

VIQ SOLUTIONS AUSTRALIA PTY LTD

ACN 008 711 877

T: 1800 AUSCRIPT (1800 287 274)

W: www.auscript.com.au

E: clientservices@auscript.com.au



TRANSCRIPT OF PROCEEDINGS

© The State of Queensland (Department of Justice and Attorney-General). Apart from any use permitted under the Copyright Act 1968 (Cth), all other rights are reserved. You must not copy, modify or distribute this material without the written authority of the Director, Recording and Transcription Services, Queensland Courts.

MAGISTRATES COURT

KENNEDY, Magistrate

MAG-00111537/19(4)

MARK STONE

and

BELMORE BULK MATERIAL PTY LTD

Complainant

Defendant

MAG-00111548/19(6)

MARK STONE

and

TIMOTHY FRANCIS SEARLE

Complainant

Defendant

BOWEN

2.32 PM, THURSDAY, 28 APRIL 2022

DECISION

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: Industrial Magistrates Court of Queensland, registry of Bowen numbers 111537/19(4) and 111648/19(6). The Complainant is Mark Douglas Stone. The Defendants are Belmore Bulk Materials Proprietary Limited, which will be known as BPM, and Timothy Francis Searle, who will be known as Mr Searle.

On Sunday the 29th of July 2018 at Jacks Quarry, which will be known as the quarry, near Collinsville in the Magistrates Court district of Bowen, a Volvo A25C truck, which will be called the truck, driven by Adam Malone crush – crashed and as a result, Adam Malone was fatally injured.

As a result, two complaints were filed. One charged BPM with having an obligation under section 38(1)(a) of the Mining and Quarrying Safety and Health Act 1999 and failing to discharge that obligation in contravention of section 31 of the Act. The complaint charged Mr Searle with having three obligations under section 39(1) of the Act and failing to discharge those obligations in contravention of section 31 of the Act.

A hearing took place over four days, the 15th, 16th, 17th and 18th of November last year, 2021. Submissions were made the last date of the 31st of January 2022. There were 14 witnesses called, including Senior Constable Michael Parker, Queensland Police Service forensic crash unit, Steven Firth, mines inspector, Mark Desira or Desira, I am not sure how to pronounce that, former mines inspector, Troy Dalby, national product specialist CJD, Craig Coleman, product support CJD, Brent Ashley, Downs Diesel Repairs Proprietary Limited, Alan Graham, mines inspector, Timothy Clerk, diesel mechanic Searles Transport, Alan Lamont, operator Searles Transport, Jeffrey Daly, operator Searles Transport, Philip Chidgey, oceanic technical support manager Volvo Construction Equipment who provided an expert report, Tony Rekstad, operator Searles Transport, Jason Ashby, operator Searles Transport, and Richard York, operator Searles Transport. There were 45 exhibits. I have read the transcript. More than once, I might tell you. Every word at every exhibit, considered every photograph, considered the legislation in the cases referred to.

It should be remembered at the outset that the truck cabin had turned on its side at the crash site. It was righted, loaded onto a truck, taken to Mackay and unloaded. It was there that the inspections and investigations of the truck occurred. The relevant statutory framework, the Mining and Quarrying Safety and Health Act 1999, section 6, Objects of the Act:

The objects of this Act are: (a) to protect the safety and health of persons at mines and persons who may be affected by operations; and (b) to require that the risk of injury or illness to any person resulting from operations is at an acceptable level.

Section 7, How the objects are to be achieved:

The objects of this Act are to be achieved by: (a) imposing safety and health obligations on persons who operate mines or who may affect the safety or

health of others at mines; (b) providing for safety and health management systems at mines to manage risk effectively; (c) making regulations and guidelines for the mining industry to require and promote risk management and control.

5

There are some other things which I am not going to refer to:

(g) providing a way for the competencies of persons at mines to be assessed and recognised; and (h) requiring management structures so that persons may competently supervise the safe operation of mines.

10

Section 19, Meaning of risk. One, or subsection (1):

Risk means the risk of injury or illness to a person arising out of a hazard.

15

And (2):

Risk is measured in terms of consequences and likelihood.

20

Section 26, What is an acceptable level of risk. Subsection (1):

For risk to a person from operations to be at an acceptable level, the operations must be carried out so that the level of risk from the operations is: (a) within acceptable limits; and (b) as low as reasonably achievable.

25

Subsection (2):

To decide whether risk is within acceptable limits and as low as reasonably achievable regard must be had to: (a) the likelihood of illness or injury –

30

sorry –

injury or illness to a person arising out of the risk; and (b) the severity of the injury or illness.

35

Section 31, Discharge of obligations:

A person on whom a safety and health obligation is imposed must discharge the obligation.

40

It then sets out all the penalties in relation to that. Section 34, How the obligation can be discharged if regulation or guideline made. One, subsection (1):

If a regulation prescribes a way of achieving an acceptable level of risk, a person may discharge the person's safety and health obligation in relation to the risk only by following the prescribed way.

45

Section 35, How obligations can be discharged if there is no obligation or guideline made. Subsection (1) is not relevant. Subsection (2):

5 *The person may choose an appropriate way to discharge the person's safety and health obligation in relation to the risk.*

Subsection (3):

10 *However, the person discharges the person's safety and health obligation in relation to the risk only if the person takes reasonable precautions, and exercises proper diligence, to ensure the obligation is discharged.*

15 Then section 36, which is in Division 2, which is headed Generally applicable safety and health obligations. Now, this – section 36 is Obligations of persons generally, so it is not in relation to the operator, it is not in relation to the site senior executive, it is workers and other persons at a mine generally and it is important, in my opinion, to take this into account. Subsection (1):

20 *A worker or other person at a mine or a person who may affect safety and health of persons at a mine or as a result of operations, has the following obligations: (a) to comply with this Act, standard work instructions, and procedures applying to the worker or person that form part of a safety and health management system for the mine; (b) if the worker or other person has information that other persons need to know to fulfil their obligations or duties under this Act, or to protect themselves from the risk of injury or illness, to give the information to the other persons; (c) to take any other reasonable and necessary course of action to ensure that persons are not exposed to unacceptable levels of risk.*

30 Subsection (2):

35 *A worker or other person at a mine has the following additional obligations at the mine: (a) to manage the risk of injury or illness to himself or herself or any other person in the worker's or other person's own work and activities, so that the risk is at an acceptable level.*

(b) is not relevant for us:

40 *(c) to the extent of the worker's or other person's involvement, to participate in and conform to the risk management practices of the operations; (d) to comply with instructions given for safety and health of persons by the mine operator or site senior executive for the mine or a supervisor at the mine.*

(e) is not relevant and (f) is:

45 *Not to do anything wilfully or recklessly that might adversely affect the safety and health of someone else at the mine.*

I would say that this section refers to all fitters, operators, etcetera, who worked at Jacks Quarry or for certain duties at Searles Transport. Section 38, Obligations of – of operators. Subsection (1):

5 *An operator for a mine has the following obligations: (a) to ensure the risk to workers while at the operator's mine is at an acceptable level, including, for example, by: (i) providing a safe place of work and safe plant; and (ii) maintaining plant in a safe state.*

10 Section (b) is not relevant:

(c) to appoint a site senior executive for the mine; (d) to ensure the site senior executive for the mine: (i) develops and implements a safety and health management system for the mine; and (ii) develops, implements and maintains
15 *a management structure for the mine that helps ensure the safety and health of persons at the mine.*

Subsection (2) says:

20 *Without limiting subsection (1), an operator has an obligation not to operate a mine without a safety and health management system for the mine.*

Section 39, Obligations of site senior executive of the mine. Subsection 1:

25 *A site senior executive for a mine has the following obligations in relation to the safety and health of persons who may be affected by operations: (a) to ensure the risk to persons from operations is at an acceptable level.*

 (b) is not relevant for our purposes:

30 *(c) to develop and implement a single safety and health management system for all persons at the mine.*

 (d) is not relevant:

35 *(e) to train workers so that they are competent to perform their duties.*

Section 45 is Defences for divisions 2, 3 or 3(a). Subsection (1):

40 *It is a Defence in a proceeding against a person for a contravention of an obligation imposed on the person under divisions 2, 3 or 3(a) in relation to a risk for the person to prove: (a) if a regulation has been made about the way to achieve an acceptable level of risk, the person followed the way prescribed in the regulation to prevent the contravention; or –*

45 (b) is not relevant –

(c) if no regulation prescribes or no guideline states a way to discharge the person's safety and health obligation in relation to the risk, that the person took reasonable precautions and exercised proper diligence to prevent the contravention.

5

Subsection (2):

Also, it is a Defence in a proceeding against a person for an offence against section 31 for the person to prove that the commission of the offence was due to causes over which the person had no control.

10

Subsection (3):

The Criminal Code, sections 23 and 24, do not apply in relation to a contravention of section 31.

15

Section 55 is Safety and health management system. Subsection (1):

A safety and health management system for a mine is a system that incorporates risk management elements and practices that ensure safety and health of persons who may be affected by operations.

20

Subsection (2):

A safety and health management system must be an auditable documented system that: (a) forms part of an overall management system; and (b) that includes organisational structure, planning activities, responsibilities, practices, procedures, processes resources for developing, implementing, maintaining and reviewing a safety and health policy.

25

30

Subsection (3):

The safety and health 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 mine.

35

Subsection (4):

The safety and health management system for a mine must be in place before operations start at the mine.

40

Five – subsection (5):

The safety and health management system must be effective to achieve an acceptable level of risk to –

45

(a), (b) and (c) are not relevant to us:

(d) including procedures for the operation of the mine and standard work instructions.

5 Section 240, Responsibility for acts or omissions of representatives. Subsection (1) and (2) are not relevant. Subsection (3):

10 *An act done or omitted to be done for a person by a representative of the person within the scope of the representative's actual or apparent authority is taken to have been done or omitted to be done also by the person, unless the person proves the person could not, by the exercise of reasonable precautions and proper diligence, have prevented the act or omission.*

Subsection (4) says:

15 *A representative means: (a) of a corporation: an executive officer, employee or agent of the corporation; or (b) of an individual: an employee or agent of the individual.*

20 Mining and Quarrying Safety and Health Regulation 2017, regulation 93, which is to do with training. Subsection (1):

25 *The site senior executive for a mine must ensure each worker at the mine is trained, if necessary, and periodically assessed, to ensure the worker has: (a) adequate knowledge and understanding of the processes to be carried out, and the materials and plant to be used, for the worker's duties at the mine; (b) adequate skill to carry out the processes, handle the materials and operate the plant; and (c) adequate ability to access and understand the procedures and standard work instructions for the worker's duties.*

30 Two – subsection (2):

The training must be carried out in an appropriate way, including, for example, by formal training courses or informal on-the-job instruction.

35 Subsection (3):

The assessment must be carried out in an appropriate way, including, for example, by examination, test or proof of relevant prior learning.

40 Subsection (4):

45 *The site senior executive for a mine must also ensure a person being trained or assessed does not carry out work at the mine unless the person is adequately supervised to prevent creating an unacceptable level of risk.*

The next section I am going to refer to is section 76 of the Justices Act 1886, which is Proof of negative etc:

5 *If the complaint in any case of a simple offence or breach of duty negatives any exemption, exception, proviso, or condition, contained in the Act on which the same is framed, it shall not be necessary for the Complainant to prove such negative, but the Defendant shall be called upon to prove the affirmative thereof in the Defendant's Defence.*

10 Criminal Code section 23 and 24, I do not intend to read them out. I return to the Justices Act in relation to section 157, 158. I do not intend to read those out. That is the – that is the introduction part and that gets rid of all the – all the sections of the relevant Acts.

15 I am now going to talk about the truck itself. The truck was an A25C, serial number 9570 and at the time of the crash, the hours were 20,160 on the manual as opposed to the electronic counter. The truck had been at the quarry before being sent to – to Schulz Earth Moving for use in the building of the second Toowoomba Range Crossing some time in early 2017 or perhaps even 2016. While at Toowoomba, the truck was serviced, maintained or repaired by Downs Diesel Repairs Pty Ltd, which I will refer to as DDR. The first recorded work was on the 10th of January 2017: see invoice number 4737 of exhibit 28. Hours were not recorded until invoice number 20 5288 on the 25th of July 2017 at – at 18,919 hours. The last recorded work was on the 20th of June 2018 – see invoice number 6755 of exhibit 28 – and the hours at that time were two – 20,084. The truck was not maintained in accordance with the manuals, that is, exhibit 3: see the cross-examination of Brent Ashley at page 2-70. Question:

25 *Did you only do what Schulz asked you to repair?*

Answer:

30 *Pretty well what we were asked to repair.*

Question:

35 *So scheduled maintenance was not occurring?*

Answer:

Pretty right, I guess.

40 And the record of interview of Mr Ashley, which is exhibit 40 at line 363, Steven Firth, question:

So the type of maintenance done on that machine was primarily B type?

45 Answer:

Yeah, primarily, yeah.

At line 365, Steven Firth, question:

And at no point did it ever receive a major service?

5 Answer:

Not through us, no.

10 Exhibit 28, DDR invoice number 4974, for work carried out between the 25th of March 2017 and the 6th of April 2017 including – included “hone cylinders”. Cross-examination at page 273 – 2-73 and 2-74. Mr Perry – I am not going to read the whole lot out but I am – the relevant parts. So Mr Perry asked:

15 *What your company undertook in about April 2017 was honing of the cylinders. See that down the bottom? Where it clean all components, hone the cylinders, that's what's written.*

Answer:

20 *Yes.*

Mr Perry:

25 *And the cylinder we're talking about were brake master cylinders?*

Answer:

Yes.

30 Question:

How many:

Answer:

35 *I think there was two in that machine. Not two, not 100 per cent sure.*

Mr Perry:

40 *But at least two. But would you expect it would be the totality of the master cylinders on the machine?*

The answer to that was yes then Mr Perry:

45 *So no matter how many there were, two, three, four, all the master cylinders on that machine would have been honed as part of this process, correct?*

Answer:

Yes.

5 *And that would be done internally, that honing?*

Answer:

I'm not sure, if I'm going to be honest.

10

Mr Perry:

But you certainly know they were honed because you were charged for it.

15 Answer:

Yes.

20 The expert report of Mr Philip Chidgey, which became exhibit 45, I think it was originally going to be exhibit 5 but it became exhibit 45, Mr Chidgey did not disassemble the brakes, Craig Coleman did. In – in relation to the rear bogie master cylinder – master brake cylinder, on page 13, there is no mention of scoring. In relation to the front axle left hand side at pages 13 and 14, quote:

25 *Hydraulic master cylinder bore scored by mechanical means causing master cylinder piston sealed bypassing.*

In relation to front axle right hand side, page 14, quote:

30 *Compressed air spring deformed, forcing the piston off centre, causing scoring of the master cylinder piston.*

Close quotes, and then another quote:

35 *Master hydraulic internal bore scored by mechanical means by the compression spring pushing master cylinder piston sideways inside the master cylinder.*

40 Craig Coleman pulled the brakes to pieces and reported it as follows in exhibit number 37. In relation to the rear bogie at page 12, quote:

Visual inspection found the master cylinder was scored.

45 Then at page 8, which is earlier, but I am trying to do it in the same way that Mr Chidgey did it, front axle left hand side and front axle right hand side on page 8, quote:

Visual inspection found the cylinder bores at both master cylinders were scored. This caused the brake fluid to bypass the piston seals and leak externally by telltale holes on the brake booster, that is, all three of these master cylinders were scored.

5

There is no mention, of course, of the front bogie cylinder. In cross-examination at page 2-61, Mr Coleman was asked by Mr Perry:

10

When you got to the brake master cylinders at the front and there are two, aren't there?---Yes, one for each side.

Did you find evidence of oil leaks through the telltale holes at the back of the cylinders?

15 Answer:

There was evidence of oil leaks but I can't remember which master cylinders they were from, whether it was front or rear.

20 Question:

Was there evidence in the two front master cylinders of scoring inside the barrel of the cylinder?

25 Answer:

Yes.

Question:

30

Both of them?---From memory, yes, both of them.

Question:

35

Right, and that scoring was consistent with the honing operation being undertaken and undertaken either improperly or ineffectively?

Answer:

40

Yes.

And the question:

45

And the consequence of that honing operation on each of these brake master cylinders was to provide a means or vehicle whereby oil could leak out of the cylinder back out the back seal because the scores in the cylinders themselves were –

start again –

were sufficient to permit that to happen?

5 And the answer. A couple of lines down but there is a bit of a problem with the question and – but a couple of lines down he said:

Yeah.

10 And going on, Mr Perry:

That permitted, did it, oil to leak out of each of those cylinders by reason of the scoring?

15 Answer:

Possible cause, yes.

Mr Perry:

20

Was there any other cause of oil leak from that front cylinder other than the scoring that you could identify?

Answer:

25

Not that I could identify, no.

Mr Perry:

30

So the only cause you could identify is the scoring undertaken as a consequence of this honing procedure?

Answer:

35

Yes.

At page 2-62, question:

40

That loss of brake fluid due to scoring would be the only aspect of re-examination that may have affected the pressure that the brake cylinders could apply once the brake pedals were depressed.

Answer:

45

Yes.

At page 2-63, Mr Coleman said that the rear axle master cylinder had the same scoring, which meant the same fluid bypassing. So this is my comment: the honing which had been done by – on behalf of Downs Diesel Repair, DDR, had been done “improperly or ineffectively” and had permitted hydraulic fluid to bypass the seals and “affected the pressure that the brake cylinders could apply once the brake pedals were depressed”. On the 28th of June 2018, the truck had its final “service at DDR”. Brent Ashley interview, exhibit 40, page 5, line 83. Quote – so this – this is Mr Ashley speaking:

10 *So this vehicle came into the workshop prior to ceasing on the [indistinct] job and so just cleaned down, checked it over and made sure it's not due for a service and prepare a report. Well, it's just a service report required to enter a new mine site for its previous history.*

15 This relates to exhibit number 28, invoice 6755 dated the 1st of August 2018, where the hours were two thousand and – 20,084. Obviously, the full extent of overstrike pins were not sighted at that time.

20 There is an invoice number 6189 from Downs Heavy Haulage, a company related to DDR and Brent Ashley, dated the 26th of July 2018 for work performed on the – on or about the 13th of August – sorry, the 13th of July 2018. Quote:

25 *Load 740B, Moxy dump truck 454 Boundary Road, Richlands, delivered to Zaminit –*

 Z-a-m-i-n-i-t –

Earth Moving Mackay, unload machine.

30 This appears to relate to the truck. Exhibit 22 relates to “the service performed by Tim Clerk” allegedly on the 30th of June 2018 which, as we know, was written up after the crash on the 29th of – hello.

35 MR PERRY: Sorry, your Honour, that was my fault.

 HIS HONOUR: Mr Perry, that is fine. Anyway, so I will just go back to say that last bit, I am not sure when it – the noise started. Exhibit 22 relates to “the service”, quote unquote, “performed by Tim Clerk” allegedly on the 30th of June 2018 which, as we know, was written up after the crash on the 29th of July 2018. It appears that the date of the 30th of June 2018 cannot be correct because of what I have just said about – about the machine coming up to Mackay on or about the 13th of July. The windscreen label from DDR apparently showed service “only eight hours” before, that is, two – 20,084 hours and therefore, if exhibit 22 is correct in any particular, the hours were then 20,092 “when Tim Clerk serviced it”.

45 The truck appears to have been in Mackay on or about the 13th of July and the quarry shortly thereafter and completed only 67 hours work at the quarry. The first

“prestart” in exhibit 14 was on the 20th of July 2018, when the truck start hours were 20,094. This allows only two hours when the [indistinct] for servicing before being taken to the quarry. The only way that the defect-related honing was discovered was by Craig Coleman dismantling the master cylinders and inspecting them. DDR and Tim Clark did not and could not discover the defects without dismantling them. There was no service “due”, to use Mr Ashley’s words, although it is obvious that Schulz/DDR had not serviced the truck in accordance with specifications. If they had, they would have found the telltale rods or overstroke pins at full extension. Troy Dalby is the national product specialist for CJD and has been in that position for 12 years. At page 2-32 of the transcript, he said, quote:

If you read the service schedule for the 250, 500, 1000, 2000 hours, one of the first things that you should check is all the functions of the machine.

Question in cross-examination:

So people undertaking the 250 hours service should have checked all of the brake functions of the machine?

Answer:

Correct.

Question:

Anyone who is familiar with a servicing schedule would be able to understand that there is a course that should be undertaken in the 250 hours service?

Answer:

Or the 500 or the 1000 or the 2000.

Question:

So the deficiencies that were eventually found in the front and rear bogie brakes should have been revealed starting with the 250 hour service and then sequentially after that through the service regime?

Answer:

Correct.

At page 3-60, line 33, Mr Dalby again said that the overstroke pins should be checked at every 250 hour service. Mr Dalby also explained that the four brake circuits, two on the front axle and one on each of the middle and rear axles, provided equal force, that is, 50 per cent of the total on the front axle and 25 per cent on each

of the middle and rear axles: see page 2-14 of the transcript. While the front and rear axle brakes did not work, the middle axle brakes, for all intents and purposes, did and therefore, that axle provided 25 per cent of the total brake force or capacity of the whole braking system, hence those brakes were apparently sufficient to
5 convince all the relevant operators that the brakes were satisfactory.

I – I go now to exhibit 37, page number 6, which is headed Manufacturer’s Static Park Brake Hold Function Specification. This is not directly relevant but is worth putting in. It says that it is to hold up to or about or over 1000 RPM. It actually held
10 1480 RPMs during testing. The service brakes stopped the unladen truck during testing at 2000 revs: see Craig Coleman transcript page 2-58, line 2.

I will then discuss the retarder braking, which is on exhibit 3, page 77. The transmission retarder is a hydraulic brake, the effect of which depends on which gear
15 the machine is operating in, ie, lower gear, greater retarder effect; higher gear, smaller retarder effect. The brake action of the retarder is controlled steplessly by the required level from – with retarder pedal on the floor. The retarder will only be engaged when the pedal is pressed down and, and this is important to remember, the accelerator pedal is fully released, the speed exceeds 1.5 kilometres per hour and the
20 gear selector control is in forward or reverse. Then that little heading is Braking with Retarder. Release the accelerator pedal, depress the retarder pedal and wait for the retarder action:

*The retarder function ceases when the retarder pedal is let up. Note: frequent
25 use of the retarder will raise the oil temperature, therefore, check the temperature gauge for the transmission stroke retarder often. When using the retarder, it is acceptable if the temperature gauge shows a reading within the yellow sector. The retarder will be disengaged automatically if the oil temperature becomes too high.*

30 That should be remembered for later on. Overspeed protection:

*This means that if there is a risk of the engine over speeding, an upshift is made
35 to the next higher gear, irrespective of the gear selector position. Shifting is done at 45 revs per second, which is 2700 revs per minute. Note: when operating down a steep slope with a full load, it is possible that the retarder and exhaust brake may not provide sufficient braking force and that the travelling speed of the machine increases. If this happens, the service brake must –*

40 and that is in bold –

be used to reduce the speed in the machine and to lower the engine speed.

45 And I say here, there is no evidence as to the gradient or steepness of the downhill taken by this truck. At page 76 of exhibit 3, there is a heading Downhill Operations, which I will now refer to:

In general, the retarder should be used before the service brakes in all braking to reduce brake wear.

This is talking about downhill operations:

5

Select suitable gear position one, two or three before the downhill slope begins and lower the speed so the machine changes back to the selected gear. Rule: select the same gear for operating downhill as you would for operating up the same hill. Use the retarder and then the service brakes if necessary.

10

Then there is a warning:

15

Do not permit the engine speed to exceed 2500 RPM when operating downhill. Always operate in the correct gear on a downhill slope together with the exhaust brake and the retarder. If this is not sufficient to slow down the vehicle, the service brakes must be used. Engage the retarder before the beginning of the downhill run. Engine speeds above 2500 revs can damage the engine.

20

There is a little graph there which talks about various percentages of the hill but as I say, there is no evidence of the gradient of that hill. Mr Dalby also said at page 2-5 that:

25

The park brake is designed to hold the vehicle while stationary.

This is a quote. And continuing the quote:

30

The operator's manual exhibits this particular early model does refer to it as an emergency brake should you have a brake failure but the park brake efficiency is not going to stop a fully laden machine downhill.

Mr Dalby explained that, quote:

35

If the weight of the machine is so great that the retarder and exhaust brake cannot hold the weight of the machine and the gravity pulling it down the hill, it will keep gear upshifting, so then you must use the service brakes.

40

That is at transcript page 2-5. Wayne Lamont did two or three loads in the truck. He said, quote:

Everything, including the brakes and the park brake, seemed to work all right.

That is exhibit 42, page 1, line 9. On the day of the incident, quote:

45

I got a lift with Adam in the truck from level 4 down to the water truck, which was parked at the bottom of the laid down area. Adam seemed normal and he had been driving same route all day. Adam didn't travel down the ramp overly

fast and I believe the truck was operating fine. To brake down the ramp, you use the transmission retarder and the service brake. They seem to function normally.

- 5 Jason Ashby said that when he drove down from level 4 to level 2 with a load, he would select low range gear 1: exhibit 47, page 21, lines 328 to 334. Richard York said that when he drove loaded from level 4 to level 2, quote:

Just put everything in low and just start real slow.

10

That is, quote:

Low range gearing and, like, first gear. First – second gear.

- 15 That's at exhibit 49, line 399 to 401. At page 27, line 421, this is still talking about Richard York, to control a descent, quote:

I used to just use the retarder. Yeah, the retarder was normally enough with the low gears.

20

At page 28, line 424, question:

Is there a need to use the service brake when you're using the retarder?

- 25 Answer:

It all depends if you're going straight down the road or you had to turn right at the bottom of level 4, going to level 3.

- 30 Now, I do not know about level 3. I – I assume that he meant level 2 and I am going to go on that basis. Close quotes. Line 427:

It's just because you're going to turn right on to level 3, you know? So you just want to make sure you slow down a bit more.

35

Senior Constable Parker assumed that Adam Malone was going to take the left path – see paragraph (a), exhibit 2 – exhibit 1 – whereas according to Jason Ashby, Adam would have turned right to go to level 2, which he had been doing all day. That is not quite the end of the part about the truck.

40

Transmission neutralising. Just excuse me a moment. There is evidence that the transmission randomly, and without warning, neutralised. When this occurred, the transmission retarder and exhaust brake (if operable) both ceased to operate. Exhibit 37 is the mechanical assessment of Volvo A25C serial number 9570 articulated truck. At page 15, bottom of column 4, column 4 is headed Actual Results, it is said, quote:

45

Intermittent wiring contact relay R30 (key dependent feeder transmission control unit). This intermittent loss of voltage caused the transmission to neutralise during testing.

5 Craig Coleman, in evidence, referred to this. He said that the retarder never worked at all at the Mackay yard: transcript page 2-43, line 28. The truck was started on day 2 but it could not be driven until the right hand instrument panel was reinstalled. When it could be driven, the retarder failed to work at all. A dynamic brake tester was never attempted because Steven Firth deemed the holding yard to be too small,
10 despite what is said in that report. The transmission neutralised – sorry, it is said that during testing at Mackay, the transmission neutralised when the truck hit a bump but this was not in Mr Coleman’s statement which is not, in fact, in evidence as an exhibit, nor in exhibit 37, the CJD mechanical assessment. The only other CJD employee at the Mackay Yard was Troy Dalby. He produced the CJD mechanical
15 assessment, exhibit 37, and it had no written input from Mr Coleman. There is no evidence by any operator at the quarry, Brent Ashley or Tim Clerk, that the transmission had ever neutralised. As I stated at the beginning, the truck had been involved in a crash, tipped on its side, righted, loaded onto a truck, taken to Mackay and unloaded. It is only then at Mackay that the transmission neutralised.

20 Now, going on to the single charge against Belmore Bulk Materials Proprietary Limited and charge number one against Timothy Searle. Particulars up to number 34 are virtually identical but they then diverge. I will look at the BBM charge first.

25 Particular 35 alleges that the truck was not in a safe state. Particulars 36 and 37 set out the obligations imposed on BBM by section 38(1)(a) of the Act. Particulars 38 to 40 set out the allegations as to how BBM failed to discharge its obligations. Particular 41 alleges that BBM did not exercise proper diligence to ensure the obligation was discharged. Particular 42 alleges that BBM did not discharge the
30 obligation to maintain plant at the quarry in a safe state so the risk to workers was at an acceptable level because the safety and health management system, which will be called SHMS from now on, for the quarry did not contain any procedure or standard work instruction for the inspection, maintenance or testing of the truck’s braking systems. Particular 43 alleges that as a result of BBM’s alleged failure to discharge
35 its obligations, Adam Malone died. Particular 44 refers to section 76 of the Justice Act and the requirement for the Defence to prove the affirmative in certain instances.

In relation to Timothy Searle charge of one breach of section 39(1)(a), particulars 35 to 39 set out the obligations imposed by those sections and particulars 40 to 44 set
40 out the allegations as to how Mr Searle failed to discharge his obligations. Particular 45 alleges that as a result of Mr Searle’s alleged failure, Adam Malone died. Particular 46 relates to section 76 of the Justice Act.

Now, I will go more particularly now to BBM. Section 38, Obligations of operators.
45 Subsection (1):

An operator for a mine has the following obligations: (a)
to ensure the risk to workers while at the operator's mine is at an acceptable level, including, for example, by: (i) providing a safe place of work and safe plant; and (ii) maintaining plant in a safe state.

5
It should be noted that there are a number of separate entities and individuals involved in the quarrying and the servicing and maintenance of plant. BBM is the operator. It is a company. Its only director and shareholder is Mr Searle. It appointed Mr Searle to be the site senior executive in 2007. As operator, BBM has
10 certain statutory requirements. BBM did not employ any of the operators. Mr Searle is the site senior executive appointed by BBM. He is a separate entity to BBM and as senior site executive, has certain statutory requirements. As senior site executive, Mr Searle did not employ any operators.

15 Searles Transport Proprietary Limited ran a trucking servicing and maintenance business. It was a separate entity to BBM and Mr Searle as SSE. It employed all the operators and the various fitters and mechanics, etcetera, who worked on BBM's plant and vehicles. It employed Tim Clerk. Section 39(a), (b) and (c) are the BBM charge.
20

At section 118 of the Defendant's submissions, it is accepted that there was no written procedure for the maintenance, inspection or testing of the truck's brakes but it is said, quote:

25 *There was an abundance of evidence of an efficient system of effective maintenance.*

At page 11 of the operator's manual, it is said, quote:

30 *The maintenance work described in this manual can be carried out by the operator. Further adjustments and repairs should be carried out by an authorised dealer workshop.*

Pages 101 to 151 of exhibit 3 are headed, quote, Basic Preventative Maintenance,
35 including page 139, which is maintenance schedule, pages 147 to 151, which is, quote, "checks, oil changes and lubrications", including (a) including daily, which is 10 hours, (a) every 50 hours, (b) every 250 hours, (c) every 500 hours, (d) every 1000 hours and (e) every 2000 hours. Those hours that I have set out is what to occur at each service. At pages 57 to 58, procedures before starting are set out in
40 fair detail. At paragraph 108 of the Complainant's submissions, it is said that, quote:

There is nothing in place to ensure the truck was serviced and maintained in accordance with the OEM specifications.

5 Adam Malone signed his site induction, exhibit 18, on the 11th of June 2018. It included, on page 1, quote:

Prestart checklist are to be completed by all employees.

10 It also included on page 3, quote:

Report any defects of machinery or vehicles, fill out appropriate paperwork and notify supervisor or workshop. If machine is inoperable, isolate and tag out.

15 Extended operating procedure, operation of dump truck, exhibit 32, states on page 1, quote:

Conduct the prestart and shutdown checks as per the training procedure.

20 Exhibits 13 and 14 show clearly that this was done each day by the operators of the truck, except that there is no prestart for Friday the 27th of July 2018. I do not know why this is so, meaning that there is none for that day. All operators, in their evidence, confirmed that prestarts were completed each day. Every form included in exhibit 14 included hour metre start and hours finished. We do not know when the
25 boxes were ticked or crossed and the, quote, “comments and defects” notes were made but it seems the operators did this every day.

Mr Clerk gave evidence that he used these prestarts when he worked on the truck. The, quote, “safety management plan”, exhibit 33, at page 4, requires all employees,
30 quote, “ensure all hazards are reported by the proper means.” When necessary, Searles Transport was contacted and necessary repairs or maintenance was carried out, sometimes at the quarry, sometimes at the Collinsville workshop.

Mr Clerk, in his interview dated the 2nd of November 2018, outlined how
35 maintenance and servicing occurred: see exhibit 41. The operators, in their interview, set out what they did if they had a repair or maintenance issue. It appears to me that indeed, there were various procedures in place to, quote, “ensure the truck was serviced and maintained” in an appropriate manner. Section 39(d) of the charge relates to procedures which, quote, “should have included, as a minimum” and it
40 goes on to (i):

Regular inspection and testing of the telltale rods in each of the compressed air hydraulic units at each of the service brakes of the truck.

45 And (ii):

Regular inspection of the relay of emergency warning lights from the compressed air hydraulic units to the control warning light display in the cab.

5 In Mr Chidgey's report, exhibit 45, at page 15, he stated that checking of these rods, quote:

Is normally carried out every 500 hours as part of the machine routine servicing schedule. When checking brake, this can break lining wear.

10 See also pages 128 and 149 of the operator's manual, exhibit 3. Mr Dalby had said, which I mentioned before, that these should be checked every 250 hours: transcript page 3-60, line 33. Mr Chidgey also stated at page 15, every 2000 hours. Quote:

15 *The brakes are required to be bled and expel any air in the brake system and to ensure all over stroking indicators are in working specifications.*

See also pages 128 and 151 of the operator's manual. Also at page 15, Mr Chidgey said, quote – is everyone right? Hello.

20 MR PERRY: Yes, your Honour.

HIS HONOUR: There was a terrible noise, then.

25 MR PERRY: [indistinct]

HIS HONOUR: Anyway.

MR PERRY: I am sorry. It is the [indistinct] on this phone, I think. I'm sorry for that.

30 HIS HONOUR: That is okay. Also at page 15, Mr Chidgey said, quote:

35 *The electric overstroking mechanical switches that activate the brake failure warning lamp was active and was previously reported numerous times on the daily operator's prestart sheets.*

There is no evidence to support the last part of this statement, that is, the part that says:

40 *And was previously reported numerous times on the daily operator's prestart sheets.*

45 Exhibit's 14 and exhibit's 13 notations are as follows and I will read them out because it is relevant. Twentieth of July 2018, Operator Ricky. Against number 8, there was a cross, brake and indicator lights. Against nine, there was a cross, backup

warning alarms. Against number 10, cross, gauges and warning systems. And then he wrote:

Dash lights on, everything seems okay, bent step.

5

On the 21st of July 2018, Ricky. Two was crossed, drive tyres. Ten was crossed, gauges and warning systems. Then in the comments:

Back tyre cuts, gauges on, bent step.

10

On the 22nd of July 2018, Ricky. Two was crossed, drive tyres. Ten was crossed, gauges and warning systems:

Cuts on tyres, warning lights on, bent step.

15

Twenty-three July '18, Adam, who, on that day, made more than 45 trips. He wrote, against two, drive tyres, and against 10, there was a cross, gauges and warning systems. Then he said:

Cuts on tyres, warning lights on, bent step.

20

On the 24th of July 2018, Jeff. Cross 2, drive tyres, and cross 10, gauges and warning systems. And he wrote:

Cuts on tyres, warning light not working, bent step.

25

Twenty-fifth of July 2018, Adam. Cross 2, drive tyres, cross 10, gauges and warning systems. Cross 6, steps. On cross 10, cuts on tyres, gauges not working and there is a comment about the steps. On the 26th of July 2018, Adam. Cross against two, drive tyres, cross against 10, gauges and warning systems. Then in notes with:

30

Cuts on tyres, gauges not working.

There is no prestart for the 27th of July 2018. Then exhibit 13 and 14, exhibit 13, on the 28th of July 2018 was Adam. Two was crossed, drive tyres. Ten was crossed, gauges and warning systems. Comments:

35

Cuts in tyres, gauges not working.

On the 29th of July 2018, Adam. Two was cross, drive tyres. Ten was crossed, gauges and warning systems:

40

Cuts in tyres, gauges not working.

Despite these notations and instructions set out above and the operator's manual, exhibit 3, every operator deemed the truck as being safe to operate and no

45

operator had any problems with the performance of the truck at all and I draw your attention back to section 36 of the Act. We do not know what, quote, “warning lights or gauges” refer to by any operator. That is not quite right but I will explain that in a moment. Section 39(e) refers to there being, quote:

5

No standard operating procedure for the inspection of a piece of plant equipment that is returning to a quarry from offsite operations and such a procedure should have existed.

10 There is no evidence at all to substantiate the need for such a procedure. As far as this truck was concerned, the evidence is clear, that it had been offsite for about 2500 hours and one could reasonably expect that routine maintenance and servicing had been done. Unfortunately, that was not the case but there was a sticker on the windscreen that a service had been completed by DDR on behalf of Schulz only
15 eight hours before Mr Clerk was told to service it at Collinsville. He guessed that the sticker referred to a B-service and therefore, he did not service the truck. Thirty-nine (f):

20

The inspection procedures should have required a service brake drive through test.

Does this mean that the only inspection procedure was a drive through brake test or does it mean included a drive through brake test? If the former, there would have been no requirement for anything else other than a drive through brake test. It seems
25 that a drive through brake test is the same as a static brake test. Exhibit 3, the operator’s manual, does not mention a static brake test for this particular model of truck. Mr Chidgey said in relation to such a test, in evidence-in-chief at page 4-24, quote:

30

But on a minimum, would be every 500 hours – sorry, every 1000 hours.

On page 4-25, when referring to a “start-up procedure”, he said:

35

You ensure that the machine is in an operable state.

And quote:

40

One of these tests is a brake test and that can vary from a drive through test, running the machine off from the parking site and applying the brakes under load, or a sharp, quick brake test. It varies between mine sites and quarries, what they have in place.

45

Mr Clerk said, at exhibit 41, interview page 26, he tested, quote, “the retarder and the foot brake and the park brake” and when he tested the service brakes, quote, “it pulled up fairly well straight away.” That is at page 27. He said that testing the retarder was, quote, “hard to test at the workshop.” That is on page

27. Wayne Lamont gave a statement, exhibit 42. At page 1, he said he drove the truck about two or three times and quote:

5 *On those occasions everything, including the brakes and the park brake, seemed to work all right.*

On page 2, he explained how he carried out a, quote, “prestart checks” on the vehicle at the quarry each morning, including park and service brakes and quote:

10 *If a fault was identified during the prestart check process, it would be recorded on the prestart sheet of the vehicle. The sheets were given to the office each shift and if any of them recorded faults, someone from the office would arrange for the fault to be rectified.*

15 We do not have a prestart from Mr Lamont in the exhibits 13 and 14. Jeff Daly was interviewed twice, exhibits 33 and 34. Jeff Daly did complete a prestart form: see exhibit 14. He was asked if there was a prestart process. Answer on page 12, quote:

20 *Just a prestart book and check. Oils and batteries, water. Fired the machines up and just let them idle away and check to see what lights came on and didn't come on and that sort of thing.*

He was asked about faults for the truck in reply, pages 13 and 14, quote:

25 *Performance-wise, I couldn't really fault the machine. I mean, everything worked. It started, it stopped, it tipped. I never noticed anything noticeable with the machine and the way –*

this is how he said it –

30 *and the way behaviour that there was anything wrong with it.*

At page 15, he said that, quote, “the brakes seemed to be pretty good.” In exhibit 44 at page 12, he thought the warning light which was on related to the raised tub. On
35 page 14, he referred to number 47 which is, in fact, the central warning lamp but he said that although there was a manual in the truck, he never pulled it out to see what the light was.

At page 23, exhibit 44, he explained how he performed the service brake test each
40 day. Mr Daly said at page 35 of exhibit 44, that he used the service brake to pull the truck up, quote, “just to make sure it will work.” The truck was loaded and was going down from level 4 to level 2 but he provided no further details and they did not ask him, either.

45 Tony Rekstad was interviewed, exhibit 46. He trained Adam Malone, as did Ricky – Ricky or Richard York. He showed Adam how to do the prestarts. He explained on

page 15 how the prestarts are done, including brake tests. Page 21, he said he had driven the truck and, quote, “there were no faults with it.”

5 Jason Ashby was interviewed twice, exhibits 47 and 48. He had never operated this truck, although he had operated similar trucks. He said the truck had only been back onsite a week and I say but, in fact, it was a little longer than that but only by a couple of days. He was not aware of any problems with the truck. At page 20 of exhibit 47, he explained he would test the brakes. At page 12 of exhibit 48, he again explained how he would test the brakes. Richard York was interviewed, exhibit 49.
10 He also trained Adam Malone in the operation of an A25C. He had driven the truck but not often. He had, this is a quote:

A couple of squeezes through the operator’s manual just to see what some things were and stuff like that.

15 But he was not asked anything further. He was shown his prestart checks. He said he told Tony Rekstad of any faults. He thought, line 47, central warning light related to the tub being up, which is what I said before about another operator. He thought the park brake, service brakes and transmission retarder all worked. He said the
20 retarder was sufficient if going straight ahead at the bottom but if you turned on to level 2, he used the service brakes as well. He said the truck never lost power when he drove it. He said that Adam appeared to him to be competent, exhibit 49, page 38.

It is obvious that even if there was no written down procedures to test the brakes,
25 each operator did test the park, service and retarder as a matter of course. No operator reported any faults with the brakes, including the retarder. No operator reported the transmission neutralise. Thirty-nine (g) and 39(f) answers that particular point.

30 At number 40, there is no evidence that a, quote, “reasonable precaution of having and implementing an inspection procedure” in relation to the service brakes was, in fact, necessary or reasonable. Such a procedure would or should have identified the service brake defects which could then have been corrected but there is no evidence to suggest it. At 41, since there was no supporting evidence of this, it is not
35 necessary to find that BBM, quote, “BBM did not exercise proper diligence to ensure the obligation was discharged,” nor that they failed to take reasonable precautions. That is section 45(1)(c). The above reasoning also alleged to charge 1 against Timothy Searle.

40 To reiterate, when the truck returned to Jacks Quarry or the Collinsville workshop of Searles Transport, it had a sticker indicating that a B-service had been done. It had not: see the interview of Brent Ashley, page 40 – exhibit 40, page 5, line 8. It is obvious that no routine maintenance had been done for more than 2500 hours by Schulz and DDR. Tim Clerk did not have a proper inspection any more than DDR
45 had and so the overstroke pins or telltale rods were not detected at full extension. The evidence is clear: DDR and Searles Transport failed in their duties

and responsibilities and BBM and Tim Searle, as operator and site senior executive, relied upon Searles Transport to properly inspect and service the machine. Tim Clerk, an employee of Searles Transport, failed to carry out his instructions.

5 Searle charge number 2. This charge relates to 39(1)(c). One – subsection (1):

10 *A site senior executive for a mine has the following obligation in relation to the safety and health of persons who may be affected by operations: (c) to develop and implement a single safety and health management system for all persons at the mine.*

I read section 40 – 55 before. I am not going to repeat it, just adds to the boredom for you two. But the particulars of this charge are identical up to particular 27 to charge number 1. Then particular 28, quote:

15 *The truck's brakes were not maintained to an acceptable level.*

Twenty-nine to 30 set out the defects in the various parts of the service brakes. Please note that (c)(viii) in fact relates to the first bogie brakes and not to the rear bogie, which is a mistake in the complaint and summons. Anyway, be that as it may. Section 31, due to defects, insufficient pressure was generated. Sections 30 – particulars 32 and 33, no operations exhaust brake and I accept that that is the case. Thirty-four, the truck had – quote:

25 *The truck had an electrical fault that caused occasional intermittent voltage loss relay 30, which was the power feed to the transmission control unit.*

In fact, it is the transmission fault – close quotes – which 35, quote:

30 *Caused the truck's transmission to randomly neutralise. In neutral, retarder would not be engaged.*

And I say and nor would the exhaust brake if it worked. Particular 36, obligation imposed by 39(1)(c) to develop and implement a safety and health management system for all persons at the mine. Section – particular 37, SMHS had to be, quote:

35 *Effective to achieve an acceptable level of risk by including procedures for the operation of the mine and standard work instructions pursuant to section 55(5)(d) of the Act.*

40 Not section 55(3)(d) of the Act as said in the complaint and summons and particulars. Particular 38, this required Searles to develop and implement procedures and standard work instructions that ensured the truck's brakes were maintained to an acceptable level. Next heading is Did Not Discharge the Obligation. Particular 39:

45

Mr Searle did not discharge the obligation because he did not take reasonable precautions and exercise proper diligence to ensure the obligation was discharged.

5 Particular 40:

Mr Searle did not take reasonable precautions to ensure the obligation was discharged because –

10 and this is virtually identical to charge 1, particular 41, so 41 is identical to 42, 42 to 43, 43 to 44. Forty-three says:

15 *The SHMS developed and implemented by Mr Searle did not include procedures for the operation of the mine and standard work instructions sufficient to achieve an acceptable level of risk because the procedures and standard work instructions that were in place did not contain and*
20 *procedure standard work instruction for the inspection, maintenance or testing of the truck's braking system to ensure the truck had effective braking capacity and therefore did not ensure that the truck's brakes were maintained to an acceptable level.*

Particular 44:

25 *In those circumstances, Mr Searle did not discharge the obligations to develop a single SHMS for all persons at the mine.*

And 45:

30 *This failure caused Adam Malone's death.*

At 34, particular 34, the allegation of electrical fault was made. I said earlier that there is no evidence at all that prior to the crash, there is such a fault. Brent Ashley was asked about it and said no. Tim Clerk was asked about it and said no. All the relevant operators were asked about it and said no. The only time and place this was
35 recorded was at Mackay and the person who discovered it, Craig Coleman, did not put it in his report. There being no evidence of such a pre-existing fault, I will not consider this matter further. There is no doubt that the service brakes were defective. There was no doubt that the exhaust brake was non-operational. There is no doubt that the park brake and the retarder both worked properly.

40 It is noted that no operator remarked on the testing of the exhaust brake, nor that it did not work. The reason for that is probably because when you put the retarder on, the exhaust brake comes in automatically and there is no suggestion anywhere in the evidence that the exhaust brake was ever tried out individually, which could have
45 been independently of the retarder. Anyway, the exhaust brake could be used alone or if the retarder was engaged then the exhaust brake, if it worked, was also engaged. It is alleged at paragraph 39 that Mr Searle did not discharge his obligation

because he did not take, quote, “reasonable precautions and ensure proper diligence,” but Mr Searle as site senior executive relied upon a separate business, Searles Transport, to service and maintain the truck. Searles Transport failed in its duty and responsibility due to Tim Clerk’s failure.

5
BBM and Mr Searle as SSE had no capacity to carry out maintenance except the daily service and the A-service, which is 10 hours and 50 hours, for which see pages 147 to 151 of exhibit 3. The other services required at least some input by Searles Transport and there is no suggestion that operators, being non-fitters or mechanics,
10 should or would have detected brake problems within the master cylinders. Indeed, the only way to detect the honing and related bypass under the brake fluid was to dismantle the master cylinders and visually inspect them as Craig Coleman did.

When I was considering the BBM charge, I referred to paragraph 108 of the
15 Complainant’s submissions. I do not intend to repeat all of this. Suffice to say that in my view, Mr Searle could do no other than what I have said previously and employ Searles Transport as he did. There is substantial evidence earlier in this decision to show that there were adequate procedures and standard work instructions that ensured the truck’s brakes should have been maintained to an acceptable level.
20 Initially DDR and subsequently Searles Transport failed to maintain the truck. Searle charge 3. This charge relates to section 39(1)(e):

A site senior executive for a mine has the following obligations in relation to the safety and health of persons who may be affected by operations: (e) –
25

sorry –

(e) to train workers so that they are competent to perform their duties.

30 See particular 28 on page 15 of the particulars. Twenty-nine:

Mr Malone did not receive training so as to be competent to perform the duties of driving the truck between the levels of the quarry.

35 Particular 30 comes under did not discharge the obligation:

Mr Searle did not discharge the obligation because he did not take reasonable precautions and exercise proper diligence to ensure Mr Malone was competent to perform his duties of driving the truck between the levels of the quarry.
40

Thirty-one:

Mr Searle did not take reasonable precautions to ensure the obligation was discharged because (a) Mr Malone did not receive training in accordance with RIIMPO337D, conduct articulated truck operations, or any
45

equivalent training prior to undertaking the duties of driving the truck between the levels of the quarry.

Thirty-two:

5

Mr Searle did not exercise proper diligence to ensure the obligation was discharged because he did not have any training procedures in place to ensure Mr Malone was competent (a) in the absence of a training procedure which required the minimum action set out above.

10

Which is that RIIMP course. So:

15

In the absence of a training procedure which required the minimum action set out above, Mr Searle did not ensure Mr Malone was competent to perform the duties of driving the truck between the levels of the quarry.

Number 33:

20

Mr Searle did not discharge the obligation to train workers so that the worker was competent to perform their duties because Mr Malone did not receive the necessary training to make him competent to perform his duties of driving the truck between the levels of the quarry.

Thirty-four is:

25

Mr Searle's failure led to Adam Malone's death.

And section 76, I referred to before. Section 34 of the Act relates to how an obligation can be discharged if regulation or guideline is made. I will requote that. Subsection (1):

30

If a regulation prescribes a way of achieving an acceptable level of risk, a person may discharge the person's safety and health obligation in relation to the risk only by following the prescribed way.

35

Section 93 of the regulation 2017 was not pleaded at all. It was mentioned in the written opening submission at paragraph 11, quote:

40

Here, a relevant regulation exists in relation to charge 3 brought against Mr Searle. Section 93 of the Mining and Quarrying Safety and Health Regulation 2017 provides –

and I have just quoted it before. It was not mentioned at all in the oral opening. It is my view, therefore, that section 93 cannot now, in final submissions but without any evidence to support it, be raised; however, if I am wrong, I will refer to it as follows. Subsection (1):

45

The site senior executive for a mine must ensure each worker at the mine is trained, if necessary, and periodically assessed, to ensure the worker has adequate knowledge and understanding –

5 I said all this before but it is worth looking at again –

adequate skill to carry out the processes, adequate ability to access and understand the procedures.

10 Two:

The training must be carried out in an appropriate way, including, for example, by formal training courses or informal on-the-job instruction.

15 And it talks about the assessment must carried out in an appropriate way and:

The site senior executive for a mine must also ensure a person being trained or assessed does not carry out work at the mine unless the person is adequately supervised to prevent creating an unacceptable level of risk.

20

Mr Searle as SSE had an obligation to ensure Adam Malone was competent to perform his duties of, quote, “driving the truck between the levels of the quarry.” His obligation did not require him personally to carry out the training. Section 92, subsection (2) allows the training:

25

To include, for example, by formal training courses or informal on-the-job instruction.

30 By his own admission, Tony Rekstad, although not formally a supervisor, in fact carried out that role, which included training by both himself and other operators who he considered to be competent, for example, Richard York.

35 When Adam Malone commenced work on the 11th of June 2018, Tony Rekstad was on days off: see exhibit 46, his interview, particularly pages 32 and on. On page 32 at line 406, he said:

That mainly sit in with them and do the time with them, teach them correctly.

40 At line 408, quote:

Normally, we sit in with them for a couple of days until we –

and he said redeem but I think he actually meant deem but anyway, we will say he said redeem –

45

then, like, I redeem him competent or anything like that or I have one of my competent drivers jump in with them and teach them how they do it.

Page 33, line 410, quote:

I turned up after four days off and Adam had – had already been there four days prior.

At page 34, line 449:

And before I turned up, Richard York was training him.

At page 10, line 116, quote:

Yes, well, Jayce –

that's talking about Mr Ashley –

has had a lot of experience on machines and he, Adam, is normally working with Jayce, who has a sort of teaching role, like, as in showing him the correct ways of doing things, easier way of doing things.

Page 11 at line 121, question:

Is Jason a trainer or assessor?

One-twenty-two, answer:

No, no, I just picked Jayce because he was the experienced one there. I wouldn't pick anyone that I wasn't capable of letting. A matter, I'd say to them, look, I'll teach you certain methods when I was on that shift but you know my philosophy here is to teach them correctly, otherwise they pick up bad habits.

One-twenty-three:

So who would've shown Adam instruction on the Moxy?

One-twenty-four:

I'd shown the first day I was there. I'd shown Adam how to check oils and Moxy check. Lift the bonnet, do his prestarts. I checked him – made him check everything out like tyre pressures and I proceeded running through the bookwork of the correct dump procedures just to – just to, you know, get it in his mind before he actually jumped in the machine. I jumped in the machine after he'd done his book, like, I'd read it all out to him so he was comfortable with it. He understood it. I'd done probably about five hours with him in it, like, me in the seat, him in the passenger seat, showed him how to correctly dump, use your mirrors, what not to do and what to do basically and then I put him in the seat and told him not to go to second gear while I sat next to him and

5 *he was comfortable with it. He got used to it. He got used to the way it
dumped the swing. I showed him exactly this is what you don't do if you can't
see and you don't know what you're reversing, you know? I said it's all in the
dump procedure I read to you and he says yes, yes, and he fully understood that
and then I jumped out, I had my own job to do – to go and do and I put Richard
York in with him and he had been in the dumping, sort of, last five months and
he was competent, very competent, about his job and he stayed with him –*

10 that is, Richard York stayed with Adam –

*for the rest of the day and I think it was nearly the whole next day, then he was
allowed to go and proceed by himself. He was deemed competent.*

15 At page 35, line 436, John Barnes, the interviewer, asked:

*So driving the vehicle by himself for a few days and he's still not deemed
competent? So he's still under training even though he's been by himself
unsupervised?*

20 Tony Rekstad, I – quote:

I deemed him as competent.

25 Line – page 36, line 465, quote:

*He's still under training but he was, like, competent in my book, so I called him
competent.*

30 And that is Tony Rekstad, that is a quote from him. Richard York was interviewed:
see exhibit 49, page 38, line four – 603. Quote:

I would have probably spent maybe a day and a-half, two days, with him.

35 Adam was allowed to drive by himself after, quote, “maybe four or five days.”
Question:

So after that time, did he appear competent?

40 The answer by Richard York was:

*Yeah, Jason Ashby appeared to be the only operator with tickets for all of the
plant at the quarry. After the crash, he attended course –*

45 that one that I read before, RIIMPO337D, conduct articulated haul truck operation:
see exhibit 16. He was then competent at the conclusion of the course but he already
had been deemed competent before. There was nothing in this training that appears
to refer to what happens if the transmission neutralised and nor is there anything in

the operator's manual about this. The thought that the transmission would neutralise and then the engine retarder, if it did operate, and the transmission retarder would both become in – inoperable was not mentioned anywhere. If this happened, what was left was the park brake and the service brake. At page 67 of the operator's manual it says, quote:

If brake action is lost in both brake circuits, that is, the service brakes, apply the retarder and the parking brake and stop the machine.

So the parking brake was also an emergency brake and I referred before to what Mr Dalby had said. At page 66 of the operator's manual it says, quote:

Always use the retarder in first instance, especially when driving downhill.

I have already referred to downhill operations earlier and I will not bore you with that again. All of the operators knew about this. It appears that all the operators except probably Jason Ashby were trained, quote, "on the job." There is no evidence either way except Jeff Daly was certainly trained on the job by Adam Malone.

At 113, the Complainant's closing submission alleges that Adam Malone, quote, "was not trained to an acceptable standard at the quarry" but is not shown what that acceptable standard was except for that course, RIIMPO whatever, which was not mandated by regulation or guideline. Both Tony Rekstad and Richard York assessed him as competent, even if he was still, quote, "under training". It is then said, quote:

He had no prior qualifications or training that might have otherwise ensured he was trained so as to be able to "operate heavy machinery at the quarry".

But of course, we are talking about his competence to perform the duties of driving the truck between the levels of the quarry and not, quote, "heavy machinery generally". We know that Adam Malone started work at the quarry on the 11th of June 2018. We know Richard York and Tony Rekstad trained him and both assessed him as competent. We know that he drove the truck on the 23rd of July 2018 when it carted at least 45 loads and drove for nine hours. On the 25th of July 2018 when he drove for at least six hours. On the 26th of July 2018 when he drove for seven hours. On the 28th of July 2018, no hours are recorded but probably eight. If you look at the sheets, it works out to be eight, and on the 29th of July 2018, the date of the crash, he started driving at about 6.30 am. The crash occurred after 1630, that is, 4.30 and according to Jason Ashby, he completed about 30 loads that day. It appears that there had been no relevant problems with the truck on any of these days except the date of the crash.

Paragraph 114 of the Complainant's closing submissions, that training consisted entirely of rudimentary on-the-job training given to him by other workers who themselves had varying degrees of knowledge and experience. There was no evidence of what training would have meant his training was other than rudimentary and no evidence was called to support what the word rudimentary means. It is noted that no trainer or similar was called, even Mr John Elliot, who carried out Jason Ashby's training. He was not called to give evidence, either.

Returning now to section 93 of the regulation, (1)(a). There is no question in my mind that Adam Malone's training was such as to provide him with, quote, "adequate knowledge and understanding of the processes to be carried out and the materials and plant" to be used for his duties at the mine and (b), quote, "adequate skill to carry out the processes, handle the materials and operate the plant; and (c) -"quote – "adequate ability to access and understand the procedures and standard work instructions" for his duties. For these, see the remarks of all the operators.

Subsection (2) relates to either formal training courses or informal on-the-job instruction, see earlier. Subsection (3), assessment, Tony Rekstad and Richard York assessed him as competent, carry out his duties and he had performed these duties for a number of days, including at least 29 trips on the fatal day. The assessment could be carried out, quote, "in an appropriate way including, for example."

Subsection (4), adequate supervision. There is no evidence to suggest that his supervision was inadequate. He drove the truck, which essentially one man vehicle, although there is a dicky seat which was being the operator's seat. How much supervision is required before it is adequate? He was assessed as competent and it could not be expected that after this, another operator would be put in the truck with him. It is my view that Mr Searle took reasonable precautions and exercised proper diligence to prevent the contravention, section 45(1)(c).

And now, finally, the summary. On Sunday the 22nd of July 2018 at Jacks Quarry near Collinsville, a Volvo A25C truck driven by Adam Malone crashed and as a result, Adam Malone was fatally injured. Adam had successfully driven the truck down the same path approximately 29 times that day. We do not know of any problems that day with the operation of the truck. We know it was the last load of the day, a day which started at 6 o'clock and finished towards 5 o'clock.

No one saw the crash. I do not know who reported it or how it came to anyone's attention. We know that after leaving level 4 to go to level 2, the truck gathered speed and may have reached 50 to 60 kilometres an hour before hitting a mound of earth on the left side of the road. The trailer unit did a complete 360 degrees end for end revolution and came to rest on its wheels. The front engine and cab rolled 90 degrees and ended up on its right hand side. Adam Malone was found partly outside the cab but mostly inside it. He was alive when found but he died subsequently.

There is no evidence that the transmission neutralised before the crash. Whether it did at that time, we will never know. To say that it did and that then the retarder

became inoperative is very convenient. Perhaps – but perhaps not the cause of the crash. The possibility of the transmission neutralising is not mentioned anywhere by exhibit 3 or any witness and therefore, no evidence of any action an operator may take in that eventuality. To quote page 77 of exhibit 3, quote:

5

The retarder will only be engaged when the pedal is pressed down and the accelerator is fully released, the speed exceeds 1.5 kilometres, the gear selector control is in forward or reverse.

10 Further down the same page:

The retarder will be disengaged automatically if the oil temperature becomes too high.

15 There is also the possibility of operator error or perhaps some other issue which we have not heard about. Whatever the cause of the transmission neutralising, if indeed it did, truck built up speed and could not be stopped by whatever actions Adam Malone took. We do not know what, if anything, he did, although there is good evidence that he applied the service brakes, as Tony Rekstad reported a hot disc.
20 There is no evidence concerning the ability of even fully operational service brakes to stop a fully laden truck travelling from level 4 to level 2.

The truck had not been serviced properly by DDR and then Tim Clerk as an employee of Searles Transport. He failed in his duty to, quote, “have a bit of a look
25 around the truck.” BBM and Tim Searle as SSE relied on Searles Transport to service and maintain the truck and Searles Transport failed to do this but the truck only operated for 67 hours at the quarry and if the windscreen sticker was relied upon, which it should not have been, then no service was due for another 175 hours and that should then have shown up that the telltale rods were fully extended and that
30 should have prompted further investigation. In my view, BBM and Mr Searle are not guilty of any offence or at least they have taken reasonable precautions and exercised proper diligence in accordance with section 45 or they followed regulation 93 and carried out the training in an appropriate way. Thank you. Mr Perry, as I said - - -

35 MR PERRY: Your Honour, yeah, the – the only real practical question is timeline. That will start with a consideration of how long a transcript might take and your clerk might be best able to advise us about that.

HIS HONOUR: Just - - -
40

MR PERRY: Or we can do it this way - - -

HIS HONOUR: Just hold on, please. Mr Perry.

45 MR PERRY: Your Honour.

HIS HONOUR: I'm a magistrate. I do not order transcripts but the clerk says that you have to order it, not us. You had - - -

MR PERRY: Okay. We will do that.

HIS HONOUR: All right.

MR PERRY: I do not know what the turnaround time will be but certainly, my clients will do that.

HIS HONOUR: Okay.

MR PERRY: And I suspect we – we will talk to the Crown about that. One of us might order it and share it but we will see what the appropriate course is.

HIS HONOUR: Well, what I will do today is - - -

MR PERRY: In terms of money.

HIS HONOUR: I will just adjourn the matter to a date to be fixed.

MR PERRY: Yes. What I could put on the record, then, is that if any application for costs is to be made and if so, the basis for it, we could do within 14 days after receipt of the transcript. That might help Mr Ballard as to timing but that is – a date to be fixed will work, sir.

HIS HONOUR: Now, if we just do that, as you know, I am retired and acting as a magistrate.

MR PERRY: Yeah.

HIS HONOUR: And in that circumstance, then if you do that, then the clerk will be in touch with me and – and if you ask – if you set out a proposal, I will simply sign it and agree with it.

MR PERRY: Good. Thank you, your Honour.

HIS HONOUR: All right. Anything else, Mr Ballard and – Mr Ballard, yes.

MR BALLARD: No, your Honour.

HIS HONOUR: Okay. Thank you and good afternoon.

