMHU at all relevant times and identifies the required steps to be taken by them for discharge planning. This Discharge Policy Directive is mandatory for NSW Health.

48. The Discharge Policy Directive requires the relevant Health Authority (here NCAHS) to prepare a Care Plan and a Discharge Care Plan.

49. The Discharge Policy Directive includes in the summary the following:

"The discharge planning for adult mental health inpatient services presents a structured and standardised process for ensuring safe and successful transition of people with a mental illness from time of admission to hospital to post discharge ..."

50. Clause 5.3 of NSW's Discharge Policy Directive directs that:-

"Discharge planning must include an assessment of the risk posed by the consumer to the health and welfare of others, including any risk to children who are in contact with the consumer. Prior to discharge, a formal assessment of risk of harm to others must be conducted. Indicators of risk include threatening statements and/or a history of violence against others. This risk and a response must be documented in the discharge care plan and relevant MH-OAT modules. Where the risk is valid, staff should notify the local Police on the basis that they have reasonable grounds to believe there is a serious and imminent threat to a member of the public."

51. At the time of and prior to the discharge of Mr. Rodriguez by LAMHU from hospital in May and June 2009, LAMHU did not provide information or documentation to On Track in compliance with the Discharge Policy Directive. I have as a result of the WorkCover investigation into this matter now been provided with copies of documents entitled 'Care Plan' which appear to relate to Mr. Rodriguez. The Care Plans are inadequate and do not comply with the mandatory requirements of the Discharge Policy Directive. Copies of the Care Plans dated 15 April 2009 and 27 May 2009 are annexed hereto behind Tabs 11 and 12 respectively.

52. As a consequence of enquiries made by myself, I understand that a telephone call was made by On Track staff to LAMHU each day after 23 June 2009 seeking a copy of the Discharge Summary. The Discharge Summary was not provided to On Track until 1 July 2009, it was signed by Dr. Foy. A copy of that Discharge Summary is in Exhibit 1 behind Tab 1D. I recall the arrival of the Discharge Summary in the On Track office in Lismore because it appeared on our fax machine without any cover sheet or explanation as to who had sent it or why it had been sent

at that time.

- 92 As to the obligations falling on the NCAHS *vis á vis* the operations of On Track, Ms Crayden gave the following evidence:

54. Clause 2.7 of the HASI Service Level Agreement states that "All parties are responsible for informing other parties to this Agreement of any known matter that may affect the safety and security of staff ..."

55. NCAHS was to provide "clinical mental health services based on each client's individual assessed needs" It is clear that clinical information about the status of any client including Mr. Rodriguez was to be provided by NCAHS to On Track if that information "may affect the safety and security of staff". No information was provided to On Track by NCAHS indicating that Mr. Rodriguez was in a state that may affect the safety and security of staff. On Track staff are not required by the Service Level Agreement or otherwise expected to carry out clinical based assessment of individual clients.

- 93 Other aspects of the NSW Health Policy Directive (which Policy pre-dated the incident) annexed to Ms Crayden's affidavit were relevant. In the Policy's Glossary, "Discharge Summary (D1)" was defined as, *inter alia*: "A component of the MS-OAT Mental Health Clinical Modules which is to be completed on or before the day of discharge". The following was noted at 3.2 of the Policy under the heading "Discharge process":

3.2 Discharge process

The Process Summary is further elaborated in the following table. It is important that the documentation in a consumer's medical record reflects this process.

...

7. Identify risks of harm to self and others (including dependent children) and develop a response, in accordance with *Policy Guidelines for the Management of Patients with Possible Suicidal Behaviour for NSW Health Staff and Staff in Private Hospital Facilities PD_2006_121*, and the *Framework for Suicide Risk Assessment & Management for NSW Health Staff*. See section 5 for more details.

- 94 What was meant by "harm to others" was further explained at 5.3 of the Policy as follows

5.3 Harm to Others

Discharge Planning must include an assessment of the risk posed by the consumer to the health and welfare of others, including any risk to children who are in contact with the consumer. Prior to discharge, a formal assessment of risk of harm to others must be conducted. Indicators of risk include threatening statements and/or a history of violence against others. This risk and a response must be documented in the discharge care plan and relevant MH-OAT modules. Where the risk is valid, staff should notify the local Police on the basis that they have reasonable grounds to believe there is a serious and imminent threat to a member of the public. If the consumer is at risk and is known to have access to a firearm, staff are required to complete a *Notification to NSW Police Force and*

- 95 In a similar vein, Ms Crayden gave evidence as to the lack of advice provided to On Track as to clinical assessments made of Mr Rodriguez, as follows:

56. In my experience it is standard practice that where a clinical assessment has been undertaken and as a result a determination has been made that the client the subject of the assessment presents a high risk of violent or aggressive behaviour then that fact is communicated to other persons who are engaged in the provision of services to the client. No such advice was provided to On Track or any person working for it at or around the time of discharge from LAMHU of Mr. Rodriguez.

- 96 Ms Crayden also stated that On Track relied upon assessments made by NSW Health on the discharge of clients, as follows:

63. On Track rely [relies] on the fact that if NSW Health discharge[s] a client they have done so on the basis of a proper clinical assessment and a view that the person is able to safely live in the community, without risk of harm to self or others. They are required to do this under the programs and agreements with On Track and the Mental Health Act 2007. From a practical perspective there is no other way for NGO's like On Track to operate.

- 97 In relation to On Track's experience with Mr Rodriguez, Ms Crayden stated that, whilst never having met Mr Rodriguez, access to On Track records and other material to which she had access resulted in the following opinions:

60. Mr. Rodriguez had not demonstrated violence toward any staff member whilst being in the HASI program. He was considered a successful consumer, had ceased drug taking, was compliant with medication and able to live in his own unit with day to day living support. He attended all clinical appointments including those for the administration of intra-muscular injections.

61. Prior to April 2009 and whilst in the HASI Program Mr. Rodriguez only had one hospital admission (1 September 2008 to 9 October 2008). The admission was not precipitated by violence. It was well known that he had abstained from alcohol and other drugs for approximately 22 months, prior to that he had been a major cannabis and amphetamine user. He was seen by staff as such a success story on 28 May 2008 the NSW Minister for Mental Health Paul Lynch met with Mr. Rodriguez at his unit. The Regional Director for Mental Health was there to see firsthand how the HASI Program could support a person with a serious mental illness in the community.

- 98 Ms Crayden's evidence as to the tenth psychiatric admission of Mr Rodriguez conforms with Professor Greenberg's

notes. His reasons for admission were not associated with violent events and he was initially the subject of a voluntary admission. This was later changed, after his condition deteriorated, to involuntary. It was during this admission, however, that Mr Rodriguez made observations about a HASI worker who was a "homosexual person". Professor Greenberg's references to hospital records, in this respect, have been earlier described in this judgment.

- 99 Ms Crayden deposed that On Track staff made observations of a non-clinical character whilst dealing with Mr Rodriguez. Records were kept of those observations. These historical records allowed the staff of On Track to be aware of changes in Mr Rodriguez's behaviour. These same notes were used as a basis for discussion between HASI workers and the management of On Track. The management would review case notes and assess the status of the client and any risk associated with the continued provision of the service.

Discharge Evidence

- 100 Ms Crayden observed that the consequence of the adjournment of the mental health inquiry concerning Mr Rodriguez in June 2009 was that Mr Rodriguez "could only be released from hospital if the clinicians responsible for him formed a view that his discharge was permissible under the Mental Health Act". The discharge records of 23 June 2009 indicate Dr Thorburn assessed Mr Rodriguez as "well".

- 101 As to the incident, Ms Crayden deposed that "there was no reason associated with his work in The Refuge that required Mr Corkhill to leave The Refuge and visit Mr Rodriguez or Ms Kennedy". No reason had been established as to why Mr Corkhill left his post at The Refuge. The fact that Mr Corkhill utilised his vehicle in making the visit to the premises was not consistent with policy and the reason for that deviation has not been explained.

- 102 This evidence was given in the context of Ms Crayden's favourable assessment of Mr Corkhill's work history, as follows:

76. Mr. Corkhill was diligent in the way in which he complied with On Track's policies in discharging his duties. He was a trustworthy and reliable employee who discharged his work duties professionally and consistent with On Track's policies.

- 103 Various aspects of On Track's policy regarding home visits have been earlier set out in this judgment. Ms Crayden referred, in this respect, to cl 3.12 of On Track's Occupational Health and Safety Manual dated February 2009 which stated:

- (a) All home visits by staff will be undertaken only during normal business hours by previously arranged appointment and with the permission and at the convenience of the consumer/client.
- (b) Details of the visit to be placed on the email calendar or sign out board.
- (c) Find out who else will be present and their relationship to the client and the consumer and make other arrangements if necessary.
- (d) Where at all possible unannounced visits should be avoided.

- 104 As to Mr Corkhill's departure from the Home Visiting Policy, in this context Ms Crayden referred to various aspects of Mr Corkhill's work history. He had worked for On Track for four years and was appointed to work in the HASI program on the basis of his extensive experience. He had demonstrated considerable knowledge as a Mental Health Support Worker and had commenced a Certificate IV in Mental Health work through the Mental Health Coordinating Council. In addition to undertaking the Certificate IV in Mental Health work, Mr Corkhill attended staff training conducted or arranged by On Track. Mr Corkhill had received training with MHARS prior to its merger with On Track. That training included advice to workers to withdraw from the vicinity of a client "if they don't feel comfortable with the client's behaviour" and, further, to contact the Lismore Hospital Mental Health Team, the Mental Health Access Line or, if the client is aggressive or threatening, "call 000".

- 105 As to On Track as an organisation, Ms Crayden gave evidence that, in October 2008, On Track Lismore formed a Quality Assurance Working Party, the purpose of which was to achieve external accreditation against the National Mental Health Standards. The Working Party was formed at that time as a consequence of the amalgamation of five organisations into the On Track structure. In January 2013, On Track also obtained certification of its Quality Management Systems. Further, as to On Track's operations, Ms Crayden deposed, as follows:

101. Risks relating to mental health consumers were identified by On Track through a number of processes. Risk assessments of mental health consumers including Mr. Rodriguez were carried out using various forms including:-

- (a) those referred to in paragraph 46 of this affidavit;
- (b) Mr. Corkhill completed a Hazard Risk Assessment of Mr. Rodriguez on 1 February 2009 (annexed hereto behind Tab 29);
- (c) Mr. Mitchell completed consumer Individual Service Plans in relation to Mr. Rodriguez on 10 January 2009, 14 March 2009 and 8 May 2009 (annexed hereto behind Tabs 30, 31 and 32 respectively);

- (d) Mr. Corkhill completed an Independence Development Plan of Mr. Rodriguez on 3 February 2009 (annexed hereto behind Tab 33);
- (e) Mr. Mitchell completed an Incident Report concerning Mr. Rodriguez on 11 April 2009 and faxed the report to Dr. Petroff, Damian Cleary and Joy Campbell (annexed hereto behind Tab 34);
- (f) Ann Bowen wrote to Mr. Rodriguez on 27 May 2009 advising him that he was banned from The Refuge as a result of an assault on a resident (attached hereto behind Tab 35);
- (g) Mr. Corkhill completed an Early Warning Signs form in relation to Mr. Rodriguez on 25 February 2009 (annexed hereto behind Tab 36);
- (h) Peter Mitchell completed a Camberwell Assessment of Need assessment of Mr. Rodriguez on 10 January 2009 which, amongst other things, sought to identify psychological distress, safety to self and others, and developed action plans around each module (annexed hereto behind Tab 37).
- 106 In addition to these matters, it was noted that On Track held monthly team meetings, daily team toolbox meetings and conducted individual employee supervision and case reviews with Community Mental Health and treating clinicians. Regular consumer reviews of Mr Rodriguez were undertaken.
- 107 As previously mentioned, a Consumer Safety Audit was undertaken by Mr Corkhill on 1 February 2009.
- 108 Ms Crayden stated that risk assessments of a person with a psychiatric condition are not static. In relation to the incident concerning Mr Rodriguez with a cricket bat in April 2009, Ms Crayden gave the following evidence:
106. The On Track HASI workers reviewed Mr. Rodriguez's behaviour following an incident on 9 April 2009 in which Mr. Rodriguez threatened to hit a man who was parked outside his flat with a cricket bat. It has been suggested that Mr. Rodriguez actually hit him with the bat, but he did not. I know this because I have spoken to the person the subject of the incident who informed me about it. The description provided by Peter Mitchell in his incident report is not consistent with what I was told and appears to be what Peter Mitchell was told by the real estate agent, Gary Wells.
107. After being advised about the incident, Peter Mitchell immediately reported it to his manager and completed an incident report and faxed this to Mr. Rodriguez's treating psychiatrist, Dr. Igor Petroff, and Damian Cleary. On Track HASI workers spoke to Dr. Petroff, Damian Cleary and Mr. Rodriguez's relief Case Manager, Fran Boston, to exchange information about Mr. Rodriguez. (A copy of the incident report is attached hereto under Tab 35).
- 109 As to the admission of Mr Rodriguez in April 2009, Ms Crayden gave the following evidence:
108. Mr. Rodriguez was unaccounted for until 15 April 2009 when he presented to LAMHU seeking admission. He was admitted into the High Dependency Unit and remained in LAMHU for a period of 6 weeks. HDUs are wards for people who need more intensive observation, treatment and nursing care than is possible in a general ward but slightly less than that given in intensive care. During the latter part of his admission LAMHU psychiatrists authorised Mr. Rodriguez to take day leave excursions with On Track staff.
109. On 20 April 2009, the On Track HASI workers advised Fran Boston that they would not visit Mr. Rodriguez in LAHMU after assessing the risks related to his delusional state. An observational risk assessment was undertaken by On Track HASI workers on 25 April 2009 while Mr. Rodriguez was an inpatient in LAHMU and while undertaking short day visits into the community. Conversations with LAHMU clinical staff indicated an improvement in Mr. Rodriguez's mental health and no evidence of psychosis or relapse in mental state. Further assessments by On Track's HASI workers were carried on multiple visits to Mr. Rodriguez in LAMHU. These observations and conversations were documented in Mr. Rodriguez's consumer's case notes which are annexed under Tab 13 hereto.
110. LAMHU's clinical notes show that Mr. Rodriguez wished to go on a day trip with On Track on 11 May 2009, and that the hospital was prepared to release him, but Roberta Brooks an On Track HASI worker refused because she did not think he was ready and was concerned about his safety and the safety of others. A copy of the LAMHU clinical note is attached hereto behind Tab 39.
111. Mr. Rodriguez was monitored by On Track's HASI workers whilst he was in hospital and he was released on day leave by the NSW Health in the company with On Track staff. At no time did NSW Health state that Mr. Rodriguez should not be released in the community or into the support of a sole worker from On Track, or that he posed any risk of harm to others.
- 110 Ms Crayden gave evidence as to the maintenance of the communal HASI team diary and HASI communications book as well as contemporaneous case notes and individual service plans.
- 111 The Agreed Statement of Facts sets out steps taken by On Track after the incident. Ms Crayden also gave evidence as to steps taken by On Track immediately following the incident and subsequently in terms of internal policies and procedures, external reviews and the development of support processes between On Track and external bodies.
- 112 The immediate changes introduced were stated by Ms Crayden to be as follows:
87. Since the incident On Track has:-
- (a) Undertaken a complete review of policies and procedures and processes around home visits, call backs, on call consumer safety audits and off site check lists and training. In addition an assessment process has been introduced in relation to them;
- (b) Documented staff shift handovers and toolbox meetings;

- (c) Requested that NCAHS ensure that when mental health clients are released from hospital they are seen by a Community Mental Health worker within 48 hours;
- (d) Developed a suite of online mandatory training tools dealing with risk assessment, WHS, managing and prevention of aggression, mental health Tiers 1, 2 and 3. We are in the process of having all of the training reviewed externally to ensure its appropriateness and we will thereafter make it available to other NGO's to utilise;
- (e) Updated the Home Visiting Policy which prohibits staff from undertaking a home visit in the event a consumer has not had a Consumer Risk Audit completed by On Track and where an updated risk assessment has not been provided by NSW Health following an admission to an in-patient clinic or a known incident involving aggression and violence (a copy is annexed hereto behind Tab 22);
- (f) Chaired the first working party for the Working Safe project with the Mental Health Coordinating Committee, WorkCover, Insurance Council Of Australia, Ministry of Health (Chief psychiatrist) and the National Disability Service;
- (g) Improved phone coverage by purchasing satellite phones for work in areas outside mobile phone range.

...

90. On Track has introduced a policy of refusing to accept any referrals without a full set of documentation which gives a clear indication of the client's status and treatment regime and includes a discharge summary. Annexed hereto behind Tab 23 is a copy of the policy (2.2 Entry and Intake) and at Tab 24, the application / referral form.

113 As to the median term adjustments, Ms Crayden gave evidence that On Track had reviewed, updated and redeveloped internal policies and procedures including the referral process from NSW Health for new and existing clients; engaged an external OHS consultant; and sought advice from various Area Health Services, other NGOs and other providers in the mental health sector in order to obtain best practice, particularly in relation to communications in relation to mental health clients on discharge from hospital. This resulted in changes to relevant policies and procedures. In relation to home visits, the following changes were introduced:

Policy / Procedure	Summary of update to procedure
Home Visiting	<p>The <i>Home Visiting policy and procedures</i> were updated to include following processes:</p> <p>Home visits to be undertaken by 2 staff for the first 2 visits following an admission to an in-patient clinic, following an incident which involved violence, aggression or intimidation</p> <p>Pre-visit phone calls to be made and documented in consumer file or staff work diary - in the event conversation not had with consumer, no visit by staff.</p> <p>Home visiting not to occur when a current risk assessment has not been provided by NSW Health during intake or after in-patient admission; 2 staff are not available to undertake initial external workplace assessment in the home; when the consumer has demonstrated detrimental behaviours or beliefs about an On Track worker; when circumstances have changed at the consumer's home and a new risk assessment has not been undertaken by 2 staff; and when staff have not been assessed as competent by their manager to undertake home visits (100% accuracy in the Home Visiting Competency Checklist is required for all staff who undertake home visits for On Track).</p> <p>Referring agency is to provide all relevant documentation (risk assessments, care plan, discharge summaries, referral form) prior to service commencing and home visits being undertaken.</p> <p>All staff undertaking home visits and community work required to complete the Off-site Risk Audit <i>prior</i> to leaving work site. White board to include details of visit and expected time of return to work site (all staff to complete each shift at work site).</p>

114 Following this evidence, Ms Crayden deposed as to the remorse of On Track, as follows:

123. The Board of On Track have authorised me to make the following statements on behalf of the organisation.

124. On Track deeply regrets that its breaches of the Occupational Health and Safety Act the subject of this hearing contributed to its workers in particular Mr. Corkhill being exposed to risk to their health and safety.

125. The impact of this tragic incident has been and is still being felt by the staff and management of On Track and the wider Lismore community.

126. On Track extend its sympathies to all persons affected by this event, particularly Mr. Corkhill's partner, his

family and colleagues.

Oral Evidence of Ms Crayden

115 Ms Crayden was cross-examined on whether a key aspect of the HASI model was the exchange of information between the parties to the accommodation provider, in particular the Area Health Service and On Track. Her evidence, in that respect, was as follows:

Q. As part of the HASI program Mr Rodriguez did sign a consent to release information permitting the Area Health Service to provide the information about Mr Rodriguez to On Trac. Just to confirm that actually occurred, look at tab 60 of the annexures to your affidavit. Can you tell me when you have had a chance to look at that using the numbering in the top right-hand corner, pages 1 and 2.

A. Yes.

Q. That is a photocopy you have produced of Mr Rodriguez's consent to On Track Community Programs to seek information from a number of listed agencies concerning matters related to his application as at August 2007?

A. Yes.

Q. So On Track had a written consent from Mr Rodriguez before this offence to obtain the information from the Area Health Service?

A. Yes.

Q. I go back to the Professor's transcript at page 38. Do you agree with his experience and opinions set out in the last answer there, which is above 15 through to 20 on page 38?

A. On page 38?

...

Q. Do you accept this proposition: A key proposition of the model was a concession to the requirement to allow the disclosure of relevant information?

A. Yes.

Q. Do you accept one reason is because HASI is done as part of a team?

A. Yes.

Q. The team involves Mr Rodriguez here as the client being managed by Housing Services to provide accommodation?

A. Yes.

Q. It was Housing Services for Mr Rodriguez to provide his accommodation?

A. North Coast Community Housing.

Q. Mental Health Services was part of this team providing mental health care?

A. My understanding is that the HASI team, it refers to the HASI co-ordinator as part of the North Coast Area Health Service, not the In-patient area.

Q. Was any part of the Area Health Service providing mental health care for Mr Rodriguez?

A. Yes.

Q. And the HASI workers were providing support for Mr Rodriguez in the community?

A. Yes.

Q. So there is these three components at least, Housing Services, Area Mental Health Services and On Track who engaged the HASI workers to work as a team?

A. Yes.

Q. There needed to be a free flow of communication between these three bodies in order to assist the client in reintegration and rehabilitation in the community, do you accept that as true and correct?

A. Yes.

Q. Coming back now to your affidavit, paragraph 38, is it not the case, given Mr Rodriguez had met the requirement of signing a consent for release of information, On Track could ask for clinical information from the Area Health Service?

A. We could.

Q. So it is not entirely correct to say On Track relies upon the Area Health Service to volunteer all necessary clinical information which is reflected in the agreement referred to by the part of the process. The key part which you accept, like Professor Greenberg, was that On Track could request it under the consent or release of information authority of Mr Rodriguez?

A. As part of the HASI program it would be requested from Community Mental Health, not from the in-patient unit.

Q. Whatever part is that part of the Area Health Service you refer to as NCAHS in paras 37 and 38 of your affidavit?

A. I am referring to the assessment and treatment of those clients within the in-patient unit.

Q. Is the in-patient unit part of what you refer to as NCAHS?

A. Yes.

116 Mr Crayden was also cross-examined as to the financial status of On Track. The following evidence was given, in that respect:

Q. Do you see on page 9 for 2012 it has total accumulated funds of \$3,372,276?

A. Yes.

Q. Does that mean funds of that quantum are available if the Court decided to impose a fine?

A. No it does not.

Q. What does it mean where it says "total accumulated funds"?

A. If I take you to the total current liabilities of \$2.229, if we subtract that from the \$3.376 that is approximately leaving \$1.9 million in cash, the other is funds that are liabilities of On Track.

The \$1.9 million that is left over is \$500,000 being set aside for maintenance of our buildings, community housing, for cyclical and responsive maintenance, a further \$500,000 will be set aside for equipment that we need to update in terms of wheelchair vans, hoists, normal vehicles, all plant and equipment. Another \$500,000 has been set aside for obligations under the contract of our community housing properties that we were given on donation funding which we have to go and borrow \$4 million against those assets and a deposit of \$500,000 needs to be expended to build more community housing properties.

That leaves approximately \$400,000 and this year On Track has lost a revenue of \$400,000.

...

Q. I am asking you, is there set out, any document which sets out the source of income and revenue for that tax year at July 2012 to 30 June 2013?

A. Not in these annexures.

Q. Is there any budget which has the types of figure you volunteered to explain the cash position? Is there any budget setting those out in your annexures?

A. That is our audited financial accounts and there would be a budget that clarified that but not in these annexures.

...

Q. Does that mean if a fine was imposed at this date there was \$3.73 million-odd of equity, part of which could be realised to pay a fine?

A. There is still liabilities of \$2.2 million, which would be long service leave, annual leave, grants which have not been expended, so no, that is not correct, there is not \$3.7 million in cash available. There is still \$2.29 million in liabilities which we would have to pay out.

...

Q. In the current financial year has On Track continued to receive funds from government?

A. From various government departments, yes we have.

Q. And from other bodies apart from government?

A. There may be some fund raising.

Q. Is there any annexure attached to your affidavit which sets out for this present tax or financial year all of those various funds and their quantum?

A. No, those audited financial accounts are not being completed until the end of the financial year, June 30. So that annexure is not here.

Q. In your possession you have access to that information, don't you?

A. Monthly profit and loss and balance sheets, yes.

Q. Are any of those attached for this present financial attachment?

A. No, they are not.

Victim Impact Statements

117 The Court received Victim Impact Statements signed by Nathan Corkhill, Mr Corkhill's son; Sarah Corkhill, Mr Corkhill's daughter; Giovanni Matthew Cordeiro, Mr Corkhill's partner; Wendy Corkhill, Mr Corkhill's mother; Kerrie Louise Kehn, Mr Corkhill's sister and Damian Andrew Corkhill, Mr Corkhill's brother. There were no objection to those Statements being received by the Court. The Statements of Nathan Corkhill, Ms Kehn and Mr Cordeiro were read aloud to the Court during the sentencing proceedings. The Court acknowledges its receipt of the Statements.

118 Whilst I am unable to take into account the Statements in determining penalty (*Inspector Lancaster v M L Colturi Sawmills Pty Ltd* [2011] NSWIRComm 47 at [80]), I acknowledge the effect the incident has had upon Mr Corkhill's family.

119 The Statements provided by each of Mr Corkhill's family members were heartfelt and of great depth. Nathan and Sarah Corkhill painted a picture of Mr Corkhill as a supportive, loving, caring, generous and compassionate father and grandfather. His sister, Kerrie, spoke of her love, pride and admiration for a man who was genuinely dedicated to the work of helping those in the community who needed it. Mr Corkhill's mother, Wendy, described how much she missed her loving and caring son. His brother, Damian, told of their shared interests in gardening, cooking, World War II and technology, and remembered Mr Corkhill as a supportive and caring brother. Mr Corkhill's partner, Giovanni, spoke of an extremely kind-hearted, empathetic and warm man who was dedicated to improving the lives of others less

fortunate. He spoke of their plans to travel, and the deep pain and anguish he suffers as a result of his loss.

- 120 It is clear, from the Statements provided by members of Mr Corkhill's family, that he was a much loved and cherished individual. It is evident that the pain caused by his death continues to be felt by each of them.
- 121 The family of Mr Corkhill is clearly close knit, and I take some comfort from the knowledge that they remain a strong source of support for one another. I wish to express my hope that, by the conclusion of these legal proceedings and with the passing of time, they will receive some deliverance from the suffering they are presently experiencing. The Court extends its deepest sympathy to them all.

Submissions

Submissions for the Prosecutor

- 122 Mr Docking made oral and written submissions which, when taken together, are summarised as follows:
- (1) The offending conduct to which the defendant has pleaded guilty is contained in the Amended Application for Order. It is a contravention of s 8(1) of the OHS Act 2000.
 - (2) There is an evidentiary foundation for the identifiable risk in particular (1) to the charges (noting further that between 23 June 2009 and before the actual incident on 27 June 2009, three of the defendant's employees were exposed to the risk which did not materialise into an actual incident). Further, there was an evidentiary foundation for the remaining particulars to the charge numbered (2) to (4) respectively.
 - (3) The maximum available penalty for a first offender such as the defendant is a fine of \$550,000.
 - (4) The offence is extremely serious. There has been a significant contravention of s 8(1) of the Act.
 - (5) As to the objective seriousness of the offence, and relying upon *Cahill v State of New South Wales (Department of Community Services) (No 4)* [2008] NSWIRComm 201 (a violence at work case), the following factors are relevant to assessing the objective seriousness of the offence in this matter:
 - (a) The gravity of the offence is most apparent from the fact that the defendant knew or should have known that Mr Rodriguez posed a serious risk to the health and safety of employees, yet the defendant allowed its employees to be exposed to that serious risk of harm and failed to implement adequate measures to deal with it.
 - (b) Relying upon the 14 June 2011 report of Professor Greenberg, the risk was reasonably foreseeable. The Court may also approach the matter on the basis that the defendant was plainly aware of the risk having regard to information contained within the defendant's own records before the incident on 27 June. On Track's own Occupational Health and Safety Policy noted that: "Due to the sometimes unpredictable nature of On Track's clients there is a potential for behaviour becoming unsafe on occasions with On Track". Professor Greenberg, in re-examination, agreed that it must be assumed that it was unpredictable when such clients, in particular Mr Rodriguez, may become unsafe and, therefore, there was always a risk. It is no answer to say it was unknown when exactly or precisely that risk may have arisen and/or manifested itself in the form of an actual incident; there was always a risk of violence.
 - (c) In relation to Mr Rodriguez in particular, it was accepted that the evidence of Professor Greenberg indicated that Mr Rodriguez could slip into a psychotic state very quickly and at any time. However, it was also his evidence that there were significant historical and static factors which pointed to Mr Rodriguez being a risk to any worker who came across him in the course of their employment.
 - (d) The evidence demonstrated that various policy documents which set out the discharge process, including the need for a discharge summary to be completed at or before the date of discharge, were always available to the defendant during and prior to the charge period. The discharge summary in relation to Mr Rodriguez dated 26 May 2009 was available to On Track prior to and during the charge period but was not obtained. That Summary noted there was a: "[m]oderate - high risk [of] violence when manic or psychotic". The reasons for referral/admission stated in that Summary included: "poor impulse control and child like behaviour". The risk of both suicide and violence was recorded as being "low". In respect of the discharge summary relating to the 23 June 2009 discharge of Mr Rodriguez, it was not suggested that Summary was provided or available to On Track before the incident (however, there should have been a prohibition on dealing with Mr Rodriguez until such time as that Summary was available to and obtained by On Track).

That Summary indicated, as a reason for referral/admission, Mr Rodriguez had been, amongst other things, "[a]pparently verbally aggressive with a neighbour. Long history of schizo affective disorder". On the 23 June 2009 discharge summary, Mr Rodriguez's risk of violence was observed as being "medium". As referred to in particulars (2) and (3)(b), had there been a prohibition on dealing with Mr Rodriguez until the discharge summaries of 26 May 2009 (which were available to On Track at all relevant times) and 23 June 2009 had been obtained by On Track, the risk would have been avoided.

- (e) It was accepted that this was not a case where the defendant had no systems in place, rather one where the defendant's systems were inadequate.
- (f) Simple and straightforward remedial steps existed that could have been taken by the defendant to avoid the risk to safety.

123 There were aggravating factors as follows:

- (1) The victim was a health worker or community worker, and the offence arose because of the victim's occupation (s 21A(2)(a)). The common law recognises that persons in certain occupations are called upon to place themselves in danger and do so for the benefit of the community at large.
- (2) The offence involved the actual or threatened use of violence (s 21A(2)(b)). This does not amount to double counting.
- (3) The injury, emotional harm, loss or damage caused by the offence was substantial (s 21A(2)(g)). In any event, although the damage or injury caused by the breach does not, of itself, dictate the seriousness of the offence or the penalty, a breach where there was every prospect of serious consequences may be assessed on a different basis to a breach unlikely to have such consequences. In such a case, the occurrence of death or serious injury may manifest the degree of seriousness of the relevant risk.
- (4) General deterrence and specific deterrence should loom large in the present sentencing exercise.
- (5) Occupational violence is a major issue in a range of industries - for example, community workers, correctional officers, teachers, police and health workers including nursing staff.
- (6) The defendant continues to be a major employer in its undertakings. The defendant has three branches in Lismore, Tweed Heads and Coffs Harbour and, at the time of the incident, employed approximately 99 full time equivalent employees and had a total staff of 189. The defendant currently employs 278 people with approximately 179 full time equivalent employees. Thus, there is a need for specific deterrence.

124 There were mitigating factors which should be taken into account in sentencing under s 21(A)(3) of the *Crimes Sentencing Procedure Act 1999* ('the CSP Act') as follows:

- (1) The offence was not part of a planned or organised criminal activity (s 21A(3)(b));
- (2) The offender does not have any record of previous convictions (s 21A(3)(e));
- (3) The offender was a person of good character (s 21A(3)(f));
- (4) The offender is unlikely to re-offend (s 21A(3)(g));
- (5) The offender has good prospects of rehabilitation (s 21A(3)(h));
- (6) The remorse shown by the offender for the offence (s 21A(3)(i));
- (7) The plea of guilty by the offender (as provided by ss 22 and 21A(3)(k) of the CSP Act) and the prosecutor accepts that the defendant entered a plea of guilty at the first available opportunity to the Amended Application for Order;
- (8) Assistance by the offender to law enforcement authorities (as provided by s 23 of the CSP Act; see s 21A(3)(m)).

125 As to subjective matters, the Court may take into account the extensive steps the defendant has taken to improve its policies and practices relating to occupational health and safety.

126 The prosecutor put submissions going to the following matters co-jointly with submissions as to the application for the Court to apply s 10(1)(a) of the CSP Act. Those were as follows:

- (1) The defendant is a non-government, not-for-profit organisation.

- (2) The contribution to a risk to safety by another entity, namely, the NCAHS, and whether it should be considered in mitigation in the assessment of penalty of a defendant.
- (3) Why Mr Corkhill attended the premises of Mr Rodriguez on 27 June 2009.

127 As to the application made by the defendant under s 10(1)(a) of the CSP Act, the prosecutor made the following submissions:

- (1) The judgment in *Inspector Jennifer Searle v Baptist Community Services - NSW & ACT* (Industrial Relations Court of New South Wales, 19 December 2003, unreported) in which an application was granted under the section may be distinguished in the light of the judgment of Boland J in *Inspector McColl v Combined Crane Rigging & Arthur Didovich* [2004] NSWIRComm 48 at [41] to [48].
- (2) It is not always helpful to trawl for comparisons with other decided cases and it would be futile to attempt to gauge the element of manifest seriousness from a single decision that forms part of a range of cases with widely differing objective and subjective circumstances (*R v Zhang* [2004] NSWCCA 358 at [26]).
- (3) On balance, there does not exist any or sufficient extraordinary or highly exceptional circumstances to permit the Court to find a proper basis for the Court to make an order under s 10(1)(a) of the CSP Act.
- (4) The objective factors weigh heavily against the application.
- (5) Reference to the actual offence committed by the defendant and its surrounding circumstances militate against it being characterised for the purposes of s 10(3)(b) as "trivial".
- (6) The defendant is entitled to have its character and antecedents weighed in its favour (s 10(3)(a)).
- (7) As to reliance by the defendant upon it being a non-government, not-for-profit organisation, the prosecutor submitted:

30. In order to put this factor in the balance, the Court would need to determine that it falls within s 10(3)(d) - "any other matter that the court thinks proper to consider";

31. The defendant's annual reports and financial statements provide a context for the Court to assess the defendant's financial means or capacity to pay any fine and costs;

32. The prosecutor advises the Court that the present estimate of costs is \$70,000 - a breakdown of that estimate is available if requested;

33. It is for the defendant to prove on the balance of probabilities that it has limited means to pay. It is submitted that the defendant cannot do so;

34. If there is any reduction in the amount of fine that the Court would otherwise have ordered to be paid by the defendant due to the defendant's limited means, contrary to the prosecutor's submission, the result should be not be a disproportionate reduction nor one that does not give sufficient weight to the primary objective factors;

35. Attachment A is a copy of extracts from judgments that have previously considered not for profit or charitable entities. The prosecutor submits that there should be consistency as explained by *Hili v The Queen* (2010) 85 ALJR 195:

The question of "norm" or starting point raises questions about consistency in sentencing federal offenders. It will therefore be necessary to examine what is meant by "consistency", and to consider the means by which consistency is achieved. These reasons will show that the consistency that is sought is consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence. Consistency in sentencing federal offenders is achieved by the proper application of the relevant statutory provisions, having proper regard not just to what has been done in other cases but why it was done, and by the work of the intermediate courts of appeal." (emphasis added).

- (8) As to the contribution of others to the risk:
 - (a) The role of the NCAHS was: to assess applicants as part of the application process; to complete assessment forms including undertaking a risk assessment and D1 discharge summary and to provide such forms to On Track; to provide clinical mental health services based on each client's individually assessed needs; to provide a Mental Health Care Coordinator who was responsible for coordinating clinical mental health care to HASI clients; to provide treatment and rehabilitation, crisis intervention and urgent psychiatric assessment when required; to provide clinical case management for HASI clients and to volunteer all necessary clinical information to On Track;
 - (b) In order to put this factor in the balance, the Court would need to determine that it falls within s 10(3)(c) or

- (d) - "the extenuating circumstances in which the offence was committed" or "any other matter that the court thinks proper to consider";
- (c) In relation to the question as to whether another entity may have played a role in the risk arising, the prosecutor submitted that, by reliance upon what was said in *Inspector Howard v Baulderstone Hornibrook Pty Ltd* [2009] NSWIRComm 92; (2009) 186 IR 128 at [241] ('*Cross City Tunnel*'), the charge sets out measures which were entirely within the control of On Track of which it had the capacity to implement before and at the time of the charge period. Such measures (in particular, prohibiting contact with Mr Rodriguez until such time as the relevant discharge summaries had been obtained) would have controlled the risk regardless of any actions the Area Health Service did or did not take.
- (9) As to the contribution of Mr Corkhill returning to the premises on 27 June 2007, the following was submitted:
- (a) The Court was informed that the basis upon which there was negotiated an Amended Application for Order and then acceptance by the prosecutor of a guilty plea included that "... it will not be suggested that Mr Corkhill was on a frolic of his own on the night of the incident and it is agreed that he attended the premises in the course of his employment". It is unable to be determined beyond reasonable doubt or on the balance of probabilities why Mr Corkhill went to he premises on the night of the incident;
- (b) In order to put this factor in the balance, the Court would need to determine that it falls within s 10(3)(c) or (d).
- (10) As to the matters raised in the affidavit of Ms Crayden at [17] to [20] regarding the initial approach of WorkCover to the investigation of the matter and various aspects of the prosecution, including the fact that NSW Health was not investigated, the investigation was undertaken over a very short period of time and key personnel were not interviewed, it was submitted that these facts may not be properly put in the balance for the purposes of s 10(3)(d). It was also submitted that the defendant had pleaded guilty to the charge contained in the Amended Application for Order, and this factor was, therefore, irrelevant.
- (11) In relation to the question of an absence of prosecution in respect of the Area Health Service, the prosecutor submitted that this was not a matter the Court should entertain. Even if the Court was convinced by the statement of principles provided by the defendant in submissions, the defendant has not proved anything sufficient, on the balance of probabilities, for the Court to take into account in this respect. If that argument was pursued in some way to mitigate any penalty, it is irrelevant. The defendant pleaded guilty to the charge as contained in the Amended Application for Order and, therefore, admitted the risk and measure set out therein. (In making that submission, the prosecutor was not suggesting that it was not open to the Court to look at the role of other entities per the principle set out in *Cross City Tunnel*.)

128 The prosecutor made an application for a moiety of the fine and costs.

Submissions for On Track

129 Mr Hodgkinson made oral and written submissions which, taken together, are summarised as follows:

- (1) The charge brought in the Amended Application for Order is significantly more refined than in the original charge.
- (2) The charge is confined to the period 23 to 27 June 2009. On 23 June 2009, Mr Rodriguez was under the care of the Area Health Service which, upon his discharge, formed a view that he was not a risk to himself or others (as per the evidence of Professor Greenberg, Mr Rodriguez's treating clinicians had to have that view in order to discharge him).
- (3) The measures particularised, if implemented, would not have eliminated the risk. The evidence of Professor Greenberg stated it was "unknown and speculative to suggest they [being measures, including those particularised in the charge] would have changed the outcome on 27 June 2009". There was a limitation to the control that may have been exercised over the risk other than by the provision of information. In the result, the offence was of a lesser category of seriousness.
- (4) The charge only relates to the risk arising in relation to Mr Rodriguez. The charges are attributed to a defined group of employees, namely, Mr Corkhill, Ms Brooks and Mr Mitchell.
- (5) The risk only arose in relation to those employees at certain times during the charge period. For example, Mr Corkhill only had contact with Mr Rodriguez on 27 June 2009 and Mr Mitchell was not at work on 23 and 24 June.

- (6) As to particular (2) it must be noted that there was no discharge summary during the charge period. The relevant discharge summary, dealing with Mr Rodriguez's 23 June 2009 discharge, was not available until 1 July 2007 (after the incident). It was not the responsibility of On Track to prepare a discharge summary; that was the responsibility of the Area Health Service.
- (7) As to particular (3), the measures had been incorporated in a new system adopted by On Track. However, the measures only go to the provision of some information "which information is not consistent with what was known".
- (8) In any event, whilst the discharge summary produced on 1 July 2009 referred to Mr Rodriguez representing a medium level risk of violence (even though the reasons for "referral/admission" indicated that he had been verbally aggressive with a neighbour and had exhibited physical aggression towards strangers), his next injection of medication was not due until 30 June and under 'measures to be taken' nothing was indicated. The discharge summary indicated that the care coordinators for Mr Rodriguez were Dr Thornburn and Dr Foy. Statements were not taken from those persons. No indication was given as to any particular measures which should have been taken upon Mr Rodriguez's discharge.
- (9) It was accepted that the discharge summary relating to Mr Rodriguez's 26 May 2009 discharge, referred to in particular (4), was available during the charge period but was not obtained by On Track. However, that discharge summary would have provided On Track with very little assistance. This was because Mr Rodriguez was discharged on 26 May but, some 12 hours later, was readmitted to Lismore Base Hospital on 27 May 2009. Hence, what was stated on 26 May was no longer valid on 27 May, given that on 26 May the Area Health Service had satisfied itself that Mr Rodriguez was not a risk to himself and others, could return to the community and had an adequate treatment regime.
- (10) The discharge summary of 26 May 2009 indicated that, in relation to Mr Rodriguez, there was a "moderate - high risk [of] violence when manic or psychotic". The discharge summary did not suggest, however, that if Mr Rodriguez was not in a psychotic state he would be violent. The discharge summary, therefore, did not act as a prohibition but as a warning in the event that Mr Rodriguez fell into a psychotic state or displayed symptoms indicating the existence of a psychotic state. That is consistent with the evidence of Professor Greenberg to the effect that, when not in a psychotic state, Mr Rodriguez presented a lower risk given there was no "clear" documentation of him being violent at times when he was not in a psychotic state.
- (11) Whilst different from the management of a risk associated with a piece of machinery, HASI workers were required to control risks associated with dealing with Mr Rodriguez based on their past experience with and through observations of him.
- (12) Nothing in the records kept by On Track during the relevant period indicated that Mr Rodriguez was slipping into a psychotic state or exhibiting signs of psychotic behaviour. This was notwithstanding the fact that the HASI workers had experience dealing with Mr Rodriguez, were aware that he had a long history of mental illness and had exhibited violent behaviour when in a psychotic state. As at June 2009, Mr Rodriguez had not consumed alcohol for a period of 22 months and had not been violent towards HASI workers whilst he was on the HASI program, although On Track knew Mr Rodriguez had a violent history (including the incident involving the cricket bat). HASI workers had visited Mr Rodriguez in hospital. At the time of his discharge on 23 June 2009, Mr Rodriguez did not exhibit any behaviour towards Ms Brooks which would indicate that he would not be permitted to rejoin the HASI program. The HASI workers were trained to observe and held daily briefings about activities. The evidence of Professor Greenberg provided that Mr Rodriguez's behaviour and speech were symptoms which may have indicated he was in a delusional state; again, as noted, there was no record of any bizarre or delusional behaviour or speech. It was also the evidence of Professor Greenberg that it was obvious when Mr Rodriguez was not behaving normally and his mental illness was having some impact on his personality.
- (13) The offence in this matter would have been a much more serious one if Mr Rodriguez had been observed to have been exhibiting signs of psychotic behaviour which HASI workers did not recognise. There was no observation of behaviour by Mr Rodriguez which would have indicated the prospect of the risk arising "right up until approximately 4.00 to 4.30 pm on the afternoon of the 27th when Mr Mitchell left Mr Rodriguez's house". The fact that Mr Rodriguez was noted as being "anxious" on 25 June 2009 was not a sign, according to the evidence of Professor Greenberg, that he was slipping into a psychotic state.
- (14) The Area Health Service was responsible for the clinical management and assessment of mental health clients, including Mr Rodriguez. The HASI program was not responsible for such assessments but, rather, to provide an

"integration service" for clients into the community. There was support by way of rehabilitation and reintegration. As noted, until the murder of Mr Corkhill, Mr Rodriguez did not exhibit any signs which may have indicated to a non-clinical person that he had slipped into a psychotic state. According to Professor Greenberg's evidence, Mr Rodriguez may not have slipped into such a state until shortly before or at the time of the murder. It may be that something had triggered him at that time. The HASI workers dealt with Mr Rodriguez in that context; the risk could not be eliminated by control.

- (15) It was accepted, however, that the nature of Mr Rodriguez's condition, and how that condition exhibited itself to both clinicians and lay persons, might have been the very reason why the additional measures referred to in the charge were required to be undertaken. However, the HASI workers potentially at risk from Mr Rodriguez were making appropriate observations and reacting appropriately to particular behaviour. There was an absence of signs that Mr Rodriguez was moving back into a psychotic state (which state he was in at the time of the murder).
- (16) It was accepted that particular (3)(a) referred to a measure where two persons would be present upon re-accepting Mr Rodriguez into the HASI program. However, having two HASI workers deal with Mr Rodriguez would not have changed the circumstances of the incident or managed the risk "in a way that would have produced a different result". This is because, on the evening of the incident, Mr Corkhill was working at The Refuge and Mr Rodriguez was not a client of The Refuge. Whilst it was not submitted that Mr Corkhill was on a "frolic", there was no Refuge-based reason for, nor any explanation, on the evidence, as to why, Mr Corkhill departed from his duties at The Refuge to visit Mr Rodriguez.
- (17) Mr Corkhill worked regularly at The Refuge, and was familiar with his duties there. He was also familiar with the policies which were required to be adhered to in the event he was to take some step outside his normal duties.
- (18) In particular, On Track had a Home Visiting Policy. The object of the policy was: "to ensure all staff [h]ad a clear understanding of the potential risks associated with home visiting and to provide a framework to eliminate any such risk". The policy statement indicated that home level support carried risks. Staff needed to provide a good risk assessment, evaluate the situation and ensure they removed themselves immediately if there was any potential risk to their safety. With those considerations in mind, the policy provided: "all home visits by staff will be undertaken only during normal business hours by previously arranged appointment and the permission and at the convenience of the consumer-client". It further provided that the On Track worker: "will do an initial phone risk assessment". It further provided that: "where at all possible unannounced visits should be avoided". There were possible exceptions including where there was an emergency or crisis calls.
- (19) Mr Corkhill did not conform with the Home Visiting Policy. He made no advance call to Mr Rodriguez or to his partner/girlfriend, Zeeta. There was no emergency or crisis situation which may have explained the need for an announced visit to the premises. In addition to not contacting Mr Rodriguez or his partner/girlfriend, Mr Corkhill made no contact with any other person before he left The Refuge to attend the premises. Mr Corkhill used his own vehicle to visit the premises.
- (20) Had Mr Corkhill followed the policy, the risk may have been controlled. A telephone call in advance may have been able to detect anything unusual about Mr Rodriguez's demeanour. Mr Corkhill's departure from the Policy was unusual as he was normally "policy compliant".
- (21) This is not a case where "no thought had been given to controlling the risk". The risk was difficult to control in such circumstances and considerable thought had been given to it, including in relation to Occupational Health and Safety policies. Hence, there were policies in place identifying appropriate steps to control the risk.
- (22) On Track made extensive, appropriate changes after the incident. These changes address not only the immediate circumstance but risk factors on a wider basis.

Role of Other Entities

- (23) As to the question as to who was interviewed by WorkCover, the defendant submitted:

Your Honour is not asked to go behind the decision as to whether somebody was or was not the subject of a prosecution. Your Honour cannot do that unless an abuse of process case is made out and no such case is made here or is sought to be made. What your Honour can do is firstly look at the culpability question, in circumstances where your Honour knows the Health Service hasn't been prosecuted, for the purpose of, the justifiable sense of grievance argument which I am sure your Honour is permitted that is the parties entitled to raise in mitigation, of its liability, the fact that other parties were culpable in the circumstances in which it found itself.

- (24) As to circumstances dealing with "joint parties", one entity, the Area Health Service, had responsibility for the clinical needs and assessments of Mr Rodriguez, and they failed in material ways to discharge that obligation.
- (25) Clients of HASI are also clients of the Area Health Service which is responsible for coordinating clinical mental health care including the provision of a full range of mental health services to clients based on their clinical needs. Mr Cleary was a coordinator for the Area Health Service in that respect. His role included making a proper assessment of the mental health needs of clients, including Mr Rodriguez. In 2007, Mr Cleary introduced Mr Rodriguez to On Track as being appropriate for the HASI program (Mr Cleary remained Mr Rodriguez's Case Manager up until the point of the incident). He was responsible for ensuring that Mr Rodriguez had been properly assessed as to his mental health needs. Mr Rodriguez was provided with social integration services (that is, assistance with non-clinical, non-mental matters such as being taken to medical appointments, taken shopping or assisted with household duties) by accommodation support providers, but was not provided with clinical services.
- (26) Mr Cleary's role with the Area Health Service also included the provision of information to hospital staff when the client was hospitalised. Mr Cleary failed to provide "any real knowledge gained by his access to clinical records both inside and outside the system [that is] the immediate Area Health Service" and he "failed to provide a lot of information that was otherwise there". Mr Cleary was a psychiatric nurse with 40 years' experience and was a clinically trained person capable of making clinical assessments himself without access to other persons with training, education and experience.
- (27) The Discharge Policy Directive issued by NSW Health concerning Discharge Planning for Adult Mental Health Inpatient Services was not a document that bound or applied to On Track. The Care Plan and Discharge Planning referred to in the Policy must be undertaken before the discharge of a client. NSW Health did not take those steps for Mr Rodriguez, and On Track could not enforce NSW Health's Policy. When Mr Rodriguez was discharged, On Track was entitled to accept that he was discharged on the basis of the Policy, including the Discharge Planning principle that "a comprehensive Discharge Care Plan should be developed before discharge" and that the MH-OAT Care and Discharge Plans would to be provided to service providers within seven days.
- (28) Even though Mr Rodriguez signed a consent form enabling On Track to access his clinical records, Ms Crayden's evidence was that clinical information was not provided by NSW Health to On Track and even its own Policy did not require the provision of discharge information for seven days.
- (29) As noted, in order to discharge Mr Rodriguez on 23 June 2009, the clinicians who were treating him had to form a view (and did form a view) that he was not at risk to himself or others (which view conformed with the observations of Ms Brooks when collecting him from the hospital). In the 23 June 2009 discharge summary (made available after the incident on 1 July 2009), an appointment was made for Mr Rodriguez with his doctor for 30 June, but on the basis of the clinical assessment made, no such visit was required between 23 and 27 June 2009. On Track relied upon the views formed by the clinicians who held a statutory obligation which was reinforced by the agreement existing between the respective organisations, namely, On Track and the Area Health Service.
- (30) The actions of the Area Health Service allowed On Track to assume "that they had reached a very important decision, that is, Mr Rodriguez had [not] harmed himself or others as at the time of the discharge on the 23rd of June". This is not a case of joint enterprise, as such, but one entity "stepping in and out to some extent". It is appropriate to assess the culpability of On Track in the light of the actions taken by NSW Health. On discharge, Dr Thorburn stated that Mr Rodriguez was "well".
- (31) The culpability of On Track is that there was a risk that Mr Rodriguez would be violent because he was in a psychotic state and "that measures that we have accepted we did not undertake on discharge summary". The Area Health Service contributed to the risk by not providing the discharge summary required.

Deterrence

- (32) As to the question of deterrence, it was submitted by On Track that deterrence should play no role in considering penalty. Alternatively, it should play only a minor role, having regard to the following:

Given the character of the Defendant, the measures in place prior to 23 June 2009 and those put in place following 27 June 2009, there is no demonstrated need for specific deterrence in order to compel the attention of the Defendant to its obligations under the OHSA.

- (33) In considering the issues raised by the principles going to the issue of general deterrence, the unique circumstances which give rise to this matter, the public interest in having services such as those provided by On Track, particularly in difficult areas of health management, give a strong indication that no element under this heading is necessary.

Subjective Factors

Co-operation

- (34) The defendant has co-operated with the prosecutor.

Prior Convictions

- (35) The defendant has no prior convictions.

Character

- (36) The defendant is a non-government charity of the highest character. On Track won a Premier's Award because the HASI program had been successful. In fact, Mr Rodriguez had been considered to be an outstanding "product" of the service and was introduced to the relevant Minister.

Financial Considerations

- (37) As to economic considerations, the evidence revealed that On Track was a not for profit charitable institution which, as a consequence of its program delivery, had budgeted to make a "\$400,000 loss this year". On Track does not make a submission under s 6 of the *Fines Act* 1996 and does not submit that it lacks the capacity to pay. However, any fine would divert money away from the delivery of programs. This is relevant to any fine which may be imposed and to the application which On Track makes under s 10 of the CSP Act.
- (38) Notwithstanding carrying over a \$1.9 million surplus for the trading year 2012-2013 there would be a \$400,000 loss.

Costs

- (39) On Track does not oppose an order for costs but submits that the Court can have regard to the quantum of costs sought by the prosecutor being estimated at \$70,000. This should be seen as sufficient penalty having regard to the character of the defendant and its activities.

Sections 10(1)(a) and 10A of the CSP Act

- (40) On Track sought the matter be dismissed under s 10(1)(a) of the CSP Act or, alternatively, that the Court dispose of the proceedings without imposing any penalty pursuant to s 10A of the CSP Act.

- (41) Those submissions were advanced on the following grounds:

2.1. The Prosecutor's characterisation of the offence as set out in paragraph 10 of the Outline ought to be rejected.

Properly characterised the offence is a minor one having regard to:

- (i) the limited nature of the charge as pleaded;
- (ii) the fact that the risk could not be eliminated but only identified or controlled;
- (iii) that Mr Rodriguez did not exhibit any signs of relapse prior to the murder itself;
- (iv) that the Area Health Service had not even prepared a discharge summary as at the 27th June 2009;
- (v) that the HASI workers demonstrated an understanding of the need to observe Mr Rodriguez's behaviour, which they did;
- (vi) that On Track and its work force were entitled to believe that Mr Rodriguez was not a threat to himself or others;
- (vii) there is no known reason for Mr Corkhill's visit to the premises occupied by Mr Rodriguez on 27 June 2009;
- (viii) On Track had policies in place regarding home visits that provided greater control measures in relation to the risk posed by Mr Rodriguez than those contained in the charge;
- (ix) there is no known reason why Mr Corkhill did not comply with the On Track Home Visit policies on 27 June 2009;
- (x) that even if the measures set out in the charge were operating on 27 June 2009, it is "unknown and speculative to suggest that they would have changed the outcome on 27 June 2009" per Professor Greenberg.

2.2. The Defendant has no prior convictions and as a non-government charity is a legal person of the highest character.

The Defendant has co-operated with the Prosecutor.

2.3. "s.10 and its predecessors reflect the willingness of the legislature and the community to provide offenders with an opportunity in certain circumstances to maintain a reputation of good character and to avoid the otherwise rigid application of inexorable laws." *R v. Mauger* [2012] NSWCCA 51 (30 March 2012) at [18] referring to *Cobiac v. Liddy* (1969) 119 CLR 257 at 269; *R v. Nguyen* [2002] NSWCCA 183 at [150].

2.4. There are cases where, notwithstanding the objective seriousness of the offence committed, it is appropriate in all the circumstances to dismiss the charge or to discharge the offender.

2.5. The focus of the Court's inquiry is "on the particular conduct of the offender and the circumstances of offending rather than on the nature of the offence." *R v. Mauger* at [19] referring to *Walder v. Hensler* (1987) 163 CLR 561 at 577.

2.6. It is open to find on the facts in this matter that the Defendant "has been subjected to extenuating circumstances over which it had no direct control." *Wong v. Melinda Group Pty Ltd* (1998) 82 IR 118 at 133.

Prosecutor's Submissions in Reply

130 In reply, the prosecutor put the following submissions in writing:

1. The Prosecutor does not purport to exercise a general right of reply but will address certain issues of law and fact by identifying contrary propositions to assist the Court in its sentencing exercise

2. The risk in particular (1) could be controlled and eliminated by at least the "prohibited" measure in particular (2); see *John Holland Pty Ltd v Industrial Court of New South Wales*; *Parsons Brinckerhoff (Australia) Pty Ltd v Industrial Court of New South Wales* [2010] NSWCA 338 at [113], [114]; *Newcastle Wallsend Coal Company Pty Limited & Ors v Stephen Finlay McMartin* [2006] NSWIRComm 339 at [365]; *Cahill v State of New South Wales (Department of Community Services) (No 3)* [2008] NSWIRComm 123 at [319].

3. In any event, it has long been settled, including in the context of violence at work cases, that for meeting the defendant's obligation, "That may be done by eliminating, or preventing or minimising exposure to, any risk however it may have come about or, given the defence of reasonable practicability, by taking all reasonably practicable steps to ensure employees are not exposed to the risk"; see, for example, *The Crown in the Right of the State of New South Wales (Department of Education and Training) v Maurice O'Sullivan* [2005] NSWIRComm 198 at [42].

4. The defendant's records indicate that its employees exposed to the risk were not armed with adequate information about the mental health, psychotic states and violence of Mr Rodriguez; see as at 1 February 2009 the defendant's "Consumer Safety Audit" completed by Mr Corkhill with the objectively incorrect ratings in rows 2, 3 and 4 of 1, 1 and 1, and the comment "There are no known safety issues with Regan." (Crayden affidavit Tab 9).

5. After that "Consumer Safety Audit", the defendant in its "Casenotes" recorded further relevant information (Crayden affidavit Tab 13).

6. Obtaining the two Discharge summaries (Tabs D and E to AF) should have led to Mr Rodriguez being rated in rows 2 and 4 as 5 and 3 (the highest scores in the audit document) and other information should have rated him for row 3 as 3 or 2. The rating in row 1 of 0 makes no sense as no information was requested or obtained by the defendant pursuant to the consumer's 'Consent' form; further see the post-incident measure of refusing to accept any referrals without a full set of documentation (Crayden affidavit at [90]).

7. The Prosecutor in oral submissions has already provided transcript references to Professor Greenberg's oral evidence supporting that Mr Rodriguez always posed a risk.

8. Particulars 3(a) and (b) apply throughout the charge period when any of the particularised employees were at work and irrespective of whether Mr Corkhill was at work in the defendant's HASI or refuge capacity. AF at [64] and [65] and Crayden affidavit tab 13 "Casenotes" for charge period demonstrate the practical intermingling of these aspects of the defendant's work.

9. *R v Mauger* [2012] NSWCCA 51 also said, "19. Where the offence that is committed is an objectively serious one and where general deterrence and denunciation are important factors in sentencing for that offence, the scope of the operation of the section decreases. The section must operate in the context of the general principle that the penalty imposed for any offence should reflect the objective seriousness of that offence ..."

131 The prosecutor supplemented its written submissions in reply orally as follows (in summary):

- (1) The defendant's contention that it was unknown and speculative as to whether the measures specified in the particulars to the charge would have affected the outcome on 27 June 2009 should be rejected. Whilst it was accepted that Professor Greenberg expressed a clear view that "having two people present" may or may not have led to a different outcome (although it would have been a risk management strategy), his comments could never have been addressed to what is contained in particular (2), namely, the measures prohibiting contact or dealings with Mr Rodriguez until discharge summaries had been obtained. Those measures were not contained in the original Application for Order (to which the Professor had access) but were introduced in the Amended Application for Order (to which the defendant pleaded guilty). It is not available, therefore, for the defendant to rely upon the evidence of Professor Greenberg to argue that prohibiting contact with Mr Rodriguez may not have resulted in a different outcome.
- (2) By expansion upon paragraphs 4 to 6 of the written submission in reply, it was contended On Track employees exposed to the risk, in particular Mr Corkhill, were not armed with adequate information about the mental health,

psychotic states and past violence of Mr Rodriguez. So much is apparent from the Consumer Safety Audit form dated 1 February 2009 which had been completed by Mr Corkhill in relation to Mr Rodriguez (see Annexure B to this judgment). In that form, in response to question 2: "Has the consumer any history of violence?", Mr Rodriguez was rated a "1" (meaning it had been "5 years or more" since any recorded history of violence). That answer was objectively wrong. Mr Rodriguez should have been rated a "5" (meaning "within 1 year"). In response to question 3: "Has the consumer a history of Drug and/or Alcohol abuse?", Mr Rodriguez was again scored as a "1" (meaning "5 years or more"). However, in his 14 June 2011 report, Professor Greenberg noted that, in relation to Mr Rodriguez's tenth admission to hospital (for the period 1 September 2008 to 9 October 2008): "Mr Rodriguez presented himself to the Emergency Department at the hospital because of increased anxiety in the context of problematic neighbours with reported drug and alcohol usage and recent relationship problems with a girl." Accordingly, Mr Rodriguez should have been rated a "3" (meaning "within 1 year"). In response to the question: "Has the consumer any history of Psychotic and/or antisocial behaviour?", Mr Rodriguez was rated a "1" (again meaning such a history had not come to notice for five years or more). Mr Rodriguez should have been rated a "3" for that question given he had, within one year, had a history of psychotic and/or antisocial behaviour. Had On Track employees been provided with adequate information about the mental health, psychotic states and violence of Mr Rodriguez to enable the Consumer Safety Audit form to be correctly completed, Mr Rodriguez would have had a total score of 11. According to the form: "If points total between 10 and 17 visiting with security personnel should be considered". (It was, in fact, concluded on that form that, as a result of his low score, Mr Rodriguez could be visited by a single staff member.)

- (3) By expansion upon paragraph 8 of the written reply submissions, the prosecutor put there was an intermingling of both clients and work between the HASI program and The Refuge. As such, it cannot be said that Mr Corkhill had strictly defined roles, and worked exclusively as a HASI worker one day and a Refuge worker the next. This is evidenced by a case note made by Mr Corkhill dated 17 June 2009 which referred to visiting and assisting both Mr Rodriguez, a HASI client, and "Zeeta" (being Ms Kennedy), who was a client of The Refuge. Similarly, after having collected Mr Rodriguez from hospital on his 23 June 2009 discharge (and, therefore, during the charge period), Ms Brooks picked up Ms Kennedy and took them to do some grocery shopping. Those are but two examples of numerous case note entries (which was a record of the defendant during and before the charge period referring to Ms Kennedy and Mr Rodriguez) showing the intermingling of work between The Refuge and the HASI program. Consistent with that conclusion is the agreed fact that, prior to the incident, a worker named Jenny Pandava had experienced that HASI workers, such as Mr Corkhill and Mr Mitchell, whilst working weekend shifts at The Refuge were sometimes more concerned with the HASI clients for whom they were responsible rather than clients of The Refuge.
- (4) Based upon the records produced by Ms Crayden, about which she was cross-examined, there is no issue of financial incapacity to pay or lack of financial means. Whether it be cash or assets, there is ample (in the millions) money to pay any fine the Court may be minded to impose in this matter. The Court would not rely upon the cross-examination answer volunteered by Ms Crayden to the effect that there is going to be some loss in the coming tax year. The witness confirmed in cross-examination that there are profit and loss statements prepared each month. Those statements were available to be produced but were not produced.
- (5) As to the issue of costs, the prosecutor submitted that it is well settled that costs are not punishment in criminal matters. Rather, they are compensatory. Further, it has been the position in summary matters, not only in this jurisdiction but in other summary criminal jurisdictions, that costs follow the event. It is not what occurs in other jurisdictions where costs are rarely ordered. The judgment of a Full Bench of this Court in *Inspector Yeung v Donald Edwin Wilson t/as Wilson's Tree Service* [2005] NSWIRComm 158 could be distinguished from this matter because, in *Wilson*, there was a real incapacity to pay evidenced before the Court. As has already been submitted, the defendant in the present case could, on the balance of probabilities, make out an incapacity case.

Relevant Principles

132 The general principles for sentencing in this jurisdiction were recently described in *Cross City Tunnel* and, more recently, in *Inspector Dall v Ullrich* [2012] NSWIRComm 87 and *Inspector Middleton v Cafe C Pty Ltd* [2012] NSWIRComm 131. I adopt those principles for the purposes of this judgment, without repetition, except to add some points of emphasis below.

Consideration

- 133 The principal and particular purposes of occupational health and safety legislation are the protection of workers from breaches of health and safety and compelling attention to occupational health and safety in the workplace.
- 134 In sentencing an offender, the Court will keep in mind not only facts which establish the seriousness of the offence but also those which tend to mitigate that seriousness or exculpate the offender. The offender must only be sentenced for the offence for which the offender has been convicted, although the Court is bound to take into consideration the circumstances surrounding the offence.

Objective Features

- 135 Whilst the sentencing of an offender under occupational health and safety legislation involves the consideration of both objective and subjective factors, the primary factor to consider is the objective seriousness of the offence. Thus, in seeking to determine an appropriate sentence for a breach of occupational health and safety legislation, it is essential to consider the gravity of the offence when viewed objectively. Each offence has its own objective gravity, meriting at most a sentence proportionate to that gravity with the maximum sentence fixed by the legislation defining the limits of sentence for the most grave category.
- 136 The assessment of the gravity of an offence under s 8 of the Act requires attention to be focussed upon the risk to safety and, viewing it objectively, the seriousness of the act or omission giving rise to the risk. This approach derives from the nature of the duties imposed by s 8 of the Act which are "directed to obviating actual risk to safety in the workplace even absent any actual incident causing injury either by eliminating the risk or by protecting employees from the dangers presented by the risk": *Morrison v Powercoal Pty Ltd & Another* (2004) 137 IR 253 at [100] and *Cross City Tunnel* at [195].
- 137 In *O'Sullivan v The Crown in the Right of the State of New South Wales (Department of Education and Training)* [2003] NSWIRComm 74; (2003) 125 IR 361 at [140], it was stated:
- ... To put it another way, the employer fails to ensure the health, safety and welfare at work of its employees by failing to appropriately equip or protect them from risks inherent in their work ... notwithstanding that such risks may be caused by external factors, known or unknown. ...
- 138 In *The Crown in Right of State of New South Wales (Department of Education and Training) v O'Sullivan* [2005] NSWIRComm 198; (2005) 143 IR 57 at [41] and [42], the Full Bench stated:
- [41] It must be kept squarely in mind that the risk here pleaded was the risk of employees, in particular Mrs Griffiths, being assaulted on 9 February 1999 by students demonstrating aggressive and/or challenging behaviour and thereby suffering physical and/or mental harm. This was the relevant risk identified by *Walton J* and the appellant accepted that this was the risk but not one created by, or under the control of, the appellant.
- [42] The fact that a risk was not created by, or under the control of, a defendant is not to the point. Many prosecutions under the *Occupational Health and Safety Act* involve risks not created by the defendant. The defendant's obligation under s 15(1) of the Act is to ensure the safety of employees. That may be done by eliminating, or preventing or minimising exposure to, any risk however it may have come about or, given the defence of reasonable practicability, by taking all reasonably practicable steps to ensure employees are not exposed to the risk.
- 139 When constrained by the particulars of the charge before the Court, the relevant risk in the present matter was the risk of Mr Rodriguez, a client of On Track, becoming violent and assaulting On Track employees.
- 140 In that respect, the charge was attributed to a defined group of employees, namely, Mr Corkhill, Ms Brooks and Mr Mitchell. The risk arose in relation to those employees at certain times during the charge period although, as contended by the prosecutor, particulars (3)(a) and (b) applied throughout the charge period when any of the particularised employees were at work.
- 141 There is merit in the submission of the defendant that the measures particularised in the charge, if implemented, would not have, on the evidence, eliminated the risk. Professor Greenberg identified that there was a link between violence and mental illness, but that risk prevention was not "an absolute prediction". He advised that risk cannot be "eliminated" and that risks would fluctuate and change continually. He specifically stated that, if the "control measures" had been put in place prior to 27 June 2009, it was unknown and speculative to suggest that they would have changed the outcome on that date.
- 142 Mr Docking submitted, however, that Professor Greenberg's evidence in relation to "control measures" was not given in the light of the Amended Application and that the measures stated in particular (2) would have eliminated the risk. This submission was, no doubt, predicated upon the notion that because no discharge summaries had been obtained by 27 June 2009, the adoption of the measure in particular (2) would have necessarily resulted in the staff of On Track

"not dealing" with Mr Rodriguez. Hence, it was contended no risk would arise in that respect. That proposition may be accepted in its terms, but should be conditioned, for the purposes of sentencing, by an understanding of the context in which On Track operated. Had the discharge summaries been obtained and, therefore, no prohibition operated upon Mr Rodriguez's re-acceptance, the measures otherwise specified in the particulars to the charge would not have necessarily eliminated the risk, as defined above, having regard to Professor Greenberg's evidence, even though, as discussed below, On Track had an obligation, by the adoption of those measures, to control or minimise the risk.

- 143 The obligation falling upon On Track under the Act also required that it control and minimise exposure to the risk. Professor Greenberg's evidence was that, whilst limits existed in eliminating the risk of violence from mentally ill clients, it was possible to assess risk factors and to manage them by means of a more comprehensive and formal risk assessment and risk management plan. (The measures specified in the charges and the significance of the acquisition of discharge summaries are discussed further below.) Thus, even though the provision of a second staff member to attend upon Mr Rodriguez (per particular (3) of the claim) may not have necessarily led to a "different outcome" (noting that On Track's obligation concerned management of the risk), Professor Greenberg was, nonetheless, supportive of "prohibitions working with high risk clients" associated with such risk management plans.
- 144 Particulars (2) to (4) of the charge stipulate measures available for implementation by On Track in relation to the risks arising in this case.
- 145 Central to those measures was the acquisition of, and utilisation by On Track, of discharge summaries regarding Mr Rodriguez in the management of the risk. I agree with the prosecutor that those discharge summaries would have armed the management and employees of On Track with adequate information about the mental health, psychotic states and violent behaviour of Mr Rodriguez in order to protect On Track's employees by controlling or minimising the risk, as comprehended by the particulars to the charge.
- 146 The discharge summary dated 26 May 2009 was available to On Track prior to and during the charge period but was not obtained by the organisation. That discharge summary noted that there was a moderate to high risk of violence when Mr Rodriguez was manic or psychotic. In the reasons for "referral - admission" section of the document, it was stated that Mr Rodriguez had "self presented [with] exacerbations of [it would appear, schizoaffective disorder]" and "primarily elevated [with] poor impulse control and childlike behaviour". Under the heading "Summary of Care Provided and Outcomes", the discharge summary refers to numerous outings on leave with "HASI/On Track workers", but that Mr Rodriguez was placed on a CTO from 27 May 2009. The discharge summary of 23 June 2009 indicated that the reason for the "referral - admission" of Mr Rodriguez included apparent verbal aggression towards a neighbour and a long history of Schizoaffective Disorder. The risk of violence was observed as "medium".
- 147 The defendant made some additional submissions of an exculpatory character regarding the failure to obtain the discharge summaries which I shall consider below.
- 148 On Track submitted that the acquisition of the discharge summary of 26 May 2009 would have been of little assistance because Mr Rodriguez was discharged on 26 May but, some 12 hours later, was readmitted to Lismore Base Hospital (on 27 May 2009). It was suggested that the discharge summary was, therefore, no longer valid from 27 May. However, this submission was advanced in the context in which On Track did not obtain the further discharge summary after Mr Rodriguez's discharge on 23 June 2009 (which, I note, did not become available until 1 July 2009). In this light, the discharge summary of 26 May would have equipped On Track staff with the most recent clinical information as to Mr Rodriguez. Whilst this information was, no doubt, reduced in its value by the further admission, it was, at least, of the static historical character that Professor Greenberg considered important in assessing risk. Furthermore, the acquisition of that discharge summary must have featured in any decision whether to re-accept Mr Rodriguez without the receipt of a discharge summary after his further admission on 27 May.
- 149 It was also submitted by Mr Hodgkinson that, even though the discharge summary of 26 May 2009 indicated a moderate to high risk of violence, the discharge summary did not suggest that, if Mr Rodriguez was not in a psychotic state, he would become violent. The difficulty with that submission is the firm conclusion reached by Professor Greenberg that Mr Rodriguez, as a particular client of On Track, always posed a risk to the safety of its employees.
- 150 On Track further submitted that the discharge summary associated with Mr Rodriguez's discharge of 23 June 2009 was, as earlier noted, not available until after the incident (on 1 July 2009) and that, in any event, the discharge summary did not require the injection of medication until 30 June. The discharge summary did not give any indication as to particular measures which should be taken on Mr Rodriguez's discharge. This much may be accepted. However, it was not suggested by the defendant that the information provided in the discharge summary would not have alerted On Track and its employees to risks associated with Mr Rodriguez. Furthermore, the contention needs to

be considered in the light of the second particularised measure that there should have been a prohibition on dealing with Mr Rodriguez until such time as the discharge summary was available to and obtained by On Track.

- 151 Whilst there are further issues bearing upon the objective seriousness of the offence (including mitigation), it is appropriate, at this juncture, to observe that, when the limitations upon On Track's capacity to eliminate the risk (in the manner described above) and the abovementioned submissions on mitigation concerning, *inter alia*, the failure to acquire the discharge summaries, are balanced against the aforementioned discussion of the merit or significance of those factors ([139] to [150]), I consider this component of the defendant's plea should only moderately temper the Court's assessment of the gravity of the offence, when viewed objectively: *Workcover Authority of New South Wales (Inspector Ankucic) v McDonald's Australia Limited and Anor* [2000] NSWIRComm 277; (2000) 95 IR 383 at [214] (*McDonald's*) (citing *WorkCover Authority of NSW v Atco Controls Pty Limited* (1998) 82 IR 80 at 84 and 85).
- 152 There are further factors bearing upon the objective gravity of the offence including aggravating factors. It will be convenient to deal with some related points in mitigation in the course of doing so.
- 153 First, any assessment as to the culpability of On Track must be made by reference to the particular circumstances in which On Track operated. It is important to remember On Track's role in the HASI programme. On Track was not responsible for clinical management and assessment of mental health clients such as Mr Rodriguez. Its role was to provide an integration service for clients into the community and to provide rehabilitation and reintegration. It relied upon an Area Health Service to provide that assessment and make appropriate judgments about the risks of discharging mental health clients from hospital to live in the community or, for that matter, to participate in the HASI program. (The contribution of other entities will be discussed later in these considerations.)
- 154 The consideration of the circumstances in which On Track operated must necessarily, however, also incorporate reference to the actual clients its staff were required to assist in the community (after their discharge). As On Track conceded, the nature of Mr Rodriguez's condition, and how that condition exhibited itself to both clinicians and laypersons, may have been the very reason why additional measures referred to in the charge were required to be undertaken. In this respect, the discharge summaries provided valuable additional information to make assessments and control the risk. This was particularly significant in the light of Mr Rodriguez's history of mental illness and violence which was, in part, known to On Track.
- 155 Secondly, I agree with the submission of the prosecutor that it is relevant to the gravity of the offence that the defendant knew or should have known that Mr Rodriguez posed a serious risk to health and safety to its employees, yet the defendant allowed its employees to be exposed to serious risk of harm without the implementation of adequate measures, as charged.
- 156 It is true that the records of On Track and the observations made by its trained staff did not indicate that Mr Rodriguez was slipping into a psychotic state or exhibiting signs of psychotic behaviour. Professor Greenberg agreed there was no record of any bizarre or delusional behaviour or speech, although he did note that there were limits to the capacity of the HASI workers to make clinical observations. It is also true that Mr Rodriguez may have slipped into the psychotic state shortly before the incident. His earlier behaviour, prior to 9 April 2009, had been quite acceptable and he had not exhibited violence towards staff members (he was also showing compliance with clinical support and drug taking). He was assessed as being well on his discharge in June 2009 and Ms Brooks had been careful in making a close assessment of him before he was taken from hospital (she assessed him as being suitable to take back into HASI).
- 157 However, those considerations do not result in the conclusion that the risk was other than reasonably foreseeable. The defendant was aware of the risk having regard to information contained within the defendant's records prior to 27 June 2009, most notably, Mr Rodriguez's threat to a member of the public with a cricket bat (he does not seem to have hit the member of the public but threatened him, most probably by swinging the bat at the man). On Track's own Occupational Health and Safety Manual contained a policy statement under the heading "Security" which stated: "[d]ue to the sometimes unpredictable nature of On Track's clients there [was] a potential for behaviour to become unsafe on occasions within On Track".
- 158 It was precisely that unpredictable nature of Mr Rodriguez and his history of mental illness and violent behaviour which made the risk of further violence, in the form that manifested itself in the actual incident, reasonably foreseeable. It was also reasonably foreseeable, in that context, that the absence of the discharge summaries may result in an increased risk for the employees of On Track because less information was available to be applied in the protection of employees.
- 159 The prosecutor's analysis of the defects in the Consumer Safety Audit of 1 February 2009, when evaluated against the

information provided in the discharge summaries and the defendant's records (and, in one respect, Professor Greenberg's analysis of the tenth admission by Mr Rodriguez), illustrates how the receipt of additional information would have enabled better control over the risk *vis á vis* the employees attending upon Mr Rodriguez.

- 160 Thirdly, a related consideration is the availability of remedial measures that were relatively straightforward or simple. The steps specified in the particulars (especially particular (3)) represent such measures. Those measures were available to the defendant prior to the incident and would have minimised the relevant risk to safety. Indeed, following the incident, On Track reviewed and updated its existing home visiting policies, requiring, *inter alia*, home visits be undertaken by two staff members for the first two visits following an admission or incident involving violence and all relevant documentation (including discharge summaries) to be received prior to home visits being undertaken. Additionally, immediately following the incident, On Track, *inter alia*, implemented documented staff shift handovers and toolbox meetings and requested NCAHS ensure that, upon discharge, mental health clients are seen by a Community Health Workers within 48 hours.
- 161 Whilst these responses by the defendant following the incident were laudable, the steps taken were such as to reveal in clear terms the simple and decisive remedial steps which may have been taken by the defendant to abate the risk. In such circumstances, the steps taken by the defendant after the incident are also demonstrative of flaws which existed in its previous systems: *McDonald's* at [226] (citing *Department of Mineral Resources of NSW (McKensy) v Kembla Coal & Coke Pty Ltd* (1999) 92 IR 8 at 36 ('*Kembla Coal*') and *WorkCover Authority of NSW (Inspector Kelsey) v University of Sydney* (unreported, Industrial Relations Commission, NSW, Matter No. CT 1280 of 1995, Hill J, 2 April 1997) at 21 and 22 ('*University of Sydney*')) and *Inspector Nicholson v Gallagher* [2012] NSWIRComm 121 at [50] ('*Gallagher*'). When taken in combination with the foreseeability of the risk to safety which I have earlier referred to, the fact that there were available to the defendant, prior to the incident, simple and straightforward remedial measures will significantly increase the gravity of the offence.
- 162 Fourthly, a factor relevant to the assessment of the objective seriousness of the offence in this matter is the relationship between the seriousness of the injuries suffered and the gravity of the offence (*Capral Aluminium Limited v WorkCover Authority of New South Wales* [2000] NSWIRComm 71; (2000) 49 NSWLR 610; (2000) 99 IR 29 at [94]). Whilst the death of Mr Corkhill does not, of itself, dictate the seriousness of the offence or penalty, a breach where, as in this case, there was every prospect of serious consequences will be assessed on a different basis to a breach unlikely to have had such consequences. In this case, the occurrence of the death of Mr Corkhill manifested the degree of seriousness of the relevant detriment to safety arising from the failure to take adequate steps to control the risk.
- 163 Fifthly, it is appropriate, in the context of a discussion of the objective seriousness of the offence, to also consider the maximum penalty for the offence (see *Cross City Tunnel* at [192(i)]). The maximum penalty for the offence, the defendant being a first offender, is \$550,000.
- 164 Sixthly, as submitted by the prosecutor, the fact that Mr Corkhill was a health or community worker and the offence arose because of his occupation. This should be taken into account as an aggravating factor in sentencing (per s 21A(2)(a) of the CSP Act) (however, this factor should not result in a duplication of considerations arising in relation to general deterrence).
- 165 It may be noted that the prosecutor submitted that a range of mitigating factors were available, under s 21A(3) of the CSP Act, to be taken into account by the Court in determining the appropriate sentence in the present matter. Those factors are accepted and shall be considered below under the heading "Subjective Features".
- 166 There are a variety of additional factors (that is, in addition to those discussed above) relevant to mitigation of the objective seriousness of the offence and the defendant's culpability.
- 167 First, as a counterpoint to the discussion in [155] to [161], I accept that On Track had some established safe systems of work in place prior to the incident. Those systems were included in its policy in relation to home visiting which, as I have noted, required employees to, *inter alia*, complete an offsite safety checklist at the beginning of each shift outlining details of any home visits to be conducted and to undertake home visits during normal business hours by previously arranged appointments (with limited exceptions). The On Track Occupational Health and Safety Policy Manual further stated that home visits should be undertaken with the permission and at the convenience of the client and by placing certain details in an internal email calendar. A risk assessment was to be undertaken before clients' premises were entered and after enquiries were made as to whether other persons would be present and their relationship with the client. Unannounced visits were to be avoided, and On Track workers were prohibited from visiting clients alone if the client's behaviour was "deemed" or "could be considered" aggressive or violent. On Track's

procedures for visiting HASI clients included a requirement that the client be telephoned before the visit to, *inter alia*, allow a 'phone-based' assessment of the client to be undertaken. Reference should also be made to On Track's extensive general Occupational Health and Safety Policies.

- 168 As the Court noted in *McDonald's* at [219] (citing *Kembla Coal* at 33 and *University of Sydney* at 21) and, more recently, *Gallagher* at [48], whilst the existence of safety procedures and systems is a factor which is relevant to the assessment of the seriousness of the offence (and which may mitigate the objective seriousness of the offence), those systems must also include searching for and identifying all possible risks and instituting safety measures to guard against those risks.
- 169 Overall, the existence of various policies and systems shows the defendant had endeavoured to deal with risks associated with visiting clients at home and will mitigate the objective seriousness of the offence. However, it is also apparent that those systems were not entirely adequate to deal with the risk occasioned in this case, as earlier discussed in this judgment and as illustrated by new policies and procedures adopted after the incident. For example, at the time of the incident employees were not prohibited from visiting clients for whom all relevant documentation (including discharge summaries) had not yet been received nor were they required to visit in pairs (except where clients were deemed 'aggressive' or 'violent'). The policy did not apply to employees of The Refuge.
- 170 A second and related consideration was that the HASI workers, in accordance with the protocols developed by On Track, did observe Mr Rodriguez carefully during the time leading up to and during the charge period in a manner consistent with the assessment of risk. On Track's efforts to manage the risk were not confined to the mere publication of paper systems or policies but were given practical application at the workplace, including the keeping of records of observations and the holding of daily briefings. This casts the offence a different light than if On Track had simply failed to observe behaviour from Mr Rodriguez in such a way as to have increased the prospect of the risk materialising.
- 171 There were two further matters raised by the defendant which were said to reduce the objective seriousness of the offence and its culpability in the present matter. Those matters concerned, firstly, the actions of Mr Corkhill and, secondly, the role of third parties.
- 172 Prior to the incident, Mr Corkhill had worked regularly at The Refuge and was familiar with his duties there and the policies, in particular the Home Visiting Policy, to which he was required to adhere as an On Track employee. In attending the premises of Mr Rodriguez on 27 June 2009, Mr Corkhill did not conform to those policies. He was working that night at The Refuge, and was not rostered in a HASI-related capacity. He made no advance call to Mr Rodriguez or Ms Kennedy (and there was no emergency or crisis situation which would have explained the need for an unannounced visit to the premises). He made no contact with any other person before leaving The Refuge to attend the premises and used his own vehicle to do so.
- 173 It is unknown why Mr Corkhill, despite having been rostered to work at The Refuge, attended the premises of a HASI client, Mr Rodriguez, on the night of the incident. It was agreed he was not on a frolic, however, the fact that Mr Corkhill acted outside the On Track Home Visiting Policy in doing so is a matter which goes to the objective seriousness of the offence in this matter. However, that conclusion must be considered in the context of the work regularly performed by On Track employees, which often involved an intermingling of both clients and work between the HASI program and The Refuge (evidenced, amongst other things, by numerous On Track case notes which referred to both Mr Rodriguez, a HASI client, and Ms Kennedy, a client of The Refuge). As such, it cannot be properly contended that Mr Corkhill had strictly defined roles, and worked exclusively as a HASI worker one day and a Refuge worker the next. Further, as noted earlier, On Track's policies were, in any event, inadequate.
- 174 It was contended by the defendant that the Area Health Service contributed to the risk to safety in the present matter. That contention was premised upon the submission that the NCAHS had responsibility for the clinical needs and assessments of Mr Rodriguez, however, it failed in material ways to discharge that obligation.
- 175 As earlier mentioned, clients of HASI are also clients of the Area Health Service which was responsible for coordinating clinical mental health care including the provision of a full range of mental health services to clients based on their clinical needs. Mr Cleary was a coordinator for the Area Health Service in that respect. His role included making a proper assessment of the mental health needs of clients, including Mr Rodriguez.
- 176 The NCAHS is not before the Court and, thus, any conclusions of the Court as to that entity or its employees must, necessarily, be limited and affected by that caveat. However, on the evidence in these proceedings, there does appear to be a failure to provide On Track with, upon Mr Rodriguez's admission to the HASI program, relevant information

regarding his history of violence.

177 Further, at the time of the incident, the NSW Health Policy Directive - Discharge Planning for Adult Mental Health Inpatient Services (dated 16 January 2008) operated with respect to Mr Rodriguez.

178 That Discharge Policy included a summary in the following terms:

The discharge planning for adult mental health inpatient services presents a structured and standardised process for ensuring safe and successful transition of people with a mental illness from time of admission to hospital to post discharge ...

179 Furthermore, cl 5.3 provided:

Clause 5.3 of NSW's Discharge Policy Directive directs that:

Discharge planning must include an assessment of the risk posed by the consumer to the health and welfare of others, including any risk to children who are in contact with the consumer. Prior to discharge, a formal assessment of risk of harm to others must be conducted. Indicators of risk include threatening statements and/or a history of violence against others. This risk and a response must be documented in the discharge care plan and relevant MH-OAT modules. Where the risk is valid, staff should notify the local Police on the basis that they have reasonable grounds to believe there is a serious and imminent threat to a member of the public.

180 The Discharge Policy Directive ('DPD') required NCAHS to prepare a Care Plan and a Discharge Care Plan (both defined in the Policy). A component of the "Mental Health - Outcome and Assessment Tools (MH - OAT) Mental Health Clinical Modules" was that discharge summaries were to be completed on or before the day of discharge. All consumers were required to have an individual care plan. On the evidence before the Court, at the time of and prior to the discharge of Mr Rodriguez by LAMHU from hospital in May and June 2009, LAMHU did not provide information or documentation to On Track in compliance with the DPD. According to Ms Crayden's evidence, the Care Plans prepared for Mr Rodriguez dated 15 April and 29 May 2009 were inadequate. Nor was a copy of the CTO of May 2009 provided to On Track.

181 To these considerations may be added that which has already been discussed, namely, that the discharge summaries of May and June 2009 were not provided to On Track. (Mr Hodgkinson submitted that the discharge summaries were to be provided within seven days contrary to that specified in the Discharge Policy, but, in any event, discharge summaries for Mr Rodriguez's discharge on 23 June 2009 was required to be provided before 1 July 2009.)

182 In culmination, the evidence would tend to indicate that the relevant clinical provider, namely, NCAHS, did not provide all relevant clinical information about the status of Mr Rodriguez to On Track which may have affected the safety and security of staff.

183 These are matters that cast a light upon the culpability of On Track: see as discussed in *Cross City Tunnel* at [242]. Its arrangement, as part of the HASI program, permitted On Track to rely upon the NCAHS to provide clinical information about Mr Rodriguez and to rely on its judgments as to the safety of staff upon his discharge. Subject to the discussion below, these are also matters mitigating the seriousness of the offence.

184 This factor in mitigation needs, however, to be considered in context. Without unnecessarily repeating what has gone before, the measures particularised in the charge and, in particular, the prohibiting with Mr Rodriguez until such time as relevant discharge summaries were available would have controlled the risk, regardless of the actions the HCAHS did or did not take. On Track had a responsibility under the Act to be proactive. It may have (at least under the authority given by Mr Rodriguez), sought the discharge summaries but failed to do so. (With respect to the 23 June 2009 summary, as I have noted, it may have prohibited contact by its employees with Mr Rodriguez until such time as the summary was obtained.) Furthermore, it had obtained, on its own part, information about Mr Rodriguez's violent history which was directly relevant to its obligations to its employees under the Act.

185 A further issue arising from the affidavit of Ms Crayden was the lack of investigation and prosecution of NSW Health/the Area Health Service (although it was expressly noted by Mr Hodgkinson in oral submissions that the Court was "not asked to go behind the decision as to whether somebody was or was not the subject of a prosecution"). A related issue concerned the failure to obtain evidence from certain doctors treating or diagnosing Mr Rodriguez. These issues were said to create a basis for genuine grievance and to warrant a conclusion that the objective seriousness of the offence was accordingly less.

186 These issues stand apart, in my view, from the assessment about the contribution of other entities to the risk which I have discussed above.

187 It should not be the role of the Court to undertake a procedure which may be tantamount to conduct a trial of an entity which is not before the Court: *Cross City Tunnel* at [243] (see also *McDonald's* at [160]). In my view, in occupational

health and safety matters, for the Court to be in any way concerned with decisions as to who is to be prosecuted, and for what, would compromise the integrity of the judicial process, in particular, the independence and impartiality of the Court and the public perception thereof: *Newcastle Wallsend Coal Company Pty Limited and others v McMartin (No 2)* [2007] NSWIRComm 125 at [39] (by reference to the judgment of Gaudron and Gummow JJ in *Maxwell v The Queen* (1996) 184 CLR 501 at 534.

- 188 On these bases, and given the defendant pleaded guilty to the charge contained within the Amended Application for Order, the question as to the lack of prosecutions of other entities in relation to the offence in the present matter, to the extent that it was an issue raised in these proceedings, is not a matter which may be properly taken into account by the Court in the process of sentencing (in contrast to the contribution of other entities to the risk which has been taken into account).
- 189 Before concluding this discussion of objective factors, it is also appropriate to consider deterrence (see *Cross City Tunnel* at [192(iii)]). It was submitted by the prosecutor that both general and specific deterrence should loom large in any sentencing exercise.
- 190 I accept that, as submitted by Mr Hodgkinson, there is a strong public interest in having services such as those provided by On Track. However, it is necessary to ensure that the penalty properly reflects the need for general deterrence so as to draw attention to those operating in the community services sector, in particular those dealing with mentally ill and vulnerable members of society, as to the appropriateness of implementing systems of work which obviate (so far as is possible) or minimise the risk to employees of injury from violence inflicted by mentally unstable and unpredictable clients. It is also in the public interest that these entities operate in such a manner as to minimise risks arising from their clients, particularly in this context, in relation to their staff. Accordingly, general deterrence is important in relation to this offence.
- 191 Whilst I accept there were systems in place prior to the incident, and there have been significant further steps taken by the defendant since the incident, to ensure the safety of its workers, specific deterrence must be a relevant factor in sentencing given the defendant continues to be a major employer in its undertakings. The defendant has three branches and, at the date of the sentencing hearing, employed 278 people with approximately 179 full-time equivalent employees. In such circumstances, in accordance with the principles stated in *Cross City Tunnel* (at [193]), specific deterrence will be factored into any penalty imposed upon the defendant.
- 192 The defendant must be sentenced having regard to the offence for which it is convicted, factors which establish and mitigate the seriousness of the offence or exculpate the defendant and any relevant circumstances surrounding the offence. Senior counsel for the defendant has pointed to the difficulties which confronted On Track in eliminating the risk together with the factors which, to varying degrees, mitigated the seriousness of the offence or exculpated the defendant. These factors should be regarded as significant and have the impact of ameliorating what may otherwise constitute a very serious offence. However, I consider that the offence, as charged, when considered in the light of the factors discussed above which aggravate or establish that the seriousness of the offence must result, overall, in a conclusion that, viewed objectively, the offence is, nonetheless, a quite serious one.
- 193 Without depreciating from my earlier discussion of objective factors, some particular matters may be raised. Mr Rodriguez had a history of violence and mental illness known to the defendant. On Track had a statutory obligation to manage and control risks of violence from Mr Rodriguez which it failed to do in the manner particularised in the charge and as discussed in this judgment. The risk was, in the circumstances I have discussed above, reasonably foreseeable and there were simple remedial measures available to control and minimise the risk. There was every prospect of serious consequences arising from the breach of the Act.

Subjective Features

- 194 I now turn to the subjective features of the matter.
- 195 The defendant is a non-government, not-for-profit organisation doing outstanding and difficult work in the community. When combined with the factors referred to below, the subjective considerations in the present matter must be considered to be high end and shall be given weight accordingly by the Court in sentencing.
- 196 The steps taken by the defendant following the incident are a relevant factor in mitigation: *Inspector Lai v Rexma Pty Ltd and Another* [2008] NSWIRComm 78; (2008) 172 IR 210 at [24] and *JT & LC Tippett Pty Limited and RD & LF Tippett Pty Limited v WorkCover Authority of New South Wales* [2008] NSWIRComm 177; (2008) 184 IR 1 at [107]. I have already outlined the significant steps taken by the defendant since the incident to reform its occupational health

and safety system and to ensure the safety of its workers. I accept the defendant has demonstrated, by having adopted those additional measures, a strong commitment to workplace safety and that is a factor to be taken into account in its favour: *Morrison v Powercoal Pty Ltd & Anor. (No. 3)* [2005] NSWIRComm 61; (2005) 147 IR 117 at [109].

197 Demonstrations of remorse and contrition by defendants is a further factor which may be taken into account in mitigation of penalty: *Alcatel Australia Limited v WorkCover Authority of New South Wales (Inspector Clyant)* (1996) 70 IR 99 at (107) - (108); *Morrison v Powercoal (No. 3)* at [111]; *WorkCover Authority (NSW) (Inspector Jones) v Challita* [2006] NSWIRComm 207; (2006) 153 IR 409 at [39]; *McDonald's* at [454] and *Rexma* at [53].

198 I accept that the defendant demonstrated remorse and contrition over the incident, evidenced by its plea of guilty and the statements made by Ms Crayden in her affidavit.

199 A related consideration is the co-operation by the defendant with the WorkCover Authority of New South Wales: *WorkCover Authority of New South Wales (Inspector Mayell) v D J Gleeson Pty Ltd* [2006] NSWIRComm 363 at [30]; *Challita* at [39] and *Rexma* at [53]. I accept that the defendant co-operated with the WorkCover Authority in its investigation and should, accordingly, be entitled to a discount in that respect.

200 The next consideration is the discount which should be afforded to the defendant for the entry of a plea of guilty.

201 I discussed the principles applicable to an assessment of the appropriate discount for the utilitarian value of a guilty plea in *Ullrich* at [77], as follows:

The determination of where, within the range of 10 - 25 per cent, a discount should fall in a particular case is a matter for the discretion of the sentencing judge, based on a consideration of the utilitarian value of a plea to the efficiency and effectiveness of the criminal justice system : *R v Thomson*; *R v Houlton* [2000] NSWCCA 309; (2000) 49 NSWLR 383 at [3], [115] and [153]. In *Thomson*, Spigelman CJ (as he then was) held, at [154], that there are two circumstances which will generally affect the appropriate level of discount in a particular case: the primary consideration is the time at which a plea is entered; the other consideration is the extent of the utilitarian benefit, for example, in the avoidance of a lengthy trial. (I note that the judgment of the Full Bench in *Ridge Consolidated Pty Ltd v WorkCover Authority of New South Wales (Inspector Mauger)* [2002] NSWIRComm 108; (2002) 115 IR 78 at [37] required that, after the judgment in *R v Sharma* [2002] NSWCCA 142; (2002) 54 NSWLR 300, the principles in *Thomson* were to be applied in sentencing offenders under the Act).

202 Also, in *Gallagher* at [81] and [82], the following was stated:

81 In *Inspector Kent v Duct Master Pty Ltd* [2009] NSWIRComm 143, Boland J made reference to the following principle espoused by the Court of Criminal Appeal in *R v Dib* [2003] NSWCCA 117 at [5] - [6] (which principle was also referred to by the defendant in submissions):

If a plea is entered a long time after a person is first charged, but at a time when a lesser charge is substituted for a greater charge, the advantages to the administration of justice are less, even though the plea may have been made at the earliest opportunity. There is in any event no entitlement to a 25% discount; and the fact that in this situation there are less advantages to the administration of justice can justify a smaller discount.

This approach may mean that in some cases an offender may obtain a lower discount just because the prosecuting authorities initially brought a greater charge than that ultimately pursued, so that the delay in the plea of guilty was not the offender's fault. But this is consistent with the nature of the discount as being at least in part a recognition of practical advantages, and not merely a recognition of mitigation of culpability.

82 However, Boland J went on to note, in *Duct Master* at [38], the following:

However, simply because a defendant waits until the prosecution amends the charge before entering a plea at the earliest opportunity thereafter, that will not, in my opinion, automatically lead to the sentence being discounted by 25 per cent. Some assessment would need to be made about whether the delay in pleading caused an unnecessary waste of time and resources.

203 I accept that the defendant entered an early guilty plea. The defendant shall receive a discount of 25 per cent for the utilitarian value of its plea.

204 The defendant has no prior convictions and, as a non-government, not-for-profit organisation, is a legal person of the highest character. These matters should be taken into account as significant subjective factors: *Corinthian Industries (Sydney) Pty Ltd v WorkCover Authority of New South Wales (Inspector Wilson)* [2000] NSWIRComm 46; (2000) 99 IR 159 at [17]; *Morrison v Powercoal (No. 3)* at [107] and *Tippett* at [107].

Applications under ss 10(1)(a) and 10A of the CSP Act

205 The application of ss 10(1)(a) and 10A of the CSP Act were issues raised by counsel for the defendant in the proceedings. In particular, On Track sought the matter be dismissed under s 10(1)(a) of the CSP Act or, alternatively, that the Court dispose of the proceedings without imposing any penalty pursuant to s 10A of the CSP Act. Those

submissions were advanced upon the grounds that, *inter alia*, the offence, properly characterised, was a minor one (given that the risk could not be eliminated but only controlled, the contribution to the risk of the Area Health Service, the actions of Mr Corkhill and the fact that Mr Rodriguez showed no signs of a relapse), and the defendant had no prior convictions and was a legal person of the highest character.

206 Section 10(1)(a) of the CSP Act is in the following terms:

10 Dismissal of charges and conditional discharge of offender

(1) Without proceeding to conviction, a court that finds a person guilty of an offence may make any one of the following orders:

(a) an order directing that the relevant charge be dismissed,

...

207 In deciding whether to make an order under s 10(1)(a), the Court must have regard to the factors contained in s 10(3) of the CSP Act. Section 10(3) is in the following terms:

(3) In deciding whether to make an order referred to in subsection (1), the court is to have regard to the following factors:

(a) the person's character, antecedents, age, health and mental condition,

(b) the trivial nature of the offence,

(c) the extenuating circumstances in which the offence was committed,

(d) any other matter that the court thinks proper to consider.

208 Section 10A of the CSP Act is in the following terms:

10A Conviction with no other penalty

(1) A court that convicts an offender may dispose of the proceedings without imposing any other penalty.

(2) Any such action is taken, for the purposes of the *Crimes (Local Courts Appeal and Review) Act 2001* and the *Criminal Appeal Act 1912*, to be a sentence passed by the court on the conviction of the offender.

209 The prosecutor put submissions as to the application of s 10(1)(a), in the same manner as the defendant, co-jointly with submissions going to objective and subjective factors, the non-government, not-for-profit status of On Track and the contribution to the risk by the Area Health Service and the actions of Mr Corkhill. I have approached the question in a similar manner; assessing the applications in the light of the detailed consideration of those matters above as well as the matters discussed below.

210 It was contended by the prosecutor that, whilst the defendant was entitled to have its character and antecedents weighed in its favour (s 10(3)(a)), reference to the actual offence committed by the defendant and its surrounding circumstances militate against it being characterised, for the purposes of s 10(3)(b), as "trivial". Further, in order for the non-government, not-for-profit status of the defendant to be taken into account, the Court would need to determine that it falls within the provisions of s 10(3)(d), that is, "any other matter that the court thinks proper to consider". In this context, it was submitted, the Court was entitled to consider the financial status of the defendant. It was, however, submitted, in that respect, that the defendant had not proven, on the balance of probabilities, it has a limited means to pay any fine imposed.

211 I consider that the issues of the nature and status of On Track (and its financial standing), the contribution to the risk of NCAHS and the actions of Mr Corkhill are matters appropriate to be considered under s 10(3)(c) and (d) of the CSP Act. However, for the reasons which will now follow, I do not consider this is a proper case for the exercise of the Court's discretion under s 10 or s 10A of the CSP Act.

212 There are cases where, notwithstanding the objective seriousness of the offence committed, it is appropriate in all the circumstances to dismiss the charge or to discharge the offender. However, where the offence committed is an objectively serious one and where general deterrence is an important factor in sentencing for the offence, the scope of the operation of s 10 decreases. Recently, in *R v Mauger* [2012] NSWCCA 51, the Court of Criminal Appeal considered the application of s 10, noting, at [18] and [19], the following:

18 Section 10 and its predecessors reflect the willingness of the legislature and the community to provide offenders with an opportunity in certain circumstances to maintain a reputation of good character and to avoid the otherwise rigid application of inexorable laws: *Cobiac v Liddy* (1969) 119 CLR 257 at 269; *R v Nguyen* [2002] NSWCCA 183 at [50].

19 Where the offence that is committed is an objectively serious one and where general deterrence and denunciation are important factors in sentencing for that offence, the scope of the operation of the section decreases. The section must operate in the context of the general principle that the penalty imposed for any

offence should reflect the objective seriousness of that offence: *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002)* [2004] NSWCCA 303; 61 NSWLR 305. However, the focus must be on the particular conduct of the offender and the circumstances of the offending rather than the nature of the offence: *Walden v Hensler* [1987] HCA 54; (1987) 163 CLR 561 at 577.

213 Section 10A was inserted into the CSP Act in 2006. In *R v Wilhelm* [2010] NSWSC 378, Howie J described the section in the following terms (at [36]):

...That seems to me to be a section that has recently been added to the armoury of the sentencing court in such a case where the Court indicates that the charge was deserving of a conviction but one where it is deserving of no other punishment in the circumstances of the particular case.

214 I recently set out factors, distilled from the judgment of Howie J in *Wilhelm*, which may be taken into account in the consideration of whether an order may be properly made under s 10A in *Inspector Mason v Graham Allen Chapman & anor* [2013] NSWIRComm 71 [124] as follows:

124 His Honour convicted the offender under s 10A of the CSP Act but, according to the provisions of that section, imposed no further penalty. His Honour had regard to a number of factors in reaching that conclusion, including:

- 1) The nature and seriousness of the offence;
- 2) The limited criminal record of the offender;
- 3) The large amount of material placed before the Court indicating the offender was a person of good behaviour and reputation;
- 4) The extraordinary affect the death of the victim had on the offender both at the time of the offence and over a subsequent long period. His Honour commented (at [19]) "there are before me a number of psychiatric reports which indicate that the offender has, over a long period of time, suffered from severe mental illness as a result of the allegations against him, the publicity of them and ramifications of what he has done. ... Mr Wilhelm has suffered grievously as a result of what occurred on that particular night";
- 5) At [21] his Honour commented that the Court may take into account "what is called extra-curial punishment, that is, punishment that is inflicted upon an offender otherwise than by a court of law";
- 6) The stigmatising of the offender and the subsequent reaction of the community towards him. He had suffered public humiliation;
- 7) At [26], his Honour observed that "any reasonable person in the community would see that this punishment exceeds in any way, shape or form the criminality of the supply to Mrs Brimble in the social context of the drug that he himself was taking"; and
- 8) The offender was a suitable case for general deterrence but the consequences of the charges for the offender over many years should be sufficient to indicate "the people of like mind in the community that they may bear the overall consequences for their actions in relation to the use and supply of what are sometimes referred to as 'party drugs'" (at [31]).

215 It is clear that, in considering the appropriateness of applying the provisions of s 10(1)(a) or, in the alternative, s 10A, the Court must balance the relevant objective and subjective factors.

216 Even allowing for the mitigating factors relevant to the offence, including those matters specifically addressed by Mr Hodgkinson concerning the s 10 application of the defendant (which was earlier considered), as I have earlier found, the offence in this matter was serious. I do not consider, therefore, there is any proper basis to find the offence was trivial in nature.

217 It is also of relevance to the consideration of the operation of ss 10(1)(a) and 10A in the present context that I consider general deterrence to be important, for the reasons earlier given, in this matter.

218 There are other factors which must be weighed in the balance in determining whether an order should be made under s 10(1)(a) or, in the alternative, s 10A. One of those factors is the subjective considerations which I have referred to under the heading "Subjective Features". I will not repeat those findings here. They must be considered as very strong subjective factors.

219 Two other factors are relevant to an assessment of whether orders should be made under either s 10(1)(a) or s 10A and the ultimate disposition of these proceedings.

220 The first factor is that On Track's prior record, when considered against the nature of its work and its status as a non-government, not-for-profit organisation, must indicate that it is, for the purposes of the Act, a good industrial citizen. Based on that observation, it may be concluded that On Track is a legal person of good reputation and of the highest character: *Morrison v Powercoal (No. 3)* at [107] and *McDonald's* at 454.

221 The second matter is the financial standing of On Track. There was some suggestion that On Track was expected to suffer a loss in the upcoming tax year. However, in reality, based upon the records produced by the defendant (upon which Ms Crayden was cross-examined), there could not be (and was not) any issue of financial incapacity to pay or

lack of financial means (no application was made to that effect under s 6 of the *Fines Act* 1996). Whilst consideration will be given, in sentencing, to the drain on the resources of an organisation which any fine would cause, it is the case that the records produced to the Court indicated that, whether in cash or assets, On Track had ample resources to pay any fine which may be imposed by the Court. I do not consider that the costs payable by the defendant in these proceedings warrant any different conclusion, or constitute sufficient punishment, in and of itself. (In any event, costs do not constitute punishment in criminal matters.)

- 222 Whilst no doubt raising particular issues in sentencing, as I have earlier discussed, I do not consider the factors of this matter such that they may be described as 'special' or 'unusual'.
- 223 Having regard to the provisions of s 10 of the CSP Act, the nature of the offence and the offender, the need for deterrence and the previous approaches of this Court to the application of that provision to proceedings arising under Occupational Health and Safety legislation, I do not consider there exists a proper basis to grant the application. Whilst there were mitigating and significant subjective matters, the offence in this matter is of such gravity and requiring such deterrence as to make application under that provision inappropriate.
- 224 Further, on balance, I do not consider that the Court should make an order under s 10A convicting the defendant without imposing a penalty. Utilising the language employed by Howie J in *Wilhelm* to describe the operation of the provision, I consider the charge is, in the face of the factors I have described in this part of my judgment (and in the earlier components dealing with objective and subjective factors), deserving of punishment in addition to a conviction, *per se*.

Verdict

- 225 Having regard to the charge in this matter, the particulars of the offence, the Agreed Statement of Facts, the evidence tendered in the proceedings, and the aforementioned consideration of the features of the matter relevant to sentencing, I accept the plea of guilty by the defendant and enter a verdict accordingly.

Conclusion

- 226 As earlier noted, the Court must ensure that mitigating and subjective factors (whilst very strong in this matter) do not produce a sentence which fails to sufficiently take into account the objective seriousness of the offence.
- 227 Here, a man was killed as a result of his exposure to a violent and unpredictable client. The objective seriousness of the offence is well manifested in the charge, and the particulars thereof, and the various factors discussed in this judgment which dictate a conclusion that the offence, as I have earlier observed, even with mitigating factors, remains a serious one. Nonetheless, I have considerably reduced the penalty which may have otherwise been imposed upon the defendant because of the mitigating factors bearing upon objective seriousness and subjective features. I shall impose a penalty of \$115,000 with a moiety to the prosecutor. The defendant shall pay the costs of the prosecutor for these proceedings as agreed or, in default, as assessed.

Orders

- 228 In all the circumstances, the Court makes the following orders:
- (1) The defendant is convicted of the offence as charged.
 - (2) The defendant is fined the sum of \$115,000 with a moiety to the prosecutor.
 - (3) The Court further orders that the defendant shall pay the costs of the prosecutor for these proceedings as agreed or, in default, as assessed.

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DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

ANNEXURE A

BEFORE THE INDUSTRIAL COURT OF NEW SOUTH WALES

No IRC 1136 of 2011

Inspector Joanne Maree Walker

Prosecutor

v

**On Track Community Programs Limited
ACN 136 602 376**

Defendant

PROSECUTION
PURSUANT TO **SECTION 8(1)** OF THE
OCCUPATIONAL HEALTH AND SAFETY ACT 2000

AGREED STATEMENT OF FACTS

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1. At all material times the prosecutor was an Inspector duly appointed under Division 1 of Part 5 of the Occupational Health and Safety Act 2000 ("OHS Act") and empowered under Section 106(1)(c) of the said Act to institute proceedings in the within matter.

Background to On Track

2. At all material times On Track Community Programs Incorporated (ARBN 136 602 376), since transferred and now known as **ON TRACK COMMUNITY PROGRAMS LTD [ACN 136 602 376]** ("On Track") a corporation with its registered office located at Suite 101 Level One, 72-80 Marine Parade Coolangatta 4225, in the state of Queensland was an employer.
3. The background to On Track is:-
 - (a) On **22 January 1993**, The Tweed River Valley Fellowship Incorporated was incorporated under the *Associations Incorporation Act* (NSW) 1984;
 - (b) On **14 March 2000**, The Tweed River Valley Fellowship Incorporated became a registered business, ABN 54 213 576 984;
 - (c) On **19 February 2004**, Tweed River Valley Fellowship Incorporated changed its name to On Track Community Projects Incorporated, ABN 54 213 576 984;
 - (d) On **16 March 2004**, On Track Community Projects Incorporated changed its name to On Track Community Programs Incorporated, ABN 54 213 576 984;
 - (e) On **7 May 2009**, On Track Community Programs Incorporated was registered as an Australian Registered Body under the *Corporations Act* 2001, ARBN 136 602 376;
 - (f) On **17 December 2010**, On Track Community Programs Ltd was registered as a public company under the *Corporations Act*, ACN 136 602 376.

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4. On Track is a non government not-for-profit organisation that receives funding grants from the NSW Government to provide a number of different services in relation to mental health, disability, housing and employment.

At all material times On Track undertook the business or undertaking of providing community based support services for people experiencing mental illness, disability or homelessness. The defendant has three branches – in Lismore, Tweed Heads and Coffs Harbour. At the time of the incident, On Track employed approximately 99 full time equivalent employees, and had a total staff of 189. Since July 2007, On Track received funding from the NSW Government to provide services as part of the 'Housing and Support Initiative' program (**HASI**).

The HASI Program

5. The HASI program is a NSW Government initiative to provide housing and support to mentally ill people in the community.
6. The HASI program is a joint partnership arrangement between the NSW Department of Health, the NSW Department of Housing and the non-government sector, which provides housing linked to clinical and psychosocial rehabilitation services for people with a range of levels of psychiatric disability.
7. The role of HASI was to assist people with mental illness access stable housing and the appropriate treatment and support to maintain their tenancy. Support is provided to people in their homes and in the community.
8. The key responsibilities for HASI Mental Health Support Workers were (amongst other things) to provide each consumer with support specific to their psychosocial needs as identified in their Individual Service Plan, to support and assist consumers to complete daily living tasks according to their level of ability, to liaise with Community Mental Health to ensure the well being of consumers and to ensure that consumers complied with the code of conduct.
9. The nature and scope of the HASI Program together with the key responsibilities for HASI Mental Health Support Workers are set out in the following documents:
 - (a) the contract of employment and job description for the relevant employees;
 - (b) the Housing and Accommodation Support Initiative (HASI) for people with mental illness (also known as the HASI Resource Manual);
 - (c) the HASI Service Level Agreement dated July 2007; and
 - (d) Stage 4A Agreement between the North Coast Area Health Service¹ and On Track.
10. Pursuant to the HASI Service Level Agreement dated July 2007 and the HASI 4A Agreement between the North Coast Area Health Service and On Track, On Track received government funding to provide HASI 4A services. On Track's business or undertaking in relation to HASI 4A is set out in the HASI Resource Manual, the HASI Service Level Agreement dated July 2007 and the HASI 4A Agreement between the North Coast Area Health Service and On Track. These documents are attached and Marked '**Annexure A**'.

¹ The North Coast Area Health Service is a statutory body created by the *Health Services Act No. 154* (NSW) 1997.

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11. The criteria for eligibility for HASI high support needs packages is to be found in Section 5 of the HASI Resource Manual, section 3 of the Funding and Performance Agreement with NSW Health (North Coast Area Health Service) dated June 2008 – July 2011 (a copy of this Agreement is attached and marked as 'Annexure B') and Section 4 of the HASI Service Level Agreement dated July 2007. A description of the requirements for eligibility that consumers had to meet in accordance with the HASI Service Level Agreement dated July 2007 and HASI Resource Manual required a referral from a referring agency (which was usually the Local Area Health Service) to be sent to an accommodation support provider such as On Track.
12. Under the terms of HASI, North Coast Area Health Service had responsibilities for people with mental illness.
13. For a client to be eligible to the high support HASI, a client must be between the ages of 16 and 65 years old, have a diagnosis of severe mental disorder and a moderate to severe level of psychiatric disability, amongst other criteria.
14. It was necessary for the applicant to be assessed by the North Coast Area Health Service as part of an application process.
15. The North Coast Area Health Service provided a Mental Health Care Coordinator who was responsible for coordinating clinical mental health care to HASI clients. One of their tasks was to ensure the client had been properly assessed to ensure they are appropriate to the HASI program.
16. North Coast Area Health Service is responsible to provide treatment and rehabilitation, crisis intervention and urgent psychiatric assessment when required.
17. On Track was responsible for providing non-clinical support to HASI clients for day to day living in the community.
18. On Track receipted the HASI 4A NSW Government funding grants into their general operating account and identified the funds by description (e.g. "North Coast Area Health Service HASI 4A") and an internal cost centre code. The HASI 4A funds would be used only for the specific purpose of the grant.

Other services operated by On Track

19. In addition to the HASI Program, On Track operated three other services for persons affected by mental illness in Lismore, being an Outreach Home Visiting Program, The Refuge (now closed) and Mandara House.
20. The Refuge and Mandara House operated a 24 hour residential service. HASI and the Outreach Home Visiting Program only provided support to clients during the day.
21. The role of the Refuge was to provide short term crisis accommodation to assist people with a mental illness who were homeless or at risk of homelessness. The type of support provided related to crisis housing and assisting people to obtain longer-term accommodation and short term respite.
22. The role of Mandara House was to provide medium term psychosocial residential rehabilitation to people living with a mental illness. The type of support provided at Mandara related to skill development in the areas of budgeting, activities of daily living, community reengagement

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through social and recreational activities and support to attend clinical and allied health appointments.

23. Prior to merging with On Track, the Mental Health Accommodation and Rehabilitation Services Incorporated ("MHARS") managed The Refuge and Mandara House. Both sites were funded by the NSW Government through the NGO Grant Program. Funding for the Refuge commenced in 1999. Funding for Mandara House commenced in 2002.

Background to the incident

24. On 27 June 2009, a client of the HASI 4A program, Reagan David Rodriguez, murdered Michael Corkhill, an employee of On Track, at 1/18 Marlyn Avenue Lismore NSW.
25. Mr Rodriguez was known to North Coast Area Health Service as early as 1998. He had been admitted both voluntarily and involuntarily to Bloomfield Hospital and Richmond Clinic (now known as the Lismore Adult Mental Health Unit ("LAMHU")) on multiple occasions between 1998 and 2009. The voluntary and involuntary admissions were made pursuant to the relevant provisions of the *Mental Health Act 2007* (and its predecessors). At the time of the admissions the circumstances applicable to Mr Rodriguez included decrease in dosage of medication, non compliance with his psychiatric medication, substance abuse, or the severity of his mental condition. On occasions, just prior to Mr Rodriguez being admitted, he committed acts of violence.
26. On 23 June 2009 Mr Rodriguez was discharged from LAHMU into the community after having spent almost ten weeks as an inpatient some of which was spent in the High Dependency Unit ("HDU").

HASI Workers employed by On Track

27. Michael Corkhill, Roberta Brooks and Peter Mitchell were employed by On Track as Mental Health Support Workers. Mr Corkhill was employed through the HASI program three days per week and through the NGO Grant Program one day per week.
28. As at 27 June 2009, Ann Bowen was employed by On Track as the Manager of Mental Health Services in the Richmond Network. She had held that position since amalgamation with MHARS in July 2007. She was responsible for managing the HASI Program. Prior to that, Ms. Bowen had been the Manager of MHARS for seven years and prior to that she managed an employment program for people with mental health issues for nine years. She had worked in the Community Services area since 1977. Ms Bowen was completing a degree in Social Science at the Southern Cross University and had Certificate IV's in Frontline Management and Assessment and Workplace Training, and qualifications in neuro-linguistic programming.
29. As at 27 June 2009, Mr. Corkhill had been employed by On Track as a HASI Mental Health Support Worker for approximately two years, having been retained on staff when On Track merged with MHARS on 1 July 2007. Prior to that, Mr. Corkhill had been employed by MHARS since 2004.
30. As at 27 June 2009, Ms. Brooks had been employed by On Track for approximately one year. As at 27 June 2009, Mr. Mitchell had been employed by On Track and previously by MHARS for approximately nine years.

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31. Prior to his employment with MHARS, Mr. Corkhill's work experience also included, but was not limited to:-
- (a) a Military Policeman in the Australian Army achieving the rank of Sergeant (1979 – 1989);
 - (b) a Diploma in Theology (Christian Ministry) (1990) and practise as a Minister of Religion in Victoria involving counselling of persons living in the community with mental health issues (1991-1996);
 - (c) a Support Worker in the de-institutionalisation program with Unicare (1997-1998);
 - (d) a Residential Support Worker with the NSW Department of Community Services (1999-2001).
32. Mr. Mitchell commenced employment with the Northern Rivers Fellowship, the predecessor organisation to MHARS, as early as July 2000. His experience and qualifications included the following:-
- (a) Lifeline telephone counselling;
 - (b) Certificate IV in Community Services;
 - (c) Diploma in Community Services;
 - (d) OH&S Consultation training with the North Coast Area Health Service;
 - (e) Completion of:-
 - (i) a 4 day course in non violent crisis intervention;
 - (ii) a course in rehabilitation in mental health with the NSW Institute of Psychiatry;
 - (iii) conflict resolution courses with Lifeline and the United National Association of Australia.
33. Roberta Brooks had over 10 years experience in the mental health sector. She had a Degree in Social Science and was undertaking a Post Graduate Course in Community Mental Health.
34. Mr Corkhill, Mr Mitchell and Ms Brooks each worked as Mental Health Support Workers under the HASI Program. They would also undertake shifts at the Refuge and Mandara House under the NGO Grant Program.
35. Mr Corkhill, Mr Mitchell and Ms Brooks' timesheets identified whether they had worked as HASI Mental Health Support Workers or at the Refuge or Mandara House under the NGO Program.
- Mr. Rodriguez**
36. As at 27 June 2009, On Track had four HASI 4A clients in the Lismore-Richmond network, Mr Rodriguez was one. Mr Rodriguez had been a HASI 4A client of On Track since about August 2007 and had previously been a client of MHARS before it merged with On Track.

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37. Mr Rodriguez was born in August 1980. In June 2009, he was 28 years of age. He had a history of mental illness known to NSW Health which extended back to about May 1998 when he was admitted to Lismore Base Hospital.
38. In June 2009, Mr Rodriguez was living at 1/18 Marlyn Avenue, East Lismore ("the Premises"), which was accommodation provided by North Coast Community Housing (a community organisation set up for the purpose of providing housing and funded by the NSW Department of Housing) through the HASI program.

Ms Kennedy

39. At the time of the incident, Mr Rodriguez was in a relationship with Zeeta Kennedy, a Refugee client of On Track. Ms Kennedy had been living between the Premises and the Refuge. From 23 June 2009, Ms Kennedy lived at the Premises. Previously, depending on the stability of the relationship, Ms Kennedy moved between the premises and the refuge.

Mr Rodriguez's discharge

40. Mr Rodriguez's discharge from the Adult Mental Health Inpatient Unit at the Lismore Base Hospital on 23 June 2009 followed two separate voluntary admissions to the Lismore Adult Mental Health Unit (LAMHU), between 16 April to 26 May and 27 May to 23 June 2009. On both occasions, Mr Rodriguez self presented to Lismore Hospital seeking admission to LAMHU. He was treated and discharged from LAMHU by NSW Health treating doctors and psychiatrists. The discharge was required to be in accordance with the requirements of the *Mental Health Act* in respect to the Discharge and Detention of affected persons and Detention of Voluntary Patients in Mental Health Facilities.
41. During the latter stages of his admission, Dr Thorburn assessed Mr Rodriguez's mental state as stable and, in accordance with the *Mental Health Act*, authorised Mr Rodriguez to take leave of absence from the hospital in the company of a sole On Track mental health worker on a number of occasions, including on 10 June 2009, 11 June 2009, 13 June 2009, 17 June 2009, 19 June 2009 and 20 June 2009. Dr Thorburn did not impose any conditions on his leave.
42. On 18 June 2009, Dr Thorburn assessed Mr. Rodriguez as 'stable' and had 'nil concerns' and authorised him for overnight leave. Dr Thorburn did not impose any conditions on his leave.
43. Upon his discharge by Dr Thorburn and Dr Foy on 23 June 2009, required to be in accordance with the *Mental Health Act*, Ms Brooks met with Mr Rodriguez's nurse (R. Brown, E.E.N) who informed her that Mr. Rodriguez was 'well' and would need a follow up appointment with his treating psychiatrist, Dr Igor Petroff. Ms Brooks was not provided with a discharge summary.
44. Attached as '**Annexure C**' is a copy of the discharge summary from LAMHU on 26 May 2009.
45. Attached as '**Annexure D**' is a copy of the discharge summary from LAMHU on 23 June 2009, dated 1 July 2009.
46. Before leaving the hospital, Ms Brooks had a game of pool with Mr Rodriguez so that she could assess his behaviour and his suitability for continued involvement with the HASI program. As a result of this assessment, she formed the view that he was in a fit state to participate in the HASI program. Ms Brooks stayed with Mr Rodriguez during the day and collected Ms Kennedy from the Refuge and took them grocery shopping before dropping them both at Mr Rodriguez's flat.

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Between 23 June and 27 June 2009

47. The day following his discharge, 24 June 2009, Ms Brooks visited Mr Rodriguez at his flat at around 2.00pm. She had a 'good chat' with Mr Rodriguez and Ms Kennedy in relation to their goals and suggested some relationship counselling to ensure that they had all supports in place.
48. Ms Brooks then dropped Ms Kennedy at a medical appointment at 3.00pm (with Dr. Foy) and had coffee with Mr Rodriguez. She had further discussions with him about his goals. Mr Rodriguez, in her presence, telephoned Mr Corkhill about resuming weekly gym sessions. Ms Brooks then dropped Mr Rodriguez at home recording in Mr Rodriguez's Case Notes that 'all is A.O.K'.
49. A further home visit was undertaken by Ms Brooks and Mr Mitchell on 25 June 2009, and an assessment of Mr. Rodriguez's well-being was carried out. They noticed that Mr Rodriguez was "a bit anxious. They spent approximately one hour with Mr Rodriguez and Ms Kennedy and discussed better ways of sharing the flat together.
50. Following the visit, Ms Brooks and Mr Mitchell called Mr Rodriguez's Mental Health Case Worker, Mr Cleary, to ascertain if any of Mr Rodriguez's medications had been changed.
51. However, at all material times, none of Mr Corkhill, Ms Brooks and Mr Mitchell were trained and qualified to undertake a clinical assessment.
52. On 27 June 2009, Mr Mitchell took Mr Rodriguez and Ms Kennedy on a day trip which included going to the beach. Mr Mitchell did not observe any issues with Mr Rodriguez and noted that they appeared to enjoy the day. On returning Mr Rodriguez to his flat, Mr Mitchell helped Mr Rodriguez put up a clothes line and hang up a load of washing before leaving late in the afternoon.

Mr. Corkhill's afternoon shift at The Refuge

53. Mr Corkhill was rostered to work from 4.30pm on 27 June 2009 at the Refuge. This work required Mr Corkhill to be present at the Refuge during his shift and assist the residents at the Refuge. He was not employed on the evening of 27 June 2009 as a HASI worker and was not required to have any interaction with HASI clients away from the Refuge. On the day of the incident, he was working at the Refuge alone. Ms Kerri Smith, who was a mental health support worker employed by On Track, was rostered to work at Mandara House.
54. Ms Smith attended the Refuge at around 4:30pm to receive a shift handover from Ms Catherine Delaney, a mental health support worker employed by the On Track.
55. Ms Delaney provided a hand-over of the day's events in relation to the Refuge clients to Ms Smith and Mr Corkhill and then left the Refuge. There was no discussion of Mr Rodriguez because he was not a Refuge client, and no discussion of Ms Kennedy because, although she stayed at the Refuge from time to time, she had not been at the Refuge that day as she had been living with Mr Rodriguez at his flat since his discharge from LAMHU on 23 June 2009.
56. Prior to Ms Smith departing the Refuge to travel to Mandara House she spoke with Mr Corkhill about joining up to go to the Video Ezy store located at Conway St, Lismore, for the purpose of hiring out DVD's for the evening, as was common practice on Saturday nights. Both agreed that they would get in contact with each other to confirm a time for the two of them to meet and go

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to the Video Ezy store. Ms. Smith then departed the Refuge to commence work at Mandara House at approximately 5:00pm.

57. Mr Corkhill telephoned Ms. Smith at Mandara House at some time before 7.00pm and left a message stating that 7.00pm was a good time to attend Video Ezy. Ms Smith returned Mr Corkhill's call and Mr Corkhill advised Ms Smith that none of the Refuge clients wanted to go to Video Ezy. It was agreed to Mr Corkhill would drive to Mandara House and collect Ms Smith and the Mandara House consumers.
58. At approximately 7.00pm, Mr Corkhill arrived at Mandara House in the On Track work vehicle and collected Ms. Smith and four consumers. They left Mandara House at approximately 7.15pm and drove to Video Ezy. They selected DVD's and Mr Corkhill then dropped Ms Smith and the consumers back at Mandara House at approximately 7.30pm.
59. Mr Corkhill mentioned to Ms Smith that he had forgotten to return the previous weeks DVD's. Ms Smith told him not to worry about it and to return them in the morning. Mr Corkhill appeared to agree with that suggestion.
60. Mr Corkhill did not mention to Ms Smith that he intended to visit Mr Rodriguez at his flat that night or of any intention whatsoever to leave the Refuge again that night.
61. Sometime shortly after he returned to the Refuge at approximately 7.30pm, Mr Corkhill had a Skype telephone call with his brother, Mr Damian Corkhill. Mr Corkhill did not mention to his brother that he intended to visit Mr Rodriguez at his flat that night or of any intention whatsoever to leave the Refuge that night. Following that conversation, Mr Corkhill left the Refuge without authorisation or notice to any On Track staff or client at the Refuge, and travelled alone in his own personal vehicle to the Premises. He did not advise Ms Smith, or his on-call manager, or anybody else of his intention to leave the Refuge or to go to Mr Rodriguez's flat. He did not telephone Mr Rodriguez or Ms Kennedy to advise them of his intended visit. The available telephone records disclose that neither Mr Rodriguez nor Ms Kennedy telephoned Mr Corkhill or the Refuge on the evening prior to the incident. Annexed hereto and marked 'Annexure E' are the telephone records for the On Track landline (02) 6622 0399; Mr Corkhill's personal mobile phone 0429 180 561; and the On Track work mobile phone 0411 367 419.
62. Prior to and at the time of the incident, On Track had in place a policy in relation to home visiting titled 'Residential Services – Home Visits'. This policy applied only to the home visiting services. This policy did not apply to The Refuge or Mental Health workers whilst working at The Refuge. The policy required employees to complete an off-site safety checklist at the beginning of each shift outlining details of any home visits to be conducted. The policy stated that once the employee returns to the office from a home visit, the completed off-site safety checklist could be destroyed. It also indicated that where at all possible, all home visits will be carried out during normal business hours by previously arranged appointments. Possible exceptions to the policy may include "Doorstop" visits for the brief exchange of messages or information; if the visit is undertaken at the express invitation of the consumer and genuine emergencies and crisis calls. The policy did not proscribe employees from conducting home visits alone or alternatively did not require employees to conduct home visits in the company of another employee or another appropriate person.
63. On Track did not have a policy that prohibited employees from being alone with mental health clients who had been discharged from a mental health facility without a discharge summary, and in particular, mental health clients who had a history of violent and aggressive behaviour,

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at any time. It did, however, have a Consumer Safety Audit form that was required to be completed by the HASI Mental Health Support Workers, which, if certain circumstances were met, required a consumer to be visited by two workers.

64. Prior to the incident, Jenny Pandava had experienced that HASI workers, such as Mr Corkhill and Mr Mitchell, whilst working a weekend shift at the refuge were sometimes more concerned in regards to the HASI clients that they were responsible for as opposed to the refuge clients.
65. Ms Kennedy was a refuge consumer at the time of the incident. However, from 23 to 27 June 2009, and at the time of the incident, Ms Kennedy was living at the premises.
66. A fellow worker, Ms Brooks, stated to the police "... I am perplexed as to why Michael would have gone to Regan's that night ... Michael did not take risks in the workplace."
67. Shortly before 8:00pm, neighbours heard Mr Rodriguez and Ms Kennedy's raised voices. Mr Corkhill arrived at the premises at about this time. There is no clear reason why Mr Corkhill attended the premises or what happened when he arrived.
68. At some point, Mr Rodriguez punched Mr. Corkhill to the face and body and continued to assault him on the front verandah of the premises. Mr Rodriguez punched Mr Corkhill with his fist and stomped on him as he lay on the ground. Mr Rodriguez stabbed Mr Corkhill with a broom handle and a knife. Mr Rodriguez wrapped a wire coat hanger around Mr Corkhill's lower face.
69. Ms Kennedy fled from the scene to call for help. At approximately 8.08pm, Ms Kennedy was observed on CCTV footage walking towards the front entrance to the East Lismore Bowling Club and then turning and walking towards the carpark.
70. At approximately 8.18pm, a taxi was called to the East Lismore Bowling Club. Mr Christopher Burrell (taxi driver) was in the area and attended to the call and drove to the East Lismore Bowling Club. When he pulled into the car park Ms Kennedy approached him in a visibly upset and distressed state and asked Mr Burrell to take her urgently to the Refuge. Ms Kennedy told Mr Burrell that her friend had called her saying he was going to kill someone.
71. Mr Burrell went inside the Bowls Club in an attempt to find the person that had called for a taxi. He was not able to locate this person and went back to his taxi. As he was driving out of the car park he saw Ms Kennedy walking on the grass verge on the right hand side of Neilson Street. Mr Burrell offered to give Ms Kennedy a lift to the Refuge, and did so.
72. Mr Rodriguez left the Premises and walked up the street and banged on the rear window of a neighbour, Mr Adam Fletcher. Mr Rodriguez was smoking a cigarette and asked Mr Fletcher to call the police as there was a dead body down the road. He advised Mr Fletcher that his name was David Rodriguez, that he had committed the felon and that the cops needed to come immediately. Mr Fletcher telephoned the Lismore Police and, although told that 'the police won't be there for a while', advised them that it was urgent and stayed on the telephone until they arrived.
73. When NSW Ambulance Paramedic Officers arrived at the Premises, they observed Mr Corkhill lying on the front verandah of the premises with numerous wounds to his body. He could not be resuscitated. A post-mortem examination was conducted and the cause of death was identified as blunt trauma to the head and stab wound to the chest.

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74. Mr Rodriguez was arrested and charged with the murder of Mr Corkhill.
75. On 19 March 2010, he was found not guilty by reason of mental illness in accordance with section 38 of the *Mental Health (Forensic Provisions) Act 1990* following a trial in the Supreme Court of NSW (Johnson J).

On Track's policies

76. Prior to and at the time of the incident, On Track had in the following policies in place relating to conducting a home visit:
 - (a) OHS Policy Manual Feb 2009; and
 - (b) Mental Health Services Manual Feb 2009

These documents are attached at '**Annexure F**'.

77. Attached as '**Annexure G**' is a copy of extracts from On Track's February 2009 "Occupational Health and Safety Manual" pages 1, 2, 36 – 39, 42, 43 and 47 – 49.
78. Before the incident, NSW Health had not provided On Track with sufficient information about Mr Rodriguez's history of violence, psychotic and anti-social behaviour. Nor did On Track possess such sufficient information.
79. On 17 August 2009, Professor David Mace Greenberg prepared a medico legal forensic psychiatric report for the Lismore Local Court, after conducting a psychiatric assessment of Mr Rodriguez on 12 August 2009 at the Long Bay Prison Hospital. Subsequently, Professor Greenberg completed at WorkCover's request a medico legal forensic psychiatric report on 14 June 2011 and then a supplementary report on 12 September 2011. Dr Greenberg's reports are attached at '**Annexure H**'.
80. Subsequent to the incident, On Track conducted a review of its policies and procedures relevant to home visits, transporting and assessment of clients. On Track reinforced the requirement for employees to complete the Off Site Safety Checklists and in/out whiteboards for all staff undertaking home visits. The Home Visiting Policy was amended so that from June 2009 to October 2009, all home visits were conducted with two workers or staff met with clients in public places. From October 2009 to July 2010, home visits were conducted with two staff for the first two visits for new clients. From October 2009 to July 2010, home visits were conducted with two staff for the first three visits after a client was discharged from an inpatient clinic. Pre-visit phone calls are now made to all clients prior to a home visit and all employees are required to phone into one of the defendant's 24-hour staffed sites when completing home visits after 4:30pm.
81. On Track has no prior convictions.



Consumer Safety Audit

Consumer Name: REGAN RODRIGUEZ Service: HASI LISMORE

Date: 1 / 2 / 09

Review Date: 1 / 2 / 10

Questions					Points
1. Has the consumer filled in a 'Consent' form?	Yes		No		0
	①		3		
2. Has the consumer any history of violence?	Within 1 year	Within 5 years	5 years or more	No history	1
	5	2	①	0	
3. Has the consumer a history of Drug and/or Alcohol abuse?	Within 1 year	Within 5 years	5 years or more	No history	1
	3	2	①	0	
4. Has the consumer any history of Psychotic and/or anti-social behaviour?	Within 1 year	Within 5 years	5 years or more	No history	1
	3	2	①	0	
5. Is the consumer known to have visitors who may have any of the above issues?	Yes		No		0
	3		①		
6. Does the consumer live in an area or situation that may place the staff member in a dangerous position?	Yes		No		0
	3		①		
	Total				3

If points total between 5 and 10 visiting with two staff members should be considered.
If points total between 10 and 17 visiting with security personnel should be considered.

When the total is known the appropriate risk rating must be noted in the provided square at the top right hand corner of the clients 'Application for Service' form.

The above is a guideline and the staff member doing the intake may feel that a score lower than 5 may still warrant a higher rating if recent violence or other anti social behaviour indicate the potential of harm to staff members.

This consumer should be visited by

Tick

- | | | |
|--|---|--------|
| a. A single staff member | (<input checked="" type="checkbox"/>) | Low |
| b. Two staff members | (<input type="checkbox"/>) | Medium |
| c. A staff member and security personnel | (<input type="checkbox"/>) | High |

M. COCKHILL
(Name of Intake Person)

[Signature]
(Signature of Intake Person)

1 / 2 / 09
(Date)

29-JUN-2009(MON) 17:12 ON TRACK

(FAX)0266217561

P. 020

Additional Comments: THERE ARE NO KNOWN
SAFETY ISSUES WITH REGROW. *Michael M. CORKHILL*
Michael Corkhill
Support Worker