

INDUSTRIAL COURT OF QUEENSLAND

CITATION: *Fuller v Stone* [2023] ICQ 008

PARTIES: **TIMOTHY NEIL FULLER**
(appellant)
v
MARK DOUGLAS STONE
(respondent)

FILE NO: C/2022/32

PROCEEDING: Appeal and application

DELIVERED ON: 26 May 2023

HEARING DATE: 16 May 2023

MEMBER: Davis J, President

- ORDERS:
1. **The appeal is dismissed.**
 2. **Upon the undertaking given by the respondent through his counsel to pay the appellant's costs of the appeal on the standard basis to be agreed or assessed by this Court, the complaint and particulars are amended so:**
 - (a) **the complaint reads:**

“Between the 21st day of December 2018 and the 1st day of January 2019 at the Saraji Mine near Dysart in the Magistrates Court District of Mackay in the State of Queensland, TIMOTHY NEIL FULLER, on whom a safety and health obligation was imposed by section 39(2)(b) of the *Coal Mining Safety and Health Act* 1999 (Qld), did fail to discharge the said obligation, in contravention of section 34 of the said Act AND the said contravention caused the death of Allan John Houston.”
 - (b) **the words “that at the abovenamed time and place”, being the first words of the particulars, are deleted.**
 - (c) **paragraph 19 of the particulars reads:**

“19. Timothy Neil Fuller (‘Fuller’) was the Manager of Production Overburden. He was either a coal mine worker or another person at a coal mine.”
 3. **In the event that the costs are not agreed by 23 June 2023:**

- (a) the appellant shall file and deliver a costs assessor's detailed assessment of the costs by 4.00 pm on 21 July 2013;**
- (b) the respondent shall file and deliver a detailed objection to the costs assessor's assessment of the costs by 4.00 pm on 18 August 2023;**
- (c) the matter of the costs shall be mentioned at 9.15 am on 1 September 2023.**

CATCHWORDS: MAGISTRATES – GENERALLY – POWERS AND DUTIES – IMPLIED OR INHERENT POWERS – where the respondent swore a complaint against the appellant – where the complaint was before the Industrial Magistrates Court – where the appellant asserted that the complaint was doomed to fail – where the appellant brought an application to strike out the complaint – where the application was brought to the Industrial Magistrates Court under a provision empowering the Court to make directions – where the industrial magistrate held that the provision did not empower the Court to summarily dismiss the complaint – where the industrial magistrate held that she did not have power otherwise to summarily dismiss the complaint – whether the Industrial Magistrates Court had power to dismiss the complaint summarily if it were an abuse of process

CRIMINAL LAW – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS – STAY OF PROCEEDINGS – ABUSE OF PROCESS – where the respondent swore a complaint against the appellant – where the complaint alleged that the appellant committed an offence against the *Coal Mining Safety and Health Act 1999* (CMSH Act) – where the complaint alleged breach of a safety obligation on 31 December 2018 – where the appellant was not at the mine on 31 December 2018 – where particulars of the complaint alleged obligations upon the appellant at times prior to 31 December 2018 – where the particulars allege breaches of obligations by the appellant before 31 December 2018 – where the appellant alleged that the complaint was doomed to fail – whether the complaint was doomed to fail

MAGISTRATES – COMMENCEMENT OF PROCEEDINGS – AMENDMENT OF INITIATING PROCESS – GENERALLY – where the respondent swore a complaint against the appellant – where the particulars alleged acts and omissions beyond the terms of the complaint – where the respondent sought to amend the complaint – where the respondent sought to amend the particulars – where the appellant opposed the amendments – where the respondent alleged the amendments would render the prosecution oppressive – where the respondent alleged that

the amendments would render any trial unfair – whether the amendments should be allowed

Acts Interpretation Act 1954, s 44

Coal Mining Safety and Health Act 1999, s 6, s 7, s 34, s 39, s 255

Criminal Code, s 1

Industrial Relations Act 2016, s 424, s 545, s 558

Justices Act 1886, s 83A

CASES:

Attorney-General for the State of Queensland v Wands (2019) 1 QR 365, cited

Director of Public Prosecutions (NSW) v Presnell (2022) 108 NSWLR 407, cited

Grassby v The Queen (1989) 168 CLR 1, followed

Hamilton v Oades (1989) 166 CLR 486, cited

Higgins v Comans (2005) 153 A Crim R 565, followed

Jago v District Court (NSW) (1989) 168 CLR 23, followed

Police v Dunstall (2015) 256 CLR 403, cited

Power v Heyward [2007] 2 Qd R 69, cited

R v Gesa and Nona; ex parte Attorney-General [2001] 2 Qd R 72, cited

R v Jacobs [1993] 2 Qd R 541, cited

R v Mosely (1992) 28 NSWLR 735, cited

Royall v The Queen (1991) 172 CLR 378, cited

Stead v State Government Insurance Commission (1986) 161 CLR 141, cited

Stone v Fuller, unreported, Industrial Magistrates Court, Industrial Magistrate Hartigan, 5 December 2022, related

Tuesley v Workers' Compensation Regulator (2021) 307 IR 395, cited

Victoria International Container Terminal Ltd v Lunt (2021) 271 CLR 132, cited

Walton v Gardiner (1993) 177 CLR 378, followed

WGC v The Queen (2007) 233 CLR 66, cited

Williams v Spautz (1992) 174 CLR 509, cited

Williamson v Trainor [1992] 2 Qd R 572, followed

COUNSEL:

C J Murdoch KC and N Weston for the appellant

M J Copley KC for the respondent

SOLICITORS:

Mills Oakley for the appellant

Office of the Work Health and Safety Prosecutor for the respondent

[1] This is an appeal from a decision of an industrial magistrate¹ dismissing an application by the current appellant to strike out a complaint that had been brought against him.

¹ *Stone v Fuller*, unreported, Industrial Magistrates Court, Magistrate Hartigan, 5 December 2022.

Background

- [2] BM Alliance Coal Operations Pty Ltd is a mine operator who operates a coal mine on Saraji Road near Dysart in western Queensland (the mine).
- [3] The appellant, Timothy Fuller, was employed at the mine in the capacity of the Manager of Production Overburden.
- [4] Allan John Houston was a coal mine worker² employed at the mine. His duties involved driving bulldozers.
- [5] On 31 December 2018, Mr Houston was driving a bulldozer when it slid off an embankment. The bulldozer rolled, coming to rest upside down in a pool of mud and water. Mr Houston was trapped and died.
- [6] The respondent, Mark Douglas Stone, swore a complaint against Mr Fuller alleging a breach of a health and safety obligation said to fall upon him by force of s 39(2)(b) of the *Coal Mining Safety and Health Act 1999* (CMSH Act).
- [7] Mr Fuller brought an application in the Industrial Magistrates Court seeking to strike out the complaint (the strike-out application).
- [8] On 5 December 2022, the strike-out application was dismissed.
- [9] It is from that order which Mr Fuller now appeals. He seeks orders on appeal from this Court summarily dismissing the complaint.

Relevant statutory provisions

- [10] The objects of the CMSH Act are to protect the safety and health of persons at coal mines, to reduce risk of injury or illness to an acceptable level and to monitor the effectiveness of the CMSH Act and other legislation in fulfilling those objectives.³
- [11] The CMSH Act seeks to achieve its objectives in various ways, including by imposing safety and health obligations “on persons who operate coal mines or who may affect the safety or health of others at coal mines”.⁴
- [12] Part 3 of the CMSH Act imposes safety and health obligations. It does this by imposing general obligations⁵ and then imposing more specific obligations upon identified classes of persons involved in the management of coal mines.⁶
- [13] As Mr Fuller was a “coal mine worker”⁷ or “other person at a coal mine”,⁸ his safety and health obligations were imposed by s 39. Here, the specific obligation the subject of the allegations is s 39(2)(b). Relevantly, s 39 provides:

² *Coal Mining Safety and Health Act 1999*, Schedule 3, Dictionary.

³ *Coal Mining Safety and Health Act 1999*, s 6.

⁴ *Coal Mining Safety and Health Act 1999*, s 7(a).

⁵ *Coal Mining Safety and Health Act 1999*, s 39.

⁶ *Coal Mining Safety and Health Act 1999*, Part 3, Division 3 and Division 3A.

⁷ *Coal Mining Safety and Health Act 1999*, s 39(2) and definition of “coal mine worker”, Schedule 3, Dictionary.

⁸ *Coal Mining Safety and Health Act 1999*, s 39(2).

“39 Obligations of persons generally

- (1) A coal mine worker or other person at a coal mine or a person who may affect the safety and health of others at a coal mine or as a result of coal mining operations has the following obligations ...
- (2) A coal mine worker or other person at a coal mine has the following additional obligations—
 - (a) ...
 - (b) to ensure, to the extent of the responsibilities and duties allocated to the worker or person, that the work and activities under the worker’s or person’s **control, supervision, or leadership** is conducted in a way that does not expose the worker or person or someone else to an unacceptable level of risk ...”

[14] Section 34 of the CMSH Act obliges a person upon whom a health and safety obligation falls, to discharge the obligation. A failure to do so is an offence. Section 34 provides:

“34 Discharge of obligations

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

Maximum penalty—

- (a) if the contravention caused multiple deaths—
 - (i) for an offence committed by a corporation—30,000 penalty units; or
 - (ii) for an offence committed by an officer of a corporation—6,000 penalty units or 3 years imprisonment; or
 - (iii) otherwise—3,000 penalty units or 3 years imprisonment; or
- (b) if the contravention caused death or grievous bodily harm—
 - (i) for an offence committed by a corporation—15,000 penalty units; or
 - (ii) for an offence committed by an officer of a corporation—3,000 penalty units or 2 years imprisonment; or
 - (iii) otherwise—1,500 penalty units or 2 years imprisonment; or
- (c) if the contravention caused bodily harm—

- (i) for an offence committed by a corporation—7,500 penalty units; or
 - (ii) for an offence committed by an officer of a corporation—1,500 penalty units or 1 year’s imprisonment; or
 - (iii) otherwise—750 penalty units or 1 year’s imprisonment; or
- (d) if the contravention involved exposure to a substance that is likely to cause death or grievous bodily harm—
- (i) for an offence committed by a corporation—7,500 penalty units; or
 - (ii) for an offence committed by an officer of a corporation—1,500 penalty units or 1 year’s imprisonment; or
 - (iii) otherwise—750 penalty units or 1 year’s imprisonment; or
- (e) otherwise—
- (i) for an offence committed by a corporation—5,000 penalty units; or
 - (ii) for an offence committed by an officer of a corporation—1,000 penalty units or 6 months imprisonment; or
 - (iii) otherwise—500 penalty units or 6 months imprisonment.”

[15] By s 255 of the CMSH Act, proceedings for offences are brought by way of summary proceedings before an industrial magistrate. By force of s 44 of the *Acts Interpretation Act 1954*, the proceedings are governed by the *Justices Act 1886*.

[16] The strike-out application was brought in reliance upon s 83A of the *Justices Act* which is in these terms:

“83A Direction hearing

- (1) This section applies to a proceeding for an offence.
- (2) A magistrate, on his or her own initiative, may direct the parties to the proceeding to attend at a direction hearing.
- (3) A party to the proceeding may apply to a court, in the approved form, for a direction hearing.
- (4) The party must serve a copy of the filed application on each other party at least 2 clear days before the day nominated for the direction hearing, unless the court directs otherwise.

- (5) At a direction hearing, a magistrate may give a direction he or she is entitled to make at law about any aspect of the conduct of the proceeding, including, for example, about any of the following—
- (aa) disclosure under the Criminal Code, chapter 62, chapter division 3;
 - (a) a party providing a copy of—
 - (i) a medical, psychiatric or other expert report; or
 - (ii) a statement, report or other stated information relevant to the proceeding;
 - (b) psychiatric or other medical examination of the defendant;
 - (c) joining complaints;
 - (ca) hearing complaints that have been ordered to be heard together under section 43A;
 - (d) receiving evidence or submissions by telephone, video link or other form of communication;
 - (e) issuing a summons or warrant;
 - (f) changing the usual practice of the court in a way that helps an alleged victim of the offence to give evidence in the proceeding;
 - (g) if the proceeding is a committal proceeding—
 - (i) the arrangements necessary for the giving of evidence by a special witness or an affected child under the *Evidence Act 1977*, part 2, division 4 or 4A; or
 - (ii) matters relating to the *Evidence Act 1977*, part 2, division 4C; or
 - (iii) cross-examining a protected witness under the *Evidence Act 1977*, part 2, division 6;
 - (h) matters relating to protected counselling communications under the *Evidence Act 1977*, part 2, division 2A;
 - (i) matters relating to the *Evidence Act 1977*, part 6A.
- (5AA) A magistrate may also, at a direction hearing, give a direction under this section requiring the prosecution to call the maker of a written statement tendered or to be tendered by the prosecution under section 110A(3)—

- (a) to attend before the court as a witness to give oral evidence; or
- (b) to be made available for cross-examination on the written statement.

(5AB) Subsection (5AA)—

- (a) applies subject to section 110B; and
- (b) does not apply to a written statement given by an affected child under the *Evidence Act 1977*, part 2, division 4A, subdivision 2.

(5AC) Also, a direction can not be given under subsection (5AA) if it would provide for a cross-examination that is not otherwise permitted.

(5A) In a summary proceeding, a magistrate may give a direction under subsection (5)(a) about prosecution disclosure, despite subsection (5)(aa) and section 41.

(6) A direction is binding unless a magistrate, for special reason, gives leave to reopen the direction.

(7) A direction must not be subject to interlocutory appeal but may be raised as a ground of appeal against conviction or sentence.

(8) To remove any doubt, it is declared that costs are not payable on a direction hearing in relation to an offence dealt with by way of committal proceeding, except to the extent they are awarded under section 83B arising out of noncompliance with a direction given under subsection (5)(aa).

(9) A direction hearing for a disclosure obligation direction under division 10B, or for a direction under subsection (5AA), may be held on the date set by the court for the commencement of the hearing of evidence in the proceeding the subject of the direction.

(10) In this section—

direction hearing means a hearing before the court for a direction about the conduct of the proceeding.”
(statutory examples omitted)

[17] As well as vesting jurisdiction upon the Industrial Magistrates Court to hear complaints against offences created by the CSMH Act, s 255 provides for an avenue of appeal to this Court. Relevantly:

“255 Proceedings for offences

- (1) A prosecution for an offence against this Act, other than an offence against part 3A, is by way of summary proceedings before an industrial magistrate.

- (2) More than 1 contravention of a safety and health obligation under section 34 may be charged as a single charge if the acts or omissions giving rise to the claimed contravention happened within the same period and in relation to the same coal mine.
- (3) A person dissatisfied with a decision of an industrial magistrate in proceedings brought under subsection (1) who wants to appeal must appeal to the Industrial Court...”

[18] Although the industrial magistrate’s judgment was not a final hearing and determination of the complaint, no party suggests it was not “a decision ... in proceedings”⁹ for “a prosecution for an offence against [the CMSH Act]”,¹⁰ so the appeal is competent.

The proceedings in the Industrial Magistrates Court

[19] The complaint is in these terms:

“THE COMPLAINT of MARK DOUGLAS STONE of 275 George Street, Brisbane in the State of Queensland, a public officer within the meaning of section 142A of the *Justices Act 1886*, a person holding a written authorisation under section 255(5)(c) of the *Coal Mining Safety and Health Act 1999* (Qld) and a person delegated the powers of the Chief Executive under s277(1) of the *Coal Mining Safety and Health Act 1999* made this twentieth day of December 2019 before the undersigned, a Justice of the Peace for the said State, who says that:

On the 31st day of December 2018 at the Saraji Mine near Dysart in the Magistrates Court District of Mackay in the State of Queensland, TIMOTHY NEIL FULLER, on whom a safety and health obligation was imposed by section 39(2)(b) of the *Coal Mining Safety and Health Act 1999* (Qld), did fail to discharge the said obligation, in contravention of section 34 of the said Act AND the said contravention of the said Act caused the death of Allan John Houston.” (emphasis added)

[20] Particulars supporting the complaint are:

“Particulars

That at the abovenamed place and date:

1. Saraji Mine was a coal mine to which Mining Leases 1775, 1782, 2360, 2410, 70126, 70127, 70294, 70298, 70325, 70328, 70369, 70370 applied (‘the Mine’);
2. The Mine was located on Saraji Road near Dysart, Queensland;

⁹ Compare, for example, the statutory provisions considered in *Tuesley v Workers’ Compensation Regulator* (2021) 307 IR 395.

¹⁰ *Coal Mining Safety and Health Act 1999*, ss 255(1) and 255(3).

3. The Mine was a coal mine as defined by section 9(1)(a) of the *Coal Mining Safety and Health Act 1999* ('the Act');
4. BM Alliance Coal Operations Pty Ltd ('BMA') was an Australian registered company with ACN 67 096 412 752;
5. BMA was the operator for the Mine. It was engaged in the business of extracting coal at the mine;
6. Mr Allan John Houston ('Houston') was employed as a dozer operator at the Mine. He was carrying out work at the Mine on 31 December 2018. He was a coal mine worker at the mine;
7. Dragline bench preparation was being conducted on ramp two, Bauhinia Pit;
8. Preparation of the bench on ramp two required explosions in two sections to break up the interburden material. The first section was fired on 5 November 2018 and the second section was fired on 6 December 2018;
9. A large body of water was present in the pit below ramp two prior to the blasts being conducted;
10. Following the blasts, the water mixed with dirt and rock creating a muddy pool in the pit below the bench area being prepared;
11. Dozers were required to assist in the bench preparation from approximately 25 December 2018. The dozer bench preparation shifts were divided into day and night shifts and involved up to three dozers at a time working on the bench, removing large boulders and reducing the level;
12. Houston was working the dozer push night shift on 31 December 2018 along with Stephen Gallow and Cameron Fowler;
13. Houston was operating dozer Caterpillar model D11T designated unit number DZ804;
14. At approximately 10.25pm on the 31st of December 2018 Houston's dozer began tramping out parallel to the bench edge towards crib;
15. Houston's dozer passed Gallow's dozer which was pushing at approximately a 70-degree angle to the low wall bench edge;
16. Houston's dozer changed direction to the left, tramping towards the low wall edge;
17. Houston's dozer drove over the low wall edge, rolling approximately 18 metres down an embankment coming to rest upside down in a pool of mud and water;
18. Houston died at the scene from aspirating mud.

19. Timothy Neil Fuller ('Fuller') was the Manager of Production Overburden. He was a person who may affect the safety and health of others at a coal mine;
20. Fuller was responsible for all truck and shovel burden excavation activities and drill and blast activities and management of open cut examiners (OCEs). Responsibility extended to coal mining activities when conducted with equipment generally allocated to the Production Overburden department. This responsibility included dragline bench preparation at ramp two, Bauhinia Pit;
21. Fuller's responsibilities and duties included:
 - a) To ensure that all work is done within an acceptable level of risk where a Safe Operating Procedure or standard system of work has not been developed, through competent people using risk management processes and systems;
 - b) To develop Safe Operating Procedures according to the Coal Mining Safety and Health Regulation 2001 (Qld) and site requirements, and to ensure that Safe Operating Procedures are accessible to workers;
 - c) To develop and implement a Safe Operating Procedure in conjunction with Coal processing for working in and around bodies of water at the mine.
22. BMA had a safety and health management system that applied to the Saraji mine;
23. The safety and health management system did not include a procedure for dozer push bench preparation;
24. The safety and health management system included a procedure for working in and around water which was not implemented during the dozer push bench preparation on ramp two;
25. The safety and health management system included a procedure for risk management which was not implemented during the dozer push bench preparation on ramp two;
26. No risk assessment was completed for the task of dozer push bench preparation;
27. The presence of water and mud was not identified as a hazard for work being conducted on ramp two;
28. No control measures were implemented to minimise the risks associated with working around water;
29. As a result, the dozer operators utilised no additional safety precautions to prevent the dozers traveling over the bench edge;

The safety and health obligation breached by Mr Fuller

30. Mr Fuller breached the obligation imposed on him by section 39(2)(b) of the Act, namely the obligation to ensure, to the extent of the responsibilities and duties allocated to the worker or person, that the work and activities under the worker's or person's control, supervision, or leadership is conducted in a way that does not expose the worker or person or someone else to an unacceptable level of risk;

The risk

31. The risk to coal mine workers was of injury or death by aspirating mud or water following a dozer fall from the bench;
32. There was a high likelihood that a coal mine worker operating a dozer that falls from the bench into water or mud would suffer a serious or fatal injury;

The manner in which the level of risk was not at an acceptable level in the place of work

33. Coal mine workers operating dozers could fall from a bench into mud or water when completing dozer push bench preparation without a safe work procedure, without a risk assessment, without knowledge they are working around water and without taking additional precautions while working in the vicinity of a body of water.
34. The risk was not at an acceptable level because it was not within acceptable limits and as low as reasonably achievable having regard to the high likelihood of injury or death resulting from the risk;

The measures Mr Fuller should have taken

35. The measures that Mr Fuller should have taken to ensure that the work activities were conducted in a way that did not expose the worker to an unacceptable level of risk include:
- a. To ensure the development of procedures for commonly undertaken work, namely, dozer push bench preparation;
 - b. To ensure training and implementation of procedures for hazards that coal mine workers might be exposed to in the course of their work, namely, working in and around water;
 - c. To ensure training and implementation of risk management procedures;
36. Mr Fuller's failure to do so meant that he failed to ensure, to the extent of his responsibilities and duties, that the work and activities under his control, supervision or leadership were conducted in way that did not expose coal mine workers to an

unacceptable level of risk, as required by section 39(2)(b), and thus Mr Fuller contravened section 34 of the Act;

37. The contravention caused the death of Mr Houston;

contrary to the Acts in such case made provided.” (emphasis added, headings are underlined on the original)

[21] The strike-out application was filed and was followed by an amended application. The amended application was in these terms:

“1. That the complaint against the Applicant / Defendant, Timothy Neil Fuller, made 20 December 2019 (Complaint) be struck out on the basis that:

a. it cannot succeed as the Complainant / Respondent cannot make out the first element of the charge, namely, that on 31 December 2018 the Applicant / Defendant was a person at a coal mine;

alternatively;

b. that the Complaint be struck out on the basis that it is void for the reason that between 29 December 2018 and 1 January 2019 the *Coal Mining Safety and Health 1999* (Qld) was not a law which applied to the Applicant / Defendant.

2. An Order and Certificate of Dismissal of Complaint (Form 34) pursuant to Section 149 of the *Justices Act 1886*.”¹¹

[22] In support of the application, affidavits were read which asserted:

1. on 5 December 2018, Mr Fuller resigned as Manager of Production Overburden;
2. the resignation was effective upon a date in January 2019;
3. Mr Fuller left the mine on 28 December 2018 with the intention to not return;
4. Mr Fuller was therefore not physically at the mine when Mr Houston was killed.

[23] That evidence was not contested.

[24] It was argued by counsel for Mr Fuller to the industrial magistrate that s 39(2)(b) of the CSMH Act, being a subsection of s 39, only casts an obligation upon a person at a coal mine. As Mr Fuller was not at the coal mine on 31 December 2018, it was submitted that no obligation fell upon him.

[25] The industrial magistrate, in dismissing the application, held:

1. the application was analogous to a “no case submission”;

¹¹ An order for costs and ancillary orders were also sought.

2. in reliance upon *R v Gesa and Nona; ex parte Attorney-General*,¹² a no case submission can only be entertained before the end of the prosecution case where the facts are either agreed or undisputed;
3. Mr Stone did not admit the factual basis of the strike-out application;
4. Mr Fuller's submission that he was seeking only an interpretation of s 39(2)(b) should be rejected as the question posed involved questions of fact that were in issue;
5. there was no power under s 83A of the *Justices Act* to strike out the complaint. In particular, her Honour held: "I find the Court has no power to make the Direction/Order sought by the Defendant primarily because s. 83A(5) of the *Justices Act* vests no power in the Court to make it..."¹³

The appeal

[26] Mr Fuller raises eight grounds of appeal. They are:

"Grounds of Appeal

Appeal from decision of Industrial Magistrate Hartigan,
5 December 2022 - Mackay

Ground One

1. The Applicant was denied procedural fairness in not being afforded the opportunity to make submissions as to the proper construction of s83A(5) of the *Justices Act 1886* in circumstances where:
 - (a) The respondent had not argued that s83A(5) did not permit the Court to make a ruling about the proper construction of s39(2)(b) of the *Coal Mining Safety and Health Act 1999*;
 - (b) The Respondent had not argued that s83A(5) did not permit the Court to finally determine the application;
 - (c) Her Honour did not raise the question of the proper construction of s83A(5) with the applicant during oral submissions; and
 - (d) Her Honour did not request further submissions about this point of law before delivering judgment.

Ground Two

2. The learned Industrial Magistrate erred in law in holding that s83A(5) of the *Justices Act 1886* does not permit the final determination by the Court of a prosecution .

Ground Three

¹² [2001] 2 Qd R 72.

¹³ *Stone v Fuller*, unreported, Industrial Magistrates Court, Industrial Magistrate Hartigan, 5 December 2022, paragraph [23].

3. The learned Industrial Magistrate erred in law in holding that s83A(5) of the *Justices Act 1886* does not permit the Court to make a ruling about the proper construction of legislation relevant to a proceedings, namely s39(2)(b) of the *Coal Mining Safety and Health Act 1999*.

Ground Four

4. The learned Industrial Magistrate erred in law in failing to consider whether, and find that, s39(2)(b) of the Coal Mining Safety and Health Act 1999 applies only to a coal mine worker who is present at a coal mine at the time of the alleged failure to discharge the obligations imposed by s39(2)(b) of the *Coal Mining Safety and Health Act 1999*.

Ground Five

5. The learned Industrial Magistrate erred in law in holding that admissions or concessions of facts by the respondent were necessary preconditions to making a pretrial ruling under s83A(5) of the *Justices Act 1886*.

Ground Six

6. The learned Industrial Magistrate erred in law in finding that the absence of cross-examination and the absence of contradictory evidence from the Respondent did not preclude the existence of a factual dispute.

Ground Seven

7. The learned Industrial Magistrate erred in law, or in the alternative in fact, in finding that there was a factual dispute, when the reasons demonstrate the following points:
 - (a) No attempt was made to evaluate the sworn and unchallenged evidence placed before the Court;
 - (b) No attempt was made to identify any admissible evidence in the respondent's material which contradicted, or could potentially contradict, the applicant's evidence;
 - (c) No attempt was made to identify the basis of the factual dispute;
 - (d) The respondent was unable to set out any coherent evidentiary basis demonstrating the existence of a factual basis;
 - (e) The evidence shows, beyond any doubt, that there is no possibility of any factual dispute as to the applicant's whereabouts on the charged date.

Ground Eight

8. The learned Industrial Magistrate erred in law, or in the alternative in fact, in failing to find that the applicant was not at the mine on 31 December 2018, in circumstances where:
- (a) The affidavits of the Applicant and Keith Haley were admitted without objection;
 - (b) The respondent did not cross-examine either deponent;
 - (c) The affidavits of the two deponents establish beyond any doubt that the Applicant was not at the mine on the charged date; and
 - (d) The respondent was unable to identify any admissible evidence that showed that the Applicant was at the mine on 31 December 2018.”

[27] Ground 1 alleges a denial of procedural fairness. The opportunity which is said to have been denied was to mount arguments as to the proper construction of s 83A of the *Justices Act* and the question of the width of the power there conferred.

[28] Mr Copley KC, counsel for Mr Stone, did not argue before the industrial magistrate that she lacked jurisdiction to make the orders Mr Fuller sought. There was no argument on the point.

[29] The point taken by Mr Copley KC before the industrial magistrate was not that the Industrial Magistrates Court lacked jurisdiction to summarily dismiss a complaint, but that the jurisdiction should not, as a matter of principle, be exercised where facts were in issue.¹⁴ No submissions were made on behalf of Mr Fuller on the jurisdictional issue. The industrial magistrate then decided that she has no jurisdiction to make the orders sought by Mr Fuller.

[30] However, the proper construction and width of s 83A is a pure matter of law upon which Mr Murdoch KC, counsel for Mr Fuller, has made submissions on appeal. It is not necessary to consider ground 1 independently.¹⁵

[31] Grounds 2, 3 and 5 raise questions as to the construction and width of s 83A. These grounds raise the following issues:

1. whether s 83A permits the Industrial Magistrates Court to summarily determine a prosecution;¹⁶
2. whether s 83A permits the Industrial Magistrates Court to determine a question of statutory construction;¹⁷
3. whether s 83A only empowers the making of such determinations where the facts are admitted or undisputed.¹⁸

¹⁴ Respondent’s written submissions, 29 July 2022; Transcript T 1-13-14.

¹⁵ See generally *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145.

¹⁶ Ground 2.

¹⁷ Ground 3.

¹⁸ Ground 5.

- [32] The Industrial Magistrates Court, like the Magistrates Court, is an inferior court. As an inferior court, it does not possess an inherent jurisdiction. It possesses implied powers which are necessary for the exercise of its jurisdiction.¹⁹ Those implied powers authorise the stay of proceedings brought in abuse of process.²⁰ It is well-established that it is an abuse of process to bring or to continue to prosecute criminal proceedings which are doomed to fail.²¹
- [33] If it is the case that an offence can only be proved as a matter of law where Mr Fuller was an employee and on site at the time of Mr Houston’s death, and the prosecution had no evidence to prove that fact, then it could be held that the continuing prosecution was an abuse of process of the Industrial Magistrates Court.
- [34] If that point was reached then, regardless of the proper construction of s 83A of the *Justices Act*, the Industrial Magistrates Court had ample power to at least permanently stay the prosecution. In the current context, the distinction between an order permanently staying the prosecution and one striking out the complaint is immaterial.²² To the extent that her Honour denied that the Industrial Magistrates Court had such a power, the industrial magistrate erred.
- [35] Grounds 6, 7 and 8 assert that the industrial magistrate was obliged to find on the undisputed evidence that Mr Fuller was not at the mine on 31 December 2018. That may or may not be so, but it means nothing unless Mr Fuller establishes ground 4, and even then he must establish that the prosecution against him must inevitably fail. In other words, he must establish that it is necessary for the Crown to prove that he was an employee at the mine and was present at the mine at the time Mr Houston died.

Ground 4

- [36] Ground 4 is couched in terms of the proper construction of s 39(2)(b) of the CSMH Act. What Mr Fuller seeks to establish is that the subsection “applies only to a coal mine worker who is present at the time of the alleged failure to discharge the obligations”.
- [37] Firstly, s 39(2)(b) does not refer to a failure to comply with a safety and health obligation. Section 39 casts obligations upon persons. Section 34 concerns the consequences of a failure to “discharge a safety and health obligation”. What must be meant is that on a proper construction of s 39(2), the obligations only fall upon persons who are physically at the coal mine.
- [38] Secondly, on the strike-out application and the present appeal, the point of construction only arises if the only date of “the alleged failure to discharge the obligations” is 31 December 2018. For reasons which follow,²³ that does not appear to be the case.

¹⁹ *Grassby v The Queen* (1989) 168 CLR 1 at 16 and generally *Higgins v Comans* (2005) 153 A Crim R 565 and *Power v Heyward* [2007] 2 Qd R 69.

²⁰ *Williamson v Trainor* [1992] 2 Qd R 572 following *Jago v District Court (NSW)* (1989) 168 CLR 23.

²¹ *Walton v Gardiner* (1993) 177 CLR 378 at 393 and for a recent example see *Director of Public Prosecutions (NSW) v Presnell* (2022) 108 NSWLR 407 at [45].

²² What is required is appropriate action to prevent injustice: *Hamilton v Oades* (1989) 166 CLR 486 at 502-504.

²³ Paragraphs [64]-[71] of these reasons.

[39] Section 39(1) of the CSMH Act casts obligations on three classes of person, namely:

1. “a coal mine worker”;
2. “[an]other person at a coal mine”;
3. “a person who may affect the safety and health of others at a coal mine”.

[40] Section 39(2) of the CSMH Act casts “additional obligations” upon two of those classes of person, namely:

1. “a coal mine worker”;
2. “[an]other person at a coal mine”.

[41] A “coal mine worker” is defined in the dictionary as:

“coal mine worker means an individual who carries out work at a coal mine and includes the following individuals who carry out work at a coal mine—

- (a) an employee of the coal mine operator;
- (b) a contractor or employee of a contractor;
- (c) a service provider or employee of a service provider.”²⁴
(emphasis added)

[42] A “coal mine worker” by definition is someone “who carries out work at a coal mine”. A “coal mine worker” therefore must be someone who is “at [the] coal mine” at least at some point. Also “another person at a coal mine” must obviously be at the coal mine at some point. This is to be distinguished from the third class of person identified in s 39(1), namely “a person who may affect the safety and health of others at a coal mine”. That person may never be on the site.

[43] Whether a “coal mine worker” or “another person at a coal mine” must physically be at the mine at the time of the breach, is a more difficult question which does not arise in the present case because, when properly understood, what is alleged here are breaches by Mr Fuller prior to 31 December 2018 when he was at the mine.

[44] The particulars cause some confusion as to the case sought to be run against Mr Fuller. The body of the complaint alleges that the obligation upon Mr Fuller is imposed by s 39(2)(b). As already observed, those obligations only fall upon two classes of person, a “coal mine worker” or “[an]other person at a coal mine”. However, paragraph 19 of the particulars alleges that Mr Fuller was “a person who may affect the safety and health of others at a coal mine”. That describes the third class of person identified by s 39(1); but the complaint specifically alleges that the relevant duty is one identified in s 39(2)(b).

[45] Assuming that presence of an offender at the coal mine at the time of the breach is necessary, the elements of an offence against s 34, where the obligation breached is one imposed by s 39(2)(b) are:

²⁴ *Coal Mining Safety and Health Act 1999*, Schedule 3, Dictionary.

1. the defendant is a coal mine worker or another person at a coal mine;
 2. the defendant is at the coal mine;
 3. the defendant carries out his activities;
 4. in carrying out his activities, he exposes someone to risk;
 5. that risk is at a level which is unacceptable.
- [46] It is not necessary, in order to prove an offence against s 34, to prove that the breach of the obligation had any impact on a person beyond exposing them to risk at an unacceptable level. It is not necessary to prove that anyone was injured let alone killed.
- [47] Section 34²⁵ of the CSMH Act creates an offence of breaching safety and health obligations. On a proper construction of s 34, the offence carries the maximum prescribed by s 34(e) unless one of the circumstances prescribed by s 34(a), (b), (c) or (d) are proved. Then the maximum penalty is more than that prescribed by s 34(e). The circumstances prescribed by each of ss 34(a), (b), (c) and (d) are circumstances of aggravation.²⁶
- [48] The particulars allege that Mr Fuller was the Manager of Production Overburden.²⁷ He was at least “[an]other person at a coal mine”.
- [49] The breaches are alleged in paragraphs 35 and 36 of the particulars. Those failures do not occur on the day Mr Houston died. They are further explained in paragraphs 21 to 29, with the risk being identified at paragraphs 31 and 32 and the circumstances rendering the risk unacceptable being alleged at paragraphs 33 and 34.
- [50] The case against Mr Fuller seems to be that while he was Manager of Production Overburden, he was required to develop and implement a Safe Operating Procedure. That should have included procedures for working in and around water. While there was a safety and health management system for working in and around water, it was not implemented.²⁸
- [51] It is alleged that those failures were failures of Mr Fuller. If they and the other elements of an offence against s 34 are proved beyond reasonable doubt, then he is guilty of the offence even though Mr Houston’s accident did not occur until after Mr Fuller left the site.
- [52] Therefore, on the particulars it is irrelevant to proof of the offence that Mr Fuller was not on site on 31 December 2018. That is not the date of the alleged breach of the health and safety obligation.

²⁵ See paragraph [14] of these reasons.

²⁶ *Criminal Code*, s 1, definition of “circumstance of aggravation”.

²⁷ Complaint, paragraph 19.

²⁸ Particulars, paragraph 24.

[53] That would leave proof of the circumstance of aggravation. That will be established upon proof that the alleged breaches of safety and health obligations caused the death.²⁹

[54] Looking at the particulars as a whole, the case alleged is as I have described it. However, while the particulars allege acts which could not all have occurred on the day Mr Houston died, the complaint alleges that the offence (which must be the breach of duty) occurred on 31 December 2018. That confusion is compounded by the opening words of the particulars: “that at the abovenamed time and place”.³⁰ Those words assert that all the particularised acts occurred on 31 December 2018. There is also the confusion caused by paragraph 19 of the particulars, where Mr Fuller is said to fall within the third category of persons upon whom s 39 casts obligations.³¹

[55] To meet these difficulties, Mr Copley KC made an application in the appeal to amend the complaint and particulars.

[56] The amendment sought was so the complaint, when amended, would read:

“Between the 21st day of December 2018 and the 1st day of January 2019 at the Saraji Mine near Dysart in the Magistrates Court District of Mackay in the State of Queensland, **TIMOTHY NEIL FULLER**, on whom a safety and health obligation was imposed by section 39(2)(b) of the *Coal Mining Safety and Health Act 1999* (Qld), did fail to discharge the said obligation, in contravention of section 34 of the said Act AND the said contravention caused the death of Allan John Houston.”

[57] Further amendments were sought to remove the words “that at the abovenamed placed and time” being the first words of the particulars and to amend paragraph 19 of the particulars so it would read:

“19. Timothy Neil Fuller (‘Fuller’) was the Manager of Production Overburden. He was either a coal mine worker or another person at a coal mine.”

[58] Arguably, no amendment to the complaint and the opening words of the particulars is necessary as time is not an element of an offence charged.³² However, that position is subject to exceptions as Derrington J observed in *R v Jacobs*:³³

“Subject to the qualification discussed below, time is not and never was an element of an offence charged except where it has some essential relation to the charge, such as where a limitation is operative or where the very existence of an offence or defence at a certain time is relevant. The particulars in the indictment as to time have the purpose only of giving to an accused person ‘every fair

²⁹ As to causation, see generally *Royall v The Queen* (1991) 172 CLR 378.

³⁰ See paragraph [20] of these reasons.

³¹ Paragraph [44] of these reasons.

³² *WGC v The Queen* (2007) 233 CLR 66 at [9], [43], [133] and [156].

³³ [1993] 2 Qd R 541.

opportunity to prepare his defence to what is charged and particularised against him’.”³⁴

- [59] The amendments reflect the case which Mr Stone wishes to now run against Mr Fuller. If no amendment is allowed, that is good ground to accept that the industrial magistrate should have at least stayed the proceedings on the complaint.
- [60] Both parties accept that this Court has jurisdiction to entertain the amendment application.³⁵
- [61] Mr Copley KC submits that the amendments bring the complaint and particulars into line with what the case has always been and that Mr Fuller would suffer no prejudice by the amendments. Mr Murdoch KC submits that the amendments render the case fundamentally different to what it was. He also submits that there is substantial prejudice.
- [62] Mr Murdoch KC submits that the expansion of the dates of the charge change the case from one where all that was in issue was Mr Fuller’s whereabouts and conduct on 31 December 2018 to one where his conduct and whereabouts over some 11 days is relevant.
- [63] That submission ought to be rejected.
- [64] The case as originally particularised concerned the avoidance of a specific risk that arose during “dozer push bench preparation”.³⁶ That risk was that bulldozers could fall from the bench into water causing the death by drowning of the driver.³⁷ It is alleged that there was not a procedure for dozer push bench preparation,³⁸ but there was a procedure for working in and around water. The breaches alleged against Mr Fuller are that he did not ensure the development, etc, of procedures for, *inter alia*, dozer push bench preparation and he did not implement existing procedures for persons operating dozers in and around water.³⁹
- [65] The work being done by the dozer operators was work “being conducted on ramp two”.
- [66] Paragraph 20 of the existing particulars identified Mr Fuller’s responsibility for “relevantly” all truck and shovel burden excavation activities” and, in particular:
- “This responsibility included dragline bench preparation at ramp two, Bauhinia Pit.”⁴⁰
- [67] Against those allegations, paragraph 8 alleges that preparation of the bench on ramp two commenced as early as 5 November 2018 and that bulldozers were required to assist in the bench preparation from 25 December 2018.⁴¹

³⁴ At 542.

³⁵ *Industrial Relations Act* 2016, ss 424(2)(a) and 558(1)(b).

³⁶ Existing particulars, paragraphs 23, 33 and 35.

³⁷ Existing particulars, paragraphs 31 and 32.

³⁸ Existing particulars, paragraph 23.

³⁹ Existing particulars, paragraph 35.

⁴⁰ Existing particulars, paragraph 20.

⁴¹ Paragraph 11.

- [68] It is alleged that a muddy pool formed after the initial blasts on 5 November and 6 December 2018.⁴²
- [69] On any fair reading of the particulars:
1. bench preparation on ramp two commenced as early as 5 November 2018;
 2. water was in a pool below the bench area from, at the latest, about 6 December 2018;
 3. bulldozers were working in that area from 25 December 2018;
 4. Mr Fuller had responsibilities to develop safe operating proceedings for dozer push bench preparation (which did not exist) and to implement the existing procedure for working in and around water;
 5. he failed to do so;
 6. Mr Houston's accident occurred on 31 December 2018;
 7. Mr Fuller's failures to fulfil his safety obligations caused the death.
- [70] It is clear I think from the existing particulars that the case against Mr Fuller is one of an ongoing failure to fulfil his safety obligations from the time, at the latest, dozers began work near the water on or about 25 December 2018. If that case is made out, then the offence has been proved and the only remaining question is whether a causal connection between those breaches and Mr Houston's death can be proved. If so, the circumstance of aggravation will have been proved and the maximum penalty is that prescribed by s 34(b) of the CSMH Act, not s 34(e).
- [71] The proposed amendments do not change the case. The amendment of the date in the complaint itself to include a range of dates merely brings the complaint into line with the particulars. The removal of the opening words of the particulars does likewise. The amendment of paragraph 19 of the particulars corrects what is an obvious error.
- [72] Mr Murdoch KC submits that unfairness and prejudice will be suffered by Mr Fuller if the amendments are allowed.
- [73] The fact that the complaint limited the date of the breach only to 31 December 2018 was pointed out to the Office of the Work Health and Safety Prosecutor (WHSP), who is conducting the prosecution, by letter on 17 August 2022.
- [74] That letter was authored by Mr Fuller's solicitors, in particular Mr Harold Downes. The letter is very detailed and was accompanied by affidavits sworn by both Mr Fuller and Mr Keith Richard Haley who, as at 31 December 2018, was employed as General Manager and Site Senior Executive of the coal mine.
- [75] The affidavits swear that Mr Fuller resigned his position on 5 December 2018 and left the mine on 28 December 2018. That evidence has not been contradicted. Mr Downes' letter contains an analysis of the evidence in the affidavits, the complaint and particulars and various provisions of the CSMH Act. It:

⁴² Paragraphs [9] and [10].

1. points out that the alleged breach is confined by the terms of the complaint to 31 December 2018;
2. observes that Mr Fuller left the mine on 28 December;
3. submits that no breach could have been committed by Mr Fuller on 31 December 2018.

[76] On 10 November 2022, some three months after Mr Downes' letter, the WHSP responded. The response consists of five lines and when formalities are disregarded, consists of:

“The submission to discontinue the prosecution against Mr Fuller was referred to the Work Health and Safety Prosecutor for consideration. The Prosecutor has determined that the prosecution of Mr Fuller will proceed.”

[77] True it is, as Mr Copley KC submitted, that the WHSP is under no obligation to give reasons for dismissing the submission. However, if the letter of 17 August 2022 was considered at all, it certainly was not considered deeply. Any proper consideration of the letter of 17 August 2022 would have revealed the disconnect between the complaint and the particulars as I have described it.

[78] Following the WHSP's rejection of the submission, Mr Fuller brought the strike-out application and then the appeal. On the appeal, the WHSP acknowledges the disconnect between the complaint and the particulars. There can be no doubt, in my view, that the complaint identifies the breach as occurring on 31 December 2018 whereas the particulars do not. The WHSP's failure to come to grips with that fact, even though it was pointed out to him in great detail by Mr Downes, has led to further delay and to Mr Fuller incurring unnecessary costs.

[79] Mr Murdoch KC further submits that Mr Fuller will be prejudiced in his defence. Mr Downes swears in his affidavit that now that the case is understood to concern actions of Mr Fuller before 31 December 2018, it is necessary in Mr Fuller's defence to:

- “(a) secure evidence, if available from BMA⁴³ or elsewhere, of the presence or otherwise of mud/water below the bench for the entire duration of the Charge Period;
- (b) investigate, if possible, the activities being undertaken on the bench subsequent to his departure from the mine on 28 December 2018 and the date of the incident on 31 December 2018;
- (c) secure the advice and opinion of experts whether the presence of mud/water in the void below the bench was, for the duration of the Charge Period, a risk that was required to be addressed under the risk management systems at that time and specifically *SRM-STD-0016 Working in and Around Water*;

⁴³ BM Alliance Coal Operations Pty Ltd.

- (d) subject to the advice or opinion of experts, consider whether the controls that were in place during the Charge Period amounted to reasonable precautions and whether he had exercised proper diligence;
- (e) recall his own whereabouts and work activities during the entirety of the Charge Period;
- (f) have the prosecution brief analysed by his legal representatives for an entirely different purpose, namely his conduct during the entirety of the Charge Period, rather than his conduct on 31 December 2018 only;
- (g) most likely seek further and better particulars; and
- (h) most likely have to ascertain whether or not the Complainant continues to rely on the current prosecution brief, or whether he will now develop a new brief to address the change to the charge. This is in a context where to my recollection the focus of the witness interviews was on the events of 31 December as opposed to the period of the new charge.”

[80] The effect of denying the amendment would be to permanently stay the prosecution as the case which Mr Stone particularises is one beyond the complaint as it presently stands.

[81] Mr Downes, in his affidavit, identifies various factors upon which it is submitted that Mr Fuller will suffer unfairness.

[82] Delay in itself is no reason for a court to terminate a prosecution. There is no right in Australia to a speedy trial.⁴⁴ The Court’s function is to control its own process so as to ensure a fair trial and otherwise avoid its process being abused.

[83] Staying a criminal proceeding is a step only taken as a last resort.⁴⁵ Denying the amendment here, and preventing the prosecution of a valid complaint which has engaged the jurisdiction of the Industrial Magistrates Court, should, in my view, also only be done as a last resort and where no fair trial could be had or where the further prosecution otherwise constitutes an abuse of process.

[84] The various issues raised by Mr Murdoch KC can be conveniently categorised as follows:

1. factors potentially impinging on the fairness of any trial of Mr Fuller; and
2. factors otherwise suggesting that the prosecution of him is oppressive.⁴⁶

[85] Those factors suggesting that Mr Fuller’s ability to obtain a fair trial have been compromised arise from the fact Mr Fuller is only now aware that his movements and actions between 21 December 2018 and 30 December 2018 are relevant.

⁴⁴ *Jago v District Court (NSW)* (1989) 168 CLR 23.

⁴⁵ *Jago v District Court (NSW)* (1989) 168 CLR 23 at 31, 47 and 49, *Victoria International Container Terminal Ltd v Lunt* (2021) 271 CLR 132 at [20] and [45] and *Police v Dunstall* (2015) 256 CLR 403 at [81].

⁴⁶ *Williams v Spautz* (1992) 174 CLR 509 at 518-9.

Previously, there was no attempt to secure or preserve evidence of Mr Fuller's activities over that period and it may be difficult to now do so. This is compounded by the fact that Mr Fuller has suffered a serious illness and his own ability to recall events is compromised.

[86] It is not possible, on the material before me, to conclude that Mr Fuller cannot have a fair trial on the amended charge. There has not yet been an investigation by Mr Downes as to what evidence is available. The highest his evidence gets is that there will now have to be investigation into what evidence is available. It may be, for instance, that documentary evidence has been preserved and that it will not be contentious between the parties as to what Mr Fuller did, where and when.

[87] If it becomes apparent, after proper investigation, that Mr Fuller has been prejudiced, then the Industrial Magistrates Court may be called upon to consider what steps can be taken to alleviate the unfairness and, if no fair trial can be achieved, that Court may stay the prosecution.⁴⁷

[88] As to broader oppression, Mr Murdoch KC points to:

1. the general effect upon Mr Fuller and his family of the continuing prosecution;
2. the prospect of further delay;
3. that further steps will now have to be taken by Mr Fuller in defence of the prosecution, presumably at additional cost.

[89] Deane J, in *Jago v District Court (NSW)*:⁴⁸

“The subjection of an accused to the burden of criminal proceedings is, however, an unavoidable concomitant of the presumption of innocence and the public administration of criminal justice by the courts. It is something which the individual must accept as necessarily flowing from membership of a society in which individual and public rights and interests are protected by laws enforced by penal sanction. In a real world where institutional resources are limited, some undesirable delay in the administration of criminal justice is inevitable. That being so, the burden of criminal proceedings even where intensified by such delay cannot, without more, properly be seen as unfairly oppressive or as an abuse of the process of the particular court. To the contrary, it is a normal incident of the due administration of criminal justice and of that process. The stage can, however, be reached where delay in the institution or prosecution of criminal proceedings is so prolonged that it becomes unreasonable. If and when that stage is reached will depend upon the particular circumstances, such as when the relevant authorities first become aware of the alleged criminal conduct and of the material said to prove the accused's guilt and whether the charge is a complex or a simple one. When that stage is reached, an accused can, if he does not share responsibility for the delay,

⁴⁷ *Williamson v Trainor* [1992] 2 Qd R 572.

⁴⁸ (1989) 168 CLR 23.

justifiably claim that the burden of pending criminal proceedings has passed beyond what can be justified in the due administration of justice.⁴⁹

- [90] The delay does not, in my view, render the prosecution unreasonable or oppressive. Mr Stone may have to produce more evidence or make further disclosure. Mr Fuller may need to make further investigations. Further steps, such as the delivery of further particulars, may also be necessary.
- [91] However, Mr Fuller has the right to apply under s 183A of the *Justices Act* for directions in order to bring the matter efficiently to trial. There is nothing to suggest that cannot be achieved.
- [92] Mr Fuller has suffered financial consequences as a result of the WHSP handling of the case. In particular, there appears to have been little, if any, consideration of the legitimate concerns raised in Mr Downes' letter of 17 August 2022.
- [93] There is limited power to award costs on an appeal to this Court.⁵⁰ However, the payment of costs could be made a condition of leave to amend.⁵¹
- [94] On behalf of Mr Stone, an undertaking was offered to pay Mr Fuller's costs of the appeal on the standard basis to be agreed, and if not agreed, to be assessed by the Court.
- [95] That will not fully compensate Mr Fuller, but in all the circumstances and with the payment of those costs, the granting of the amendment will not render the proceedings oppressive.

Conclusions and orders

- [96] Mr Fuller had substantial success on the appeal. It was obvious that he was not given an opportunity to be heard by the magistrate on the construction of s 83A of the *Justices Act*.⁵² He established that the industrial magistrate erred in finding that she had no jurisdiction to order the summary dismissal of the complaint.⁵³ He established that any breach of health and safety obligations must have occurred earlier than 31 December 2018, thus compelling Mr Copley KC to seek an amendment of the complaint.
- [97] In the end result though, there is no basis to disturb the industrial magistrate's decision to dismiss the strike-out application and the appeal must be dismissed.
- [98] The orders are:
1. **The appeal is dismissed.**

⁴⁹ At 55-56.

⁵⁰ *Industrial Relations Act* 2016, s 545.

⁵¹ See cases such as *R v Mosely* (1992) 28 NSWLR 735 and *Attorney-General for the State of Queensland v Wands* (2019) 1 QR 365.

⁵² Ground 1.

⁵³ Grounds 2 and 3.

2. Upon the undertaking given by the respondent through his counsel to pay the appellant's costs of the appeal on the standard basis to be agreed or assessed by this Court, the complaint and particulars are amended so:
 - (a) the complaint reads:

“Between the 21st day of December 2018 and the 1st day of January 2019 at the Saraji Mine near Dysart in the Magistrates Court District of Mackay in the State of Queensland, TIMOTHY NEIL FULLER, on whom a safety and health obligation was imposed by section 39(2)(b) of the *Coal Mining Safety and Health Act* 1999 (Qld), did fail to discharge the said obligation, in contravention of section 34 of the said Act AND the said contravention caused the death of Allan John Houston.”
 - (b) the words “that at the abovenamed time and place”, being the first words of the particulars, are deleted.
 - (c) paragraph 19 of the particulars reads:

“19. Timothy Neil Fuller (‘Fuller’) was the Manager of Production Overburden. He was either a coal mine worker or another person at a coal mine.”
3. In the event that the costs are not agreed by 23 June 2023:
 - (a) the appellant shall file and deliver a costs assessor's detailed assessment of the costs by 4.00 pm on 21 July 2023;
 - (b) the respondent shall file and deliver a detailed objection to the costs assessor's assessment of the costs by 4.00 pm on 18 August 2023;
 - (c) the matter of the costs shall be mentioned at 9.15 am on 1 September 2023.