



QUEENSLAND COURTS AND TRIBUNALS

TRANSCRIPT OF PROCEEDINGS

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MAGISTRATES COURT

SHEPHERD, Magistrate

MAG-00088616/21(9)

WORKERS' COMPENSATION REGULATOR **Complainant**

and

THIESS PTY LTD **Defendant**

BRISBANE

10.04 AM, FRIDAY, 9 AUGUST 2024

DAY 1

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HER HONOUR: So I apologise for that delay. I didn't anticipate – I thought it would be very quick. So sorry to keep you waiting on that one. So taking the matter of Guilfoyle and Thiess.

5

MR NICHOLSON: If it please your Honour, my name is Nicholson, N-i-c-h-o-l-s-o-n, initial S. I'm a Work and Safety prosecutor and appear for the complainant.

HER HONOUR: Thank you.

10

MR MURDOCH: Yes. May it please the court, Murdoch, initials C J. I appear with my learned friend Ms Harburg, initials S E, for the defendant, instructed by Allens.

15 HER HONOUR: Instructed by Allens. Thank you. And is someone from the company here today or - - -

MR MURDOCH: Yes, your Honour.

20 HER HONOUR: Yes. All right. So, Mr Nicholson, it's your application.

MR NICHOLSON: It is, your Honour.

25 HER HONOUR: So can we just clarify, because what was filed in the registry, the application for a direction hearing, was that it was an amendment to the complaint under section 48.

MR NICHOLSON: Yes.

30 HER HONOUR: Is that right?

MR NICHOLSON: It's an amendment to the particulars of the complaint, your Honour. So there is reference in section 48(1), subsection (c) relating to an amendment where there is a variance between what is alleged and that which is led at
35 hearing. That's my words. The - - -

HER HONOUR: So it is an application under section 48?

40 MR NICHOLSON: It is.

HER HONOUR: I was just a bit confused when I read your – was it your outline? There was no name to it.

45 MR NICHOLSON: There – it is my outline, your Honour.

HER HONOUR: That it – I was confused as to whether – because you referenced Parhusip v Bell.

MR NICHOLSON: That's right. So the position is rather confusing, your Honour, because in *Parhusip v Bell*, the learned judge referred to the fact that particulars stand separate from the complaint.

5 HER HONOUR: Can you speak up for me?

MR NICHOLSON: I do beg your pardon. The learned judge in that case referred to the fact that particulars stand separate from the complaint.

10 HER HONOUR: Yes.

MR NICHOLSON: So the application is to amend the particulars.

HER HONOUR: Yes.

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MR NICHOLSON: The power may lie in section 48, subsection (1)(c) or within the discretion of the court, consistent with *Parhusip*.

HER HONOUR: Right.

20

MR NICHOLSON: In any event, it is an application to amend the particulars only, not the charge itself.

25 HER HONOUR: All right. I'll just ask Mr Murdoch a question. So, Mr Murdoch, your outline appeared to reasonably – it was prefaced on the fact that it was an application under section 48 of the Justices Act.

30 MR MURDOCH: Well, that's our understanding, that it is an application under section 48. And, your Honour, cutting to the chaise, our position is that whether our friend refers to what's sought to be changed is a change to particulars or not, what's sought to be done is an amendment that changes the true nature of the charge.

35 HER HONOUR: All right. I understand from both of the outlines that the cases that have been put forward – some are related to the principles with respect to application under 48 and others with respect to applications to amend particulars, and that there appears to be a consensus that there's consistency in those principles and how I proceed today.

40 MR MURDOCH: Yes, that's so. That's right.

HER HONOUR: All right. Yes. Mr Nicholson.

45 MR NICHOLSON: If it please. Your Honour should have the material that was filed on the 29th of July, being the outline that your Honour has referred to already, along with a statement of facts that was also provided.

HER HONOUR: So can I – I just want to – with that statement of facts - - -

MR NICHOLSON: Yes.

HER HONOUR: Is that an agreed statement of facts?

5 MR NICHOLSON: It was a statement of facts that was provided to the defendant in September 2023, during preparation of the case itself. And, of course, it's now progressed to the hearing stage, which will commence on the 2nd of September. Where the – I'm not sure whether it was agreed or not, but certainly it was a draft statement - - -

10

MR MURDOCH: It's not agreed. The matter's going to trial.

MR NICHOLSON: That is so. And the defendant stands trial.

15 HER HONOUR: Right. So I'm just trying to understand that statement of facts.

MR NICHOLSON: Yes.

20 HER HONOUR: I've had limited experience – some, but limited experience with Work Health and Safety hearings.

MR NICHOLSON: Yes.

25 HER HONOUR: But certainly a lot of experience with criminal trials per se.

MR NICHOLSON: Yes.

HER HONOUR: And one starts talking about an agreed statement of facts - - -

30 MR NICHOLSON: Yes.

HER HONOUR: - - - but that's not what we're talking about.

35 MR NICHOLSON: It's not.

HER HONOUR: Okay. So the relevance of that for me today is what?

40 MR NICHOLSON: Yes. The relevance is, your Honour, as to what the prosecution put the defendant on notice of as at that time of the prosecution case. It is relevant to what was said to – the case the prosecution expected the defendant to meet, to use the words of Johnson v Miller. So its relevance is marginal now that the defendant has been committed – I'm sorry, will stand trial. It's relevant to submissions about how the case was framed. My friend is likely to make some submissions about that, but certainly the core submissions, your Honour, will be about the principles enunciated
45 in the cases that I've referred you to in my outline.

My learned friend was correct in terms of the contest here today. It is about whether there has been a substantial change in the case by reason of these particulars that are – or the amendment that is applied for. And I will make some submissions, your Honour, consistent with my outline regarding that it is not.

5

HER HONOUR: Okay. So, Mr Nicholson, I'll just have some questions. It just helps me with my thinking.

MR NICHOLSON: Certainly.

10

HER HONOUR: So – and I might put things fairly basically.

MR NICHOLSON: Certainly.

15

HER HONOUR: But – so the charge is under section 43 - - -

MR NICHOLSON: That's right.

20

HER HONOUR: - - - of the relevant Act, which is about – which is an assertion that the defendant has failed in its workplace health and safety obligations - - -

MR NICHOLSON: That's right.

25

HER HONOUR: - - - that were – as articulated under the Act.

MR NICHOLSON: That's right.

30

HER HONOUR: And the prosecution say, "Well, you failed because you didn't implement these three measures - - -"

MR NICHOLSON: That's right.

HER HONOUR: "- - - as articulated in the particulars 38(a), (b) and (c)."

35

MR NICHOLSON: That's right.

40

HER HONOUR: So, for example, in the hearing, do you agree that – let's say we're talking about 38, subsection (a). The prosecution would have to satisfy the court beyond a reasonable doubt of that particular.

MR NICHOLSON: That's right.

HER HONOUR: Yes.

45

MR NICHOLSON: That's right. So it - - -

HER HONOUR: So it – in effect, it does – those – 38(a), (b) and (c) really are recorded as essential elements of the charge.

5 MR NICHOLSON: They go to the court’s assessment of whether it is satisfied beyond a reasonable doubt if the defendant, as the contractor, has complied with its obligations under the Coal Mining Safety and Health Act. So there’s the allegation under section 43(1)(c), which your Honour has identified, that relates to an obligation upon the contractor to ensure that the contractor’s work is not adversely – the safety and health of the contractor and of others is not adversely affected by the
10 way the contractor undertakes the work. So that’s the primary allegation.

And then consistent with what your Honour may have seen in the discussion in cases like Kirk, the decision of Lowndes from the Northern Territory, which is referred to by my learned friend, also the decisions from the Industrial Court in the Thomas
15 cases, Parhusip – the particulars then spell out for the defendant that which the prosecution says is how the failure occurred.

So the essential elements of the offence, in my submission, your Honour, are that the – that it is a question for the court as to whether it is satisfied beyond a reasonable
20 doubt that the obligation has not been met. The particulars frame the prosecution’s case in order to show the defendant what it is to meet, on the prosecution’s submission, and assists the court in understanding that, and to assist it in determining whether it is so satisfied that the obligation has been – whether or not the obligation has been complied with. Does that assist, your Honour?

25 HER HONOUR: Well, it does, but, I mean – yes.

MR NICHOLSON: But those are the three ways - - -

30 HER HONOUR: But it seems to me that they – I mean, you’ve conceded that – because I know they’re framed in “and/or”, but that the prosecution would have to prove them beyond a reasonable doubt - - -

35 MR NICHOLSON: That’s right. But the - - -

HER HONOUR: - - - as the prosecutor does have to do with any essential element of the charge.

40 MR NICHOLSON: That’s right. That’s right.

HER HONOUR: So it’s an essential element of the charge.

45 MR NICHOLSON: There’s some discussion in one of the cases about that – Thomas v Harrison, I think, which I’ll have to find. I do beg your pardon, your Honour. Your Honour, the case of Thomas v Harrison may assist you. So that is in the prosecution’s bundle and it is at tab 4.

HER HONOUR: Yes.

MR NICHOLSON: So the citation is [2018] ICQ 7. Now, in that case, the defendant was charged with an offence contrary to the Petroleum and Gas Act and was said to have failed to comply with an obligation in a number of ways. Now, in that case, the court was considering an amendment and considering the function of particulars. And, there, the court considered that it was the – the essential elements of the offence were that – well, in the context of this case, that there was an operator, it was undertaking work and that it had failed to comply with an obligation. Those are the essential elements. It is the framing of how that is said to occur that is assisted through the function of particulars. So it may sound like two halves or one part of the other, but it is a difference that is relevant. But I accept that, in any event, the evidence that would need to satisfy the court at the hearing as to the breach of the obligations would, of course, need to be proven beyond a reasonable doubt. And the establishing facts relating to the court's consideration of [indistinct] again would need to be satisfied beyond a reasonable doubt.

HER HONOUR: Yes. Thank you. Yes.

MR NICHOLSON: Now, just to confirm with your Honour, you do have that bundle of material that was filed? Thank you.

HER HONOUR: Yes.

MR NICHOLSON: Your Honour, this case has always been about a number of things. It has been about, as I have addressed you on, an allegation that, between late December 2019 and early December 2020, the defendant, who was a contractor at the Coronado mine, failed to meet its obligations under section 43(1)(c). That was in relation to the work of a tyre fitter, Mr Rabbitt, who's alleged to have died at the site in January 2020.

It has been about three things: the provision of a work pack. Your Honour will see in the detail of my contentions what that is in relation to. It is the provision of a number of procedures to the worker undertaking this task. And the task was the wire – the tyre and wheel assembly task. The second thing it has been about is the requirement to undertake a job safe analysis. That, again, comes from a particular procedure relating to this task and is something that is alleged that the defendant failed to do consistent with its obligation to provide this safe work practice. The third thing it has always been about is implementing a requirement that two workers undertake the wheel assembly task in relation to the heavy mobile equipment, the Bosich loader.

So, in my submission, consistent with my contentions that I've advanced to you in writing, the changes that are sought to be made do not change the essential pith and substance of this case. They relate to those three essential matters that the prosecution will lead evidence about. It is not a case where the prosecution is seeking to commence a different charge under a different provision. It is not a case

where, in my submission, there has been a radical departure from the central allegation in this case, namely, the provision of instruction and supervision as to these three things to meet the defendant's obligation. So that's where I commence my submissions, your Honour. Your Honour will see in the early parts of my contentions the proposed amended particulars. Has your Honour had an opportunity to read those?

HER HONOUR: Yes.

MR NICHOLSON: I won't take your Honour through those as they speak for themselves.

HER HONOUR: Sorry, I did have a question, though.

MR NICHOLSON: Yes, your Honour.

HER HONOUR: I might ask it here.

MR NICHOLSON: Sure.

HER HONOUR: The bay supervisor, is that a position that's – is that an employee of the defendant, it – that position went – at a mine?

MR NICHOLSON: Excuse me, your Honour. My solicitor will just interrogate, that your Honour.

MR MURDOCH: Your Honour, it's alleged at paragraph 14(b) that the tyre bay supervisor is employed by the defendant.

HER HONOUR: Is that of the fact that - - -

MR MURDOCH: Yes.

HER HONOUR: - - - [indistinct] sorry, what paragraph, Mr Murdoch?

MR MURDOCH: That's of the complaint, your Honour.

HER HONOUR: The complaint. I see.

MR NICHOLSON: Fourteen (b).

HER HONOUR: Yes. Yes. Yes, Mr Nicholson.

MR NICHOLSON: Please. So as my learned friend has pointed you to, a copy of the complaint is provided along with the amendments. As I have articulated at paragraph 7 of my contentions, it's the prosecution's submission that, if the amendments are granted by your Honour, that they do not alter the broad allegation

that the defendant should have conducted itself in a particular way; that particular way being clear from what I have addressed your Honour and what is contained in the complaint.

5 Now, as I was addressing your Honour on, **it's not a situation where the amendments seek to commence a new charge.** It is not a situation where the amendments seek to correct or change the provision under which the defendant is charged. And that is – your Honour will see that kind of situation in some of the cases that I will refer you to where, for example, in – in *Malahoff v White*, your Honour, which I referred your
10 Honour to, which is from the Tasmanian jurisdiction, a decision of his Honour Chief Justice Cox, reported at [1991] TASSC 60 or 14 MVR 450. In that case, the court had to consider the disqualification provisions that the defendant was charged under.

15 So, initially, the defendant had been charged under provisions of the Road Safety (Alcohol and Drugs) Act. When he was intercepted and it was alleged that he had been driving whilst disqualified, the charge was then brought under the Vehicle and Traffic Act. So when the matter came on for hearing, an amendment was sought to change the Act – the provision of the relevant – in relation to the complaint so as to properly capture the order of disqualification. So there was the consideration there
20 as to whether that was an injustice to the defendant. And his Honour Justice – Chief Justice Cox determined that the pith and substance of the complaint was the same because the essential allegations were no different. It was simply that the relevant legislation was different.

25 But that's not the case here. The pitch and substance test, yes, is relevant, but we're – I'm not – **the prosecution is not seeking to amend to a different charge.** That is also considered in cases such as *Barnes v Hovington*, another decision from the Tasmanian jurisdiction, and others that have been referred to your Honour. It's – similarly, in my submission, the prosecution is not seeking to cure an irregularity, as
30 was considered in a number of the cases I referred to in my outline. It is a situation where the particulars are sought to clarify and reflect the evidence to be adduced at trial.

35 HER HONOUR: I mean, it's certainly not a determinative matter, but is it not the case, in their current form, 38(a) and (b) prosecution would have to file because they're not reasonable measures, because the document isn't in the defendant's control to do what – saying they should do, or is that – have I misinterpreted that?

40 MR NICHOLSON: It's a matter that would – it would be a matter for evidence. It would be a matter for submission. It is an - - -

HER HONOUR: As to whether they had any ability to - - -

45 MR NICHOLSON: Yes. And a - - -

HER HONOUR: - - - start amending that document.

MR NICHOLSON: And an – yeah, and an - - -

HER HONOUR: All right. So that would something that would need to be decided.

5 MR NICHOLSON: Yes.

HER HONOUR: Okay. Yes.

10 MR NICHOLSON: But I accept that is the way in which the prosecution has originally framed its case. So, your Honour, there are a number of considerations here, and, of course, this application has been brought shortly before trial. It's not been brought at trial, as some of the cases that I've referred your Honour to - - -

15 HER HONOUR: No. Can we – sorry. Can we come back to that.

MR NICHOLSON: Yes.

20 HER HONOUR: Because if that's – that's more moving into the issue of unfairness.

MR NICHOLSON: Yes.

25 HER HONOUR: Are we? Yes. I'll just – because, certainly from my point of view, I'm reading the outline - - -

MR NICHOLSON: Yes.

HER HONOUR: - - - and we're all talking about the same thing.

30 MR NICHOLSON: Yeah.

HER HONOUR: And you're telling me it's not a change of substance, and Mr Murdoch is telling me it is.

35 MR NICHOLSON: That's right.

HER HONOUR: So it's black and – it's really two ends of the spectrum.

40 MR NICHOLSON: Yes.

HER HONOUR: So I thought, perhaps, you might want to speak to Mr Murdoch's arguments.

45 MR NICHOLSON: Certainly. Your Honour, the – I'll take it, then, your Honour, that I – that the principles can be taken as read, if - - -

HER HONOUR: Well, I – can I – so I did have a look at this - - -

MR NICHOLSON: Yes.

5 HER HONOUR: - - - already, you know, not in – but can I just say to you both, this is what I’ve taken in terms of the principles because if there’s no – if you’re both in agreement that I’m applying those principles correctly, we probably can move on from that.

MR NICHOLSON: Yes.

10 HER HONOUR: So in essence, with respect to whether the amendments change the nature of the charge, in particular, I’ve noted the case of Kypri that was outlined in Mr Murdoch’s statement, that “an amendment which clarifies the charge is permissible and an amendment which goes further is not. If the amendment would result in the formulation of a new and different charge it would constitute an
15 impermissible attempt to avoid the limitation period.” The matter of Thomas v Harrison, where his Honour held that in that case, the amendment to the particulars was permissible in those circumstances because it did not change the nature of the offence, did not alter the broad allegation that the defendant should’ve conducted himself in a particular way. That’s the principle you’ve been speaking to today. He
20 was not facing – the defendant is not facing a different charge. Also that an amendment to particulars will ordinarily be allowed in the absence of any unfairness unless the amendment works to change the true nature or essential elements of - - -

25 MR NICHOLSON: Yes

HER HONOUR: - - - the charge. Also, Crafter v McKeough.

MR NICHOLSON: Yes.

30 HER HONOUR: I think that might’ve been one in your outline, that a person charged can’t be convicted of an entirely different offence, but the charge can be amended to charge a different offence in the sense of an offence which is differently described or stated, so long as the pith and substance – and you - - -

35 MR NICHOLSON: Yes.

HER HONOUR: You use that phraseology a lot in your outline. Also, Barnes v Hovington, which talks about “pith and substance to that originally faced, or is a cognate one; that is, allied in nature or akin in quality.” And then the other that I
40 found also helpful was where it’s been observed that it’s always going to be a matter of degree.

MR NICHOLSON: That’s right. Yes. And that was the - - -

45 HER HONOUR: Which I think is the essence - - -

MR NICHOLSON: Yes.

HER HONOUR: - - - here.

MR NICHOLSON: Yes. That was an observation of his Honour Justice Underwood, as he then was, in Olver v Dix. In that case, he summarised many of the cases that I've put in my outline, some of which your Honour has touched on, and then observed that it is a question, in his view, of degree.

HER HONOUR: Yes. So that was – having read your outlines last night, that was the – kind of what I took from them as to how I would proceed - - -

MR NICHOLSON: Yes.

HER HONOUR: - - - with this - - -

MR NICHOLSON: Yes.

HER HONOUR: - - - in terms of principles. Have I – are you – can we move on from that? Are you satisfied with that, Mr Murdoch?

MR MURDOCH: The summary that your Honour has given is accurate. There's a couple of additional things I'll say in my oral submissions, but I don't cavil with the thrust of - - -

HER HONOUR: Okay.

MR MURDOCH: - - - your Honour's observations.

HER HONOUR: All right. Thank you. Yes. So we could perhaps move on from that, Mr Nicholson.

MR NICHOLSON: Certainly, your Honour. Your Honour, the – in reply to my contentions that the complaint ought be amended, the defendant alleges that it essentially creates a new charge. In my submission, it doesn't. The – as I have reiterated, the contravening section remains the same. The essential parts of the allegations also remain the same.

In relation to 38(c) – sorry; I beg your pardon – 38(a), the allegation is regarding the provision of this work pack. Now, the obligation is to ensure that the contractor conducts itself – conducts the work in a way that does not adversely affect the safety of its workers or others. The provision of the work pack will be said to be consistent with this charge and that obligation, be it in the SHMS or be it that the defendant does that practice itself. The essential allegation is the same. If it was in the SHMS, the Safety Health Management System, then the defendant would be obliged to provide the work pack. The allegation in the amended particulars is that it simply provides the work pack with those procedures.

So in my submission, your Honour, for what is advanced in my contentions, taking into account those principles, it is not a departure from the allegation as originally put. It is the same pith and substance. It is of the same – it relates back to the same essential issue regarding instruction supervision. And so that is what I say in relation to 38(a). It is not a – an entirely different control measure. It is an allegation that it would've improved the quality of instruction provided to the contractors through that work pack for an activity that was complex and dangerous.

In relation to particular 38(b), again, the defendant asserts that the implementation of the work method statement requirement that a JSA, or job safety analysis, for the particular task was different to a control measure to ensure that the workers complete a job safety analysis for the same task in the same circumstances. Your Honour, the evidence is, of course – will be that a job safety analysis had to be completed. It should've been completed for the task. The control measures alleged in both the original and amended particulars refer to that same process. As stated in my outline in relation to 38(b) – and I'm referring now to - - -

HER HONOUR: So, sorry, just with the SOP008 - - -

MR NICHOLSON: Yes. Standard operating procedure.

HER HONOUR: Yes. There's a lot of acronyms. Is that document – so the original particulars, ensuring the JSA, prior to undertaking tyre changing activities to which – sorry, what was it called again? The - - -

MR NICHOLSON: The standard operating procedure, your Honour.

HER HONOUR: The standard operating procedure applied. And does that – is that to do with the machinery outside a designated work bay?

MR NICHOLSON: That's right. It's required if the machine is located outside the designated tyre bay, your Honour. A drop safety [indistinct] yes, is to be undertaken.

HER HONOUR: So is the amended particular – what, are you saying that what it does is clarify that this is about the JSA as it lies under the work method statement? Is that the point of the amendment?

MR NICHOLSON: The clarification, your Honour, as I've set out at 35, is that it's consistent with the original – that it is directed to implementing the same work method statement requirement that called for the JSA to be carried out. It is directing language and specifically referring to the work method statement requirement. It is directed to the same requirement in the original and clarifies that this obligation that is alleged is something that would have again ensured that the work was undertaken safely, consistent with the contractor's obligation. So it clarifies that a JSA should have been completed in relation to this task, consistent with the work method statement.

HER HONOUR: So the work method statement and the appendix sit under the SOP?

5 MR NICHOLSON: That's right. They're part of the safety health and management system of the operator, your Honour.

HER HONOUR: Right. Yes.

10 MR NICHOLSON: In relation to 38(c), this is about the need for two workers to be undertaking this task. In the original particulars, that refers to the contractor including in the operator's SHMS that two workers undertake the wheel assembly task. The amended particulars remove the reference to the SHMS, but the essential allegation is the same: that two workers undertake this task, consistent with the appendix. It uses more direct language that those two workers, who would be coal
15 mine workers – so consistent with the original particularisation – be persons that are suitably qualified, and that is consistent with the work instruction. So the - - -

20 HER HONOUR: Does it lift the bar, though? I mean, doesn't the SOP – was that one qualified and one trainee who's had some actual experience? So it's raise the bar?

MR NICHOLSON: In my submission, it doesn't.

25 HER HONOUR: It doesn't.

MR NICHOLSON: It's still two coal mine workers. It is still one worker who is qualified and one that is – I'm going to use the general term – undertaking training for qualifications. And it is related to a task that is inherently complex and for which, as your Honour can see in that appendix and the references throughout the
30 complaint, necessitates a number of steps. So, in my submission, it doesn't raise the bar.

35 HER HONOUR: So what's meant – so what does "trained and a competent tyre fitter" mean? That can't be a trainee, can it?

MR NICHOLSON: The appendix does refer to some of the minimum requirements. So there may be – that the bar is risen slightly.

40 HER HONOUR: Yes.

MR NICHOLSON: I accept that, your Honour. But not to the extent that it is a completely different allegation, and indeed it is consistent with the rest of the prosecution case, it's consistent with the evidence, and consistent again regarding an assessment the court will need to undertake as to the discharge of the obligation. My
45 - - -

HER HONOUR: Yes.

MR NICHOLSON: My contention is otherwise, in that respect, for themselves, your Honour. I don't seek to address you any further than what I've written on the page.

5 HER HONOUR: Yes.

MR NICHOLSON: I understand, of course, that they are diametrically opposed to my learned friends' contentions regarding a change in the pith and substance, a change in the essential elements, and a – it amounts to a new charge. In my
10 submission, it doesn't.

HER HONOUR: And I'm no doubt oversimplifying – I'm about to oversimplify, I'm sure - - -

15 MR NICHOLSON: Yes.

HER HONOUR: - - - what Mr Murdoch is arguing with me, but on a very basic level, as I understand it, for years the prosecution have been saying, "You failed because you didn't do A, B and C," and now it's saying, "You failed because you
20 didn't do D, E and F." But you say, for example, am I – is this correct: for example, with 38(a) - - -

MR NICHOLSON: Yes.

25 HER HONOUR: - - - that that was about these essential documents being provided to the workers - - -

MR NICHOLSON: That's right.

30 HER HONOUR: - - - that needed them.

MR NICHOLSON: That's right.

HER HONOUR: And what the prosecution is now seeking to do is make a change
35 to how it says that should have happened.

MR NICHOLSON: That's right. That's right. In a way that is - - -

40 HER HONOUR: So Mr Murdoch says to me, "Well, that's a – you know, you're really changing the essential ingredient as to what you say their failure is."

MR NICHOLSON: Yes.

45 HER HONOUR: And you say it's a change, but akin and similar in pith and substance.

MR NICHOLSON: That's right. Precisely, your Honour, yes. If I can - - -

HER HONOUR: So it's about – it's a matter of degree.

MR NICHOLSON: Yes.

5 HER HONOUR: Yes.

MR NICHOLSON: That's right. So I would invite your Honour to consider those comments of his Honour justice Underwood in *Olver v Dix* – of course, a different factual circumstance related to Fisheries legislation, but certainly the - - -

10

HER HONOUR: Which one was that one?

MR NICHOLSON: *Olver v Dix*. It's a decision again of the Tasmanian Supreme Court.

15

HER HONOUR: Yes.

MR NICHOLSON: It considered a Fisheries legislation, but his Honour usefully summarised the position as to the argument that we're having today and came to the conclusion that it is a matter of degree.

20

HER HONOUR: Yes. All right.

MR NICHOLSON: So I've dealt with, your Honour, the amended particulars. If it suits your Honour, I can turn to the - - -

25

HER HONOUR: Yes, please.

MR NICHOLSON: - - - questions regarding fairness.

30

HER HONOUR: Yes.

MR NICHOLSON: Now, my learned friend has – will put into evidence the affidavit that sets out a number of things that have occurred since this litigation commenced, and I don't seek to cross-examine the deponent, and there are things in there that one has to live with; that the prosecution was commenced in May 2021. It was put on hold for a year or so as a result of unrelated litigation in terms of a – the case. **So it was the Carborough Downs matter relating to the jurisdiction of the Industrial Magistrates Court, but the outcome of that case may have had some impact on this litigation, so it couldn't be advanced for a period of time.**

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40

HER HONOUR: Uh-huh.

MR NICHOLSON: There were further communications between the defendant and the prosecution throughout 2022 and into 2023, and then there was the commissioning of an expert report that will be relied on at trial, which then came to – which then led us to February 2024, where, by consent, a number of orders were

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made for the prosecution to deliver its tender bundle for a number of procedural matters to be attended to by the 4th of July.

5 That was all complied with and, as at the 4th of July, your Honour, the defendant was put on notice that an application would be brought to amend the particulars. The defendant was also provided with the opening statement that was consistent with those amended particulars. So the – in my submission, there is – one can't shy away from the fact that this criminal litigation has been going on for a number of years. The application has been brought, though, in my submission, at a stage where an
10 assessment can be properly made as to unfairness, and it is different than if the situation had been following trial or at the very commencement of the trial, and it goes back, in my submission, your Honour, your Honour's assessment of the particulars themselves.

15 Again, in my submission, the allegations are not, in pith and substance, materially different from that which was laid in 2021. Yes, there has been some delay as a result those factors I have addressed your Honour on, but it is, perhaps, the nature of these kinds of cases. It is not a situation where I'm also saying, "Not only am I seeking to amend these particulars, your Honour, but, also, here's a new expert
20 report, and here's a suave of new evidence in support." It is a situation where the – it is the clarification of the case it has – as it has always been. That is the situation here.

25 So there has been the effluxion of time. The limitation period has clearly expired. That was a relevant consideration in Kypri. There are other considerations in Kypri, of course, as to the – when the police brief was provided and other relevant matters to his Honour Justice Nettle's determinations. But the situation here is that the application has been made at a proper time before the trial has commenced, in circumstances where the prosecution is putting the defendant fairly on notice, as it is
30 obliged to do, consistent with Kirk, consistent with Johnson v Miller, as to what it is it says the defendant failed to do. So those are the matters I'd seek to raise, your Honour, in relation to the question of unfairness.

35 HER HONOUR: So, Mr Nicholson, Mr Murdoch, in his outline, says that the defendant would be prejudiced - - -

MR NICHOLSON: Yes.

40 HER HONOUR: - - - in essence, because the defendant would be required to restart its preparation to meet this new case and at this very late stage and also says it would need to consider the need for and seek to obtain expert evidence on these new particulars. So accepting that, are there – is it correct for the court to consider, though, given where we are, that is, a few weeks out from trial, whether there are steps that can be taken that would mitigate any prejudice? I mean, what I'm getting
45 at - - -

MR NICHOLSON: Yes.

HER HONOUR: Is it proper to consider – I mean, I’m jumping ahead.

MR NICHOLSON: Yes.

5 HER HONOUR: But to consider, could any kind of prejudice be ameliorated by de-listing and re-listing the hearing, for example?

MR NICHOLSON: In my submission, it’s a submission, of course, my friend will develop, but the situation was always that the prosecution material was to go to the
10 defendant on the 4th of July, so two months out. The – in my submission, of course, the – any change in the case is clarification, rather than major. This case has been set down for a number of months now and, of course, is a two-week block, which is difficult to - - -

15 HER HONOUR: Three - - -

MR NICHOLSON: Three-week - - -

HER HONOUR: - - - actually.
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MR NICHOLSON: Three-week block, which is difficult to obtain, relating to allegations, of course, that occurred in 2020 – or 2019/20. So perhaps it’s a matter that my learned friend could develop in terms of that prejudice, but to me – in my submission, given those matters that I’ve raised, the prejudice is minimal, given the
25 nature of the change that is sought. So I’m not applying for an adjournment. I, of course, accept that that option is there, if the court determines that such prejudice arises so as to unfairly burden the defendant, but certainly, in my submission, it’s not an avenue that needs to be explored now.

30 HER HONOUR: Yes.

MR NICHOLSON: Your Honour, those are the matters I’d seek to raise with you unless I can be of any further assistance.

35 HER HONOUR: No, thank you.

MR NICHOLSON: If it please.

HER HONOUR: Mr Murdoch.
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MR MURDOCH: Yes, your Honour. Could I just, for the record, read the affidavit of Samantha Louise Betzien that was sworn on 5 August 2024 and the outline of submissions on behalf of the defendant - - -

45 HER HONOUR: Yes.

MR MURDOCH: - - - that was filed on the same date. Your Honour, we had - - -

HER HONOUR: Mr Murdoch, do I need to mark that affidavit as an exhibit?

MR MURDOCH: It's a matter for your Honour. Whatever your Honour's usual practice is. It might be prudent, your Honour.

HER HONOUR: All right. So that's – affidavit is exhibit 1.

EXHIBIT #1 ADMITTED AND MARKED

MR MURDOCH: Your Honour, noting that you've marked the affidavit, would it assist you if I gave you a working copy or - - -

HER HONOUR: I - - -

MR MURDOCH: Or does your Honour already have a working copy?

HER HONOUR: I don't have a working copy, but I haven't marked it up.

MR MURDOCH: Would - - -

HER HONOUR: But I will take a working copy.

MR MURDOCH: Thank you. And I'll give you – your Honour a working copy of our submissions and, also, a copy of - - -

HER HONOUR: I have marked up your submissions quite a lot already.

MR MURDOCH: Well, I'll give your Honour a copy for the file, then.

HER HONOUR: Yes. Thank you.

MR MURDOCH: And, your Honour, in terms of the – I'll give your Honour as well the additional cases that we've referred to in our material and, also, some excerpts of the Coal Mining Safety and Health Act 1999 that we will be referring to in our oral submissions.

HER HONOUR: Thank you. Yes.

MR MURDOCH: So, your Honour, just in terms of the chronology of the matter, as your Honour will have seen from the material, the complaint was originally made on 7 May of 2021. The complaint deals with an incident that occurred in early 2020, and the charge period is between 23 December 2019 and 13 January 2020, and as your Honour knows, the matter is set down for a three-week trial commencing the 2nd of September and has been so set down since the 16th of February this year. Now, notwithstanding that lengthy period from when the complaint was filed and

notwithstanding the matter was set down in February, it wasn't until 4 July that the prosecution apprised the defence of its intention to amend and then made its application to amend on 11 July.

5 Now, just while I'm on that point, my learned friend stated that when their material was provided pursuant to the orders back on 4 July that we were provided with an opening that reflected the amendment. Well, can I say, your Honour, in respect of that that being provided with an open that reflects an amendment that hasn't been made is of no assistance at all, and, in fact, it leaves the defence in a worse situation
10 that – than that pursuant to the orders that it was supposed to be put in, that being being provided with an opening of what was to be the opening for trial. As we stand here today, because of that delay on the part of the prosecution, we still don't know with any certainty as to what is the opening for the trial.

15 So in terms of the objection, your Honour, as your Honour has, of course, seen, it's made on two bases, and we'll develop this, of course, that being that the changes that are sought to be made to paragraph 38(a), (b) and (c) have the effect of lying a new charge out of time and, therefore, ought to be rejected because they're out of time, and, secondly, and in any event, it is not in the interests of justice to allow the
20 amendments at this time on grounds of fairness, which, again, we'll develop in the course of the submissions. Now, your Honour, in respect of a law, your Honour summarised it to each of my learned friend and ourselves earlier. And we don't cavil at all with what your Honour said, but we just wanted to develop it slightly. And to do so, could we ask you to take up the decision of Justice – I beg your pardon –
25 President Martin in Thomas v Harrison that your Honour, I think, may have been given twice.

HER HONOUR: So, Mr Murdoch, you provided me with – originally, with Harrison v The President of the Industrial Court, not that - - -

30 MR MURDOCH: No, no. A different – I'm referring to Thomas v Harrison.

HER HONOUR: Okay.

35 MR MURDOCH: It's [2018] ICQ 7. It's at – it should be in that separate bundle that I handed up a moment ago, your Honour.

HER HONOUR: Yes.

40 MR MURDOCH: Thank you.

HER HONOUR: Yes.

45 MR MURDOCH: Now, your Honour referred to or was referred earlier to what Justice Martin said at paragraph 36. So if you could – if your Honour could please go to paragraph 36. And in that case, of course, his Honour was of the view that the amendments to the particulars sought there did not change the nature of the offence.

And it's not so much relevant, in our submission, to compare and contrast the particular form of particulars or amendments on a case-by-case basis, but it's more important, as your Honour has articulated, to look at these matters from a position of legal principle. And his Honour has eloquently set out the relevant principle there, the question being: **does the amendment change the nature of the offence?** Does the amendment alter the broad allegation that the defendant should have conducted itself in a particular way? And does the amendment result in the defendant, therefore, facing a different charge?

Now, you'll note that his Honour has referred there to alteration of the broad allegation that the defendant should have conducted itself in a particular way. That's of particular relevance, your Honour, in Work Health and Safety cases where, as was touched upon in the submissions made by my learned friend earlier, the focus of the charge in a Work Health and Safety matter is the measures that have not been taken. And that's been said a number of times, but it was said, of course, by the High Court in the Kirk decision. And if your Honour goes to paragraph 30 of the Thomas v Harrison decision, his Honour has set out there what was said by the majority in Kirk at paragraph 14.

And without asking your Honour to overlook the entirety of the paragraph, we'd ask your Honour to look in particular at what's said in the last four lines: "But it is the measures which assume importance to any charges brought. Sections 15 and 16 are contravened where there has been a failure on the part of the employer to take particular measures to prevent an identifiable risk eventuating. That is the relevant act or omission which gives rise to the offence". And that, of course, we say, resonates in Justice Martin's observation that one can't alter the board allegation that the defendant should have conducted himself in a particular way. Now, in a case such as this, when one goes to the legislative scheme – we've handed your Honour a copy of some extracts of the Coal Mining Safety and Health Act.

HER HONOUR: Yes.

MR MURDOCH: And if your Honour could please go to section 43. And the charges that's brought here is under section **43(1)(c) in respect of the obligation to ensure the contractor's own safety and health and the safety and health of others is not adversely affected by the way the contractor undertakes work at the mine.** Now, consistent with what was said in Kirk, the focus is then on what are the measures that ought to have been taken to ensure that the contractor's own safety and health, etcetera, is not adversely affected by the way the contractor undertakes work at the mine. And the particular measures are the relevant act or omission which gives rise to the offence as referred to in the legislation.

So it's a situation where, in order for the true nature of the charge that's proffered to be understood, the courts have said that one needs to focus on what are the particular measures that are relied upon as the basis of the charge. And here, of course, the prosecution has sought to proceed in a way that identifies those particular measures by what's articulated in section 38, because, no doubt, appreciating what was said by

Justice Martin and, no doubt, appreciating what the High Court said in Kirk about the need to focus upon the measures not taken, when one goes to paragraph 38 of the complaint - - -

5 HER HONOUR: Yes.

MR MURDOCH: - - - the prosecution says in the opening statement at paragraph 38, “The defendant failed to take the following reasonable measures to ensure the safety and health of its worker and the safety and health of others was not adversely affected”. And then the measures are laid out in (a), (b) and (c). And that’s why we say that, if there’s a fundamental change to the measures, that are relied upon, that results in there being a fundamental change to the charge.

15 HER HONOUR: So, Mr Murdoch, are you – you’re – the words you used there is that defence say it’s a fundamental change to the measures.

MR MURDOCH: That’s right.

20 HER HONOUR: So just so I understand, is inherent in that, as I understand it, is that it – there could be an example where the application to amend the particulars is an application to amend the measures, but it might not be fundamental - - -

MR MURDOCH: We accept that.

25 HER HONOUR: - - - and, therefore, could be – could happen.

MR MURDOCH: We accept that.

30 HER HONOUR: Okay. So it – again, we sort of come back to that – the issue of: is it fundamental? Is it of such substance that it changes the nature of the charge?

MR MURDOCH: That’s so.

35 HER HONOUR: Okay.

MR MURDOCH: Yes. So, your Honour, unless you have any further questions from us on the law, we had intended to move as to – to explain in more detail orally as to why it is that what’s sought here does change in a fundamental way the true nature of the charge.

40 HER HONOUR: Yes. I think I – we can move on to that.

MR MURDOCH: Yes. So if your Honour takes up, please, the amended version of the complaint. That’s perhaps the most convenient way to do this because it contains the strikeout and the addition.

45 HER HONOUR: Yes. I find that helpful. Yes.

MR MURDOCH: Yes. So, your Honour, in terms of 38(a), the case that's currently advanced – and when we say “currently advanced”, we mean the unamended - - -

HER HONOUR: Yes.

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MR MURDOCH: - - - charge. The case currently advanced is that Thiess, our client, failed to include a requirement in a SHMS implemented by the prior co-accused, Coronado's site senior executive, and that the failure was to implement that procedure – I beg your pardon – to include that procedure a requirement that coal mine workers be provided with a work pack containing copies of SOP008, the work methods statement and the appendix prior to undertaking tyre change activities. Now, if your Honour goes to that bundle of the legislation that we provided to you, please, and if you could please go to section 42.

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15 HER HONOUR: Yes. Yes.

MR MURDOCH: Section 42 provides for the obligations of a site senior executive for a coal mine, and if your Honour goes, please, to section 42(c), you'll see there that the site senior executive for a coal mine has a range of obligations, but one of them is “to develop and implement a safety and health management system for all persons at the mine, including contractors and service providers”. So that's an obligation that under section 42 of the legislation isn't placed on Thiess; it's placed upon the site senior executive for the coal mine, and as we see at paragraph 25 of the complaint, the prosecution accepts as part of its case that Coronado Curragh, a different entity to Thiess, had a SHMS that applied to the mine.

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So we go from a situation where the allegation is that Thiess has failed to include a requirement in respect of work packs, etcetera, in an SHMS that's not implemented by Thiess but is implemented by a third party pursuant to a different obligation under the legislation to an allegation that's sought to be amended to seek to assert that Thiess independent failed to implement a procedure requiring the provision of a work pack prior to coal mine workers undertaking the different and more specific activities of removing an refitting cleat-driven wheel assemblies to which SOP008 applied. So in terms of the measure not taken, the prosecution now attempts to assert that it was for Thiess to implement a different procedure, as opposed to Thiess including a particular requirement in the SSE's SHMS. So they really are fundamentally different obligations that are sought to be brought to bear on Thiess.

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HER HONOUR: I know I'm going to oversimplify things, Mr Murdoch, but isn't the crux of it that the coal miners needed to know about these documents and what were in them to be safe, and the defendant was obliged to ensure their workers were – had knowledge of it, and the change is about how they went about that?

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MR MURDOCH: And the difficulty – I – we don't disagree with what your Honour is saying, but that's the problem. The change is in how they went about it. It's gone from an allegation that it was on Thiess to seek for a third party to include something in their system to an allegation that Thiess, independently of the third party, was to

implement a procedure, and that's in the context – and, well, we're about to take you to it – in the context of a piece of legislation that puts very specific obligations on particular entities in respect of the development of a Safety and Health Management System, in a context of there needing to be an integrated system. So we've gone from a situation of requiring Thiess to somehow include something in the mine operator system to requiring Thiess itself, independently of that mine-wide system, implement this process, and that's why it's a different allegation in terms of the obligations under legislation. And to – can I – can we develop that further by taking you to the various provisions that deal with the development of the SMHS.

HER HONOUR: Yes.

MR MURDOCH: If your Honour, please, would – could go to section 41 of the legislation. It deals with the obligations of the coal mine operator, which, here, was Coronado. If your Honour goes to section 41(1)(e).

HER HONOUR: Yes.

MR MURDOCH: So Coronado, the coal mine operator, has an obligation “to ensure the site executive for the mine develops and implements a safety and health management system for the mine”. Then, as we've taken you to, paragraph 42. There's an obligation on site senior executive for the coal mine “to develop and implement the safety and health management system for all persons at the mine”. If we then ask your Honour to go to section 43, which deals with the obligations of contractors, and noting that, here, the charge is under 43(1)(c), your Honour will note that 43(1)(d) – there's an obligation on the contractor “to ensure no work is undertaken by the contractor until the contractor has given the site senior executive for the mine a safety and health management plan; and - - -”

HER HONOUR: I'm sorry. I might be on the wrong – so section 43 - - -

MR MURDOCH: Forty-three (d).

HER HONOUR: I see. Yes. Yes.

MR MURDOCH: “To ensure no work is undertaken by the contractor until the contractor (i) has given the SSE for the mine a safety and health management plan; and (ii) has made all changes to the contractor's safety and health management plan required by the site senior executive to enable the plan to be integrated with the mine's safety and health management plan.” And then, if we go back up to (b), another obligation “to ensure the contractor complies with the mine's safety and health management system to the extent it relates to the work undertaken by the contractor.”

So the structure of the Act makes it pellucidly clear that it's for the contractor, that here being Thiess, to comply with the safety health and management system that has been developed by Coronado and its SSE to apply to the entire mine, and that's why

it's – that's why we say that what's being sought to be done here is a fundamental change to what's been alleged because we've gone from a situation of – and we're not – we don't seek to be repetitive, but we've gone from a situation of where we're alleged to have failed to include something in this integrated system developed by the SSE to a situation where we're somehow failed to implement a procedure independently.

HER HONOUR: So is 43(d) – that provides the mechanism for a contractor to, if I can put it this way, seek necessary variation into the SHMS.

MR MURDOCH: Well, that would be the mechanism via which it would occur because the contractor is giving the SSE a safety health management plan and then, when one goes to (ii), "has made all changes to the safety and health management plan required by the site senior executive". So the scheme is contractor comes on, provides theirs to the SSE but doesn't do any work until been received back with necessary changes to enable the plan to be integrated with the mine's safety and health management system.

HER HONOUR: Is – so is it the case that a contractor can't have other safety policies and measures in place other than what they have in their safety and health management plan?

MR MURDOCH: The key, your Honour, is the need for integration because the mine has an overarching - - -

HER HONOUR: Yes.

MR MURDOCH: - - - safety and health management plan, and whatever the contractor is doing in respect of its own systems has to be integrated with that.

HER HONOUR: Right.

MR MURDOCH: And that's why the scheme is such. And, of course, as well, because the contractor is required, up in 43(b), to ensure he – it complies with the mine's safety and health management system, there can't be a situation where the contractor is operating its own independent and unrelated system. They need to be integrated and meshed together. So that's why what's being sought to be done here by way of the amendment really does change very much the nature of what's alleged to have been the measure that Thiess has not taken.

HER HONOUR: So is – does it fundamentally change the nature or is it more an issue of – an issue at trial as to whether it was reasonable?

MR MURDOCH: Well, we say it fundamentally changes the nature because the current charge involves a question of whether or not it **was reasonable for Thiess to seek to include this need for a work pack in the SMH – in the SHMS of the mine operator, whereas the charge that's sought to be brought now is one that is**

disconnected with the requirement to seek to include it in the SMHS, but rather it's baldly and boldly put that the reasonable measure not taken was Thiess itself implementing a procedure.

5 HER HONOUR: Yes.

MR MURDOCH: So it's a different obligation. It's not being said that Thiess was obliged to include something in the SHMS. It's being said that Thiess was obliged to independently implement a procedure. And the second point that we make in respect
10 of a change is that - - -

HER HONOUR: Still on 38(a)?

15 MR MURDOCH: Still on 38(a), yes.

HER HONOUR: Yes.

MR MURDOCH: Currently, in terms of the provision of the work pack, the focus is on providing the work pack prior to undertaking a broad range of activities, being
20 tyre change activities, whereas the charge is sought to be changed to a different obligation – and this is quite a way from the including and implementing difference, but a further difference being that the work pack is to be provided prior to undertaking not tyre changing activities, but specific activities of removing and refitting cleat-driven wheel assemblies. **So the specific type of activities that the
25 requirement is said to – or is said to be required to relate to is also proposed to change, from tyre change activities generally to the specific activities of removing and refitting cleat-driven wheel assemblies.**

HER HONOUR: But given that's a subset of the first, how is – why is that such a
30 fundamental change?

MR MURDOCH: Well, it's a fundamental change, we say, because it's gone from – and again putting to one side the “including implements” aspect.

35 HER HONOUR: Yes.

MR MURDOCH: It's gone from saying that – it's gone from Thiess having to defend a charge of a reasonable measure being a requirement to provide a work pack at large in respect of all tyre change activities, to it now being said that the – it was a
40 reasonable measure to provide a work pack only, it would seem, when workers are doing a very, very specific activity. So in terms of the obligations and the extent and the reasonableness of what's required, it's changed, because we've gone from, “You must do it in respect of the broad sense,” and whether doing it in the broad sense is reasonable, to, “You must do it in respect of this very narrow activity.”

45 So, yes, it's a subset, but because it's a subset, that's changed whether it was reasonable or not. And that's something that Thiess would be required to grapple

with, and that's why we say it's – that's why we say we have to start again, because we've gone from defending whether it's reasonable to do something in respect of broad activities to now having to consider whether it's reasonable to do something in respect of a very narrow band of activities. So that's all we wish to say in respect of
5 – and subject to any further questions your Honour may have – in respect of 38(a). And in terms of 38(b), the case that's - - -

HER HONOUR: Sorry, Mr Murdoch.

10 MR MURDOCH: I'm sorry.

HER HONOUR: No, I just wonder would it be helpful to me – perhaps not – as we go that you address me on unfairness.

15 MR MURDOCH: Yes.

HER HONOUR: I just wonder if it would be helpful, because perhaps just – I mean, I think you've touched it on already for 38(a) because you say that there'd have to be new consideration in terms of how to defend the issue of reasonableness, and in your
20 outline you talk about possibly expert evidence.

MR MURDOCH: Well, in – that's so, your Honour, and in respect of (a), there's two primary points we'd make in respect of the unfairness in that respect.

25 HER HONOUR: Yes.

MR MURDOCH: The first one is that there needs to be a consideration – and I'm just repeating what I said a moment ago, but in a different context – **a consideration of the reasonableness of providing the work pack not in the broad sense, but now in**
30 **the narrow sense.** That's the first point. And the second point is that if the amendment were made, there would need to be, from an evidentiary perspective – the question would need to be considered as to the reasonableness of Thiess – I beg your pardon. I withdraw that. As the charge is presently framed, there needs to be a consideration in an evidentiary sense of the reasonableness of Thiess somehow
35 having a third party – include this requirement in the third party's SHMS. However, if the amendment is made, there needs to be consideration forensically as to how Thiess would go about implementing a procedure or workplace practice independently from the SHMS, noting the need, as we've addressed you on, for an integrated SHMS.
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HER HONOUR: Yes. Thank you.

MR MURDOCH: In respect of paragraph 38(b), the case that's currently advanced by the prosecution is that **Thiess failed to ensure the completion of a JSA prior to**
45 **undertaking tyre changing activities to which SOP008 applied.** Now, in terms of the JSA, if one goes up to paragraph 35 of the complaint, it's said there that, **"Mr Rabbitt did not undertake a job safety analysis and no JSA was approved by a supervisor."**

Just taking your Honour to that so your Honour can see where else JSA is referred to in the complaint.

5 So, presently alleged, Thiess failed to ensure the completion of a JSA prior to undertaking tyre changing activities to which SOP008 applied. The amendment, however, would assert that Thiess failed to implement the work method statement requirement that a task-specific JSA be completed in respect of machines located outside a designated work bay.

10 So, in our submission, the reasonable measure or the measure not taken that's sought to be asserted is a different one, and a fundamentally different one, because there's a change from a complaint that Thiess should have ensured a JSA was completed prior to tyre changing activities, a broad allegation to ensure a JSA, without qualification, was conducted to undertaking a broad range of activities. That's sought to be
15 changed to implementing a requirement contained in a specific document, the WMS, to complete a task-specific JSA where a machine is located in a particular area, that being outside a designated work bay.

20 So the amendment, in our submission, has the effect of introducing a new control measure and thereby amounting to a new charge, and we are again placed in that situation of being required to, if the amendment were made, defend what used to be a allegation of a failure to take a reasonable measure expressed in the broad sense, to now defend what's said to be a reasonable measure that has been asserted in a very specific way, based upon a specific document in respect of work being undertaken in
25 a particular area, none of which was the subject of – or is the subject of the charge as it stands.

HER HONOUR: So the safety operating procedure, or the SOP - - -

30 MR MURDOCH: Yes.

HER HONOUR: - - - if I've called it the correct thing.

35 MR MURDOCH: Yes.

HER HONOUR: Is a document that is accompanied by the work method statement and the appendix; correct?

40 MR MURDOCH: Well - - -

HER HONOUR: They travel together, those three documents? Are they attachments to the SOP?

45 MR MURDOCH: In paragraph 26 of the prosecutor's complaint – and 26 and 27 is where this is dealt. The mine's SHMS contains a relevant procedure, namely, SOP008. And then it's asserted that the SHMS for the mine contain two supporting documents to SOP008, namely, (a) and (b).

HER HONOUR: Yes. So the SOP sat under the SHMS and the work method statement and appendix were subdocuments to the SOP, if I can put it that way.

MR MURDOCH: That's what alleged.

5

HER HONOUR: Yes.

MR MURDOCH: Or perhaps putting it a different way, it's alleged that the SHMS for the mine contained two supporting documents to SOP008. But what we say, your Honour, is notwithstanding that the assertion is that there are two supporting documents to SOP008, one of them being, it's alleged, the work method statement, that doesn't alter the fact that the allegation in subparagraph 38(b) has gone from one which required the completion of a JSA prior to undertaking a broad range of activities, to now implementing a very specific requirement contained in the – what's said to be a very specific requirement contained in the work method statement.

15

HER HONOUR: But didn't – sorry, I thought that the SOP008 only applied to machines outside a designated bay.

MR MURDOCH: No. That's not what's asserted in the complaint. At paragraph 26 of the complaint, it said, "The SHMS for the mine contained a relevant procedure for the removal of the wheels from the Bosich loader, namely, SOP008 tyres, wheels and rims for LV, MV, HV, and HME."

20

HER HONOUR: Right.

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MR MURDOCH: It's not asserted, as I read the complaint, that SOP008 only applies when work's being conducted outside a designated tyre bay.

HER HONOUR: Uh-huh.

30

MR MURDOCH: And one can – without giving evidence from the bar table, one can infer, given its name, that it has a far broader application, SOP008 that is.

HER HONOUR: Yes.

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MR MURDOCH: Then, your Honour – if your Honour didn't have any further questions for us in respect of subparagraph (b), we'll move to subparagraph (c).

HER HONOUR: Yes. And, Mr Murdoch, I don't want to interrupt your flow, but I'm just mindful it's almost 20 to 12 and I've been sitting since 9 o'clock.

40

MR MURDOCH: Yes, your Honour. I'll be a little while longer, but not – I won't be – I don't plan to be orally addressing your Honour, subject to any questions, until half past 12, but I will be a little bit longer.

45

HER HONOUR: I might – if you feel you can keep your flow going, I might just take a short - - -

MR MURDOCH: It's a convenient time, your Honour, yes.

HER HONOUR: Yes. All right. We'll resume soon after midday.

ADJOURNED

[11.37 am]

RESUMED

[12.04 pm]

HER HONOUR: Yes. Thank you. Please be seated. Resume the application by Guilfoyle against Thiess, Mr Murdoch.

MR MURDOCH: Yes. Thank you, your Honour. We're about to address you in respect of paragraph 38(c).

HER HONOUR: Yes.

MR MURDOCH: Now, in terms of the changes to the alleged reasonable measures not taken in paragraph 38(c), the case that's current advanced is that Thiess failed to include a requirement in the site senior executive's safety health and management system that the tyre bay supervisor allocate two coal mine workers to the task of removing wheels from the Bosich loader in accordance with the appendix and the appendix is referred to at paragraph 33 of the particulars, and it's said in paragraph 33 of the particulars: "Part 2 of the appendix provided a tyre change skill matrix table which identified that a minimum of two workers were required to remove wheels from the Bosich loader". The proposed amendments assert that Thiess failed to implement a workplace practice by ensuring that two trained and competent tyre fitters were required to performed the task of removing wheels from the Bosich loader.

So paragraph (c) firstly suffers from the same vice as paragraph (a), in that the reasonable measure that the prosecution is now seeking to assert is the implementation of a workplace practice by Thiess, which is a fundamentally different requirement to Thiess including a requirement in the SSC's safety health and management system. And, your Honour, just while we're on that point, we had a discussion with you earlier about the need for the safety and health management system in a coal mine to be an integrated one. We don't have a copy here for you, but we'd also ask your Honour to note section 62 of the Coal Mining Safety and Health Act 1999, and we can have a copy sent over.

HER HONOUR: That's all right, Mr Murdoch. Sorry. Section - - -

MR MURDOCH: Sixty-two - - -

HER HONOUR: Yes.

5 MR MURDOCH: - - - of the Coal Mining Safety and Health Act 1999.

HER HONOUR: Yes.

10 MR MURDOCH: And it deals with safety and health management system and, in particular, we ask your Honour to note what's in subsection (1) and subsection (2), which refers to: "The safety and health management system must be a single, auditable documented system". Subsection (3): "The safety and health management system must provide a single, comprehensive and integrated system for the management of all aspects of risks to safety and health in relation to the operation of the coal mine" – and sub – section (6) that requires: "The site senior executive can make available for inspection a copy of the safety and health management system", and we just take you to that, your Honour, to further make good the proposition about the need for there to be one system developed by the operator's SSC for the whole mine.

20 Now, going back to the – back to section – I beg your pardon – paragraph 38(c), as we said, there's been that change in the change from implementing – beg your pardon – the change to implementing a practice by Thiess as opposed to Thiess including it in the SSC, but there's also a change to a substantive requirement that is the subject of paragraph 38(c) because it currently requires the involvement pursuant to the appendix of two coal mine workers. Now, your Honour, would know that, under the legislation, two coal mine workers means just that, and the appendix had to be applied. Now, what's sought to be imposed is an amendment which requires not two coal mine workers in accordance with the appendix but a requirement that's over and above the appendix requirements, that being two trained and competent tyre fitters must be involved in the task of removing wheels from the Bosich loader.

30 Now, in our submission, that change in terms of the personnel who must be involved is both in terms of the nature of what's alleged significant and also significant in respect of the nature of the evidence that would need to be led at trial because we've gone from it being a – putting aside the implementation and include difficulty, we've gone from a situation where it's alleged that it was a reasonable measure to allocate two coal mine workers pursuant to the appendix, acting consistently with the SHMS, to an allegation of requiring, as a reasonable measure, two trained and competent tyre fitters requiring our client, if the amendment's made, to do something on the prosecution's case that's above and beyond what's contained in the appendix and the SMHS. That is a substantive and very significant difference, in our submission.

40 And then, lastly, there's a change in respect of who is to be responsible for this workplace practice because, previously, the charge sought to have the workplace practice be one that revolved around allocation by the tyre bay supervisor, whereas there's now been a change to the – or sought to be change to the specific

management role that should've been accountable on the prosecution's case for allocating workers. **No longer the tyre bay supervisor**, whereas now the proposed amended charge, it would seem, **places or seeks to place the accountability on Thiess globally** and, by inference, all of its employees generally. So, again, a significant change in respect of what's alleged and something that also, in our submission, would require, forensically, a change in respect of the evidence that may have to be led in regard to whose responsibility this ought to have been.

HER HONOUR: So, Mr Murdoch, I'm struggling with that one a little bit. I mean, currently, it says do it and have the tyre – the tyre bay supervisor allocate them.

MR MURDOCH: Yes.

HER HONOUR: And now isn't it just saying – basically leaving it up to Thiess itself as to what the procedure would look like, who they would put - - -

MR MURDOCH: Well - - -

HER HONOUR: - - - which position within their company would take on that allocation role. Isn't it just leaving it open for Thiess to develop that as part of their workplace procedure?

MR MURDOCH: Well – and I'm – we're not being cryptic in our response; we don't know. Because it's not – there's no – the particular – or the charge that – the amendment simply refers to implementing a workplace practice for the purposes of part 2 of the appendix of ensuring, so it's not made at all clear there as to who is to have the responsibility, what level of – what level of management, whether it's – and whether it's – whether this is to be ensured via training of workers or whether it's to be ensured by a particular person as is the case currently, having responsibility for it, or whether it's to be specified and the ensuring is to incur via the workplace practice, all of which, we say, goes to demonstrate that there's a change to the actual omission to act by either measure not taken in a number of fundamental ways. We've gone from including to implementing, and we've changed a way – I beg your – I withdraw that. We've changed the nature of the qualifications of the workers involved in the task, and we've changed who's allocating it.

So looked at individually or separately, it's a fundamental change. And it's, your Honour, inferential in what we've said, but by – because of those changes, in order for Thiess to consider how it defends the charge, it requires now – it would require a consideration of what evidence/what expert evidence would need to be led to deal with, not the question of how Thiess would go about including something in the Coronado SHMS and whether or not it was appropriate for the appendix to be complied with by allocating two coal mine workers, but to a different consideration of how would Thiess go about implementing a procedural workplace practice independently from the SHMS and whether or not it was reasonable for there to be, differently from the appendix, two trained and competent tyre fitters involved in this

task. So unless your Honour has any questions for us in respect of paragraph 38(c) – or further questions, they’re our submissions on that.

HER HONOUR: Yes.

5

MR MURDOCH: Your Honour, in terms of the matter of fairness, we’ve sought to address you, as we’ve gone through the various paragraphs, in respect of why, from a forensic evidential perspective, the goalposts, as it were, have changed, but could we just note a couple of further observations that are relevant to the issue of fairness, and they’re not divorced from those evidentiary difficulties, but they’re, perhaps, relevant in themselves, and they are relevant in themselves. We’ve already taken you to the age of this proceeding, and we shan’t repeat that, but it is consistent with the age of the proceeding that our client has been preparing for a trial, including in terms of the potential need for lay witnesses and experts to be called by it that have been advanced in a particular way for three years. Not only had it been advanced in a particular way for three years, Thiess had been told by the prosecution expressly in September of 2023 that the charge would not be changed, and I don’t know if your Honour has had a change to read comprehensively Ms Betzien’s affidavit - - -

20 HER HONOUR: Yes, I have read it.

MR MURDOCH: Yes.

25 HER HONOUR: Yes, that she queried the divergence - - -

MR MURDOCH: Indeed.

HER HONOUR: - - - with the statement of fact, as it then was.

30 MR MURDOCH: And we were told - - -

HER HONOUR: Yes.

35 MR MURDOCH: - - - that the charge would continue and that the statement of facts ought to be read pursuant to the particulars that are contained in the complaint. So - - -

HER HONOUR: And the statement of fact has been changed.

40 MR MURDOCH: It - - -

HER HONOUR: I mean, the statement of fact, as it talks about the particulars, mirror them in their current form.

45 MR MURDOCH: The – insofar as it - - -

HER HONOUR: The one that I’ve been provided by prosecution.

MR MURDOCH: Insofar as it refers to them, it mirrors it in its current form.

HER HONOUR: Yes.

5 MR MURDOCH: But in any event, and without wanting to trudge through
whatever other charges there may have been, the fundamental point is we were told
- - -

HER HONOUR: Yes.

10 MR MURDOCH: - - - that the matter would proceed, and the statement of facts
would not alter the particulars that were relied upon. So whilst my friend has said
that it's sometimes in the nature of these matters that things change, certainly, it can
be said in the context of this case that the prosecution plainly expressly considered its
15 situation back in September of 2023, sought to change the particulars, when called on
it withdrew from that change. So it's not a situation, it would seem, where changes
are only being considered now. They were considered at least back in September of
2023. And so your Honour can infer that the prosecution expressly considered their
20 position at that time but, for an unexplained reason, has now sought to change that
position after the matter, in February this year, was set down for a three-week trial in
September. So, your Honour, unless you have any further questions for us, they're
our oral submissions.

HER HONOUR: No, I don't think so. I've asked too many.
25

MR MURDOCH: I beg your pardon. I do beg your pardon.

HER HONOUR: Yes.

30 MR MURDOCH: There was one further point that I – that I'm instructed to raise.
You discussed – and we understand why. You discussed the prospect of an
adjournment with my learned friend. The charge has been on foot now since May of
2021. **Given that the trial is only three weeks away,** your Honour would be surprised
if our client hadn't already prepared extensively for a trial based upon the current
35 particulars. In those circumstances, our client certainly is not seeking an
adjournment because that would (a) serve to prolong what's already been a
prolonged matter; (b) risk the further potential for the memories of witnesses to fade,
and if there was to be an amendment on the basis of the particulars – I beg your
pardon – the changes that are sought to be made to the charge, that would have the
40 effect that, consistent with what we've asserted, much time that's been spent to date
would have to either be started again or put to one side and be brought back to later
on with, as your Honour appreciates from practice, the time and cost that's inevitably
wasted in that exercise.

45 HER HONOUR: Yes.

MR MURDOCH: So we don't see this as a situation where, if your Honour was against us in respect of it being a different charge, that our prejudice could somehow be assuaged by an adjournment for those reasons.

5 HER HONOUR: Yes.

MR MURDOCH: May it please the court.

10 HER HONOUR: Thank you. I think, optimistically, I hope to give a decision this afternoon. I don't think I'll be in a position to give a decision this afternoon. There's significant complexity to it. In the break, I checked my court commitments next week, and I'd be available to give a decision Thursday afternoon.

15 MR MURDOCH: I'm available then.

HER HONOUR: Is that satisfactory to you, Mr - - -

MR NICHOLSON: Please - - -

20 HER HONOUR: - - - Nicholson?

MR NICHOLSON: Please the court – thank you.

25 HER HONOUR: All right. So I believe that will be court 35. So that will be the 15th of August, and if I list it, I think, for 2.15 - - -

MR MURDOCH: Thank you, your Honour.

30 HER HONOUR: - - - pm.

MR NICHOLSON: Please the court.

HER HONOUR: And now, the defendant is being released at large.

35 MR NICHOLSON: Yes, your Honour.

HER HONOUR: I'll repeat that. All right. Nothing further?

40 MR MURDOCH: No, thank you, your Honour.

HER HONOUR: All right.

MR NICHOLSON: Please, your Honour.

45 HER HONOUR: Thank you.

MATTER ADJOURNED at 12.24 pm UNTIL THURSDAY, 15 AUGUST 2024