INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*Nicholson v Carborough Downs Coal Management Pty Ltd & Ors* [2022] ICQ 34
PARTIES:	**SIMON NICHOLSON (WORK HEALTH AND SAFETY PROSECUTOR)** (applicant) **v** **CARBOROUGH DOWNS COAL MANAGEMENT PTY LTD** (first respondent) **ACTING MAGISTRATE ATHOL KENNEDY** (second respondent) **SIMON NICHOLSON (WORK HEALTH AND SAFETY PROSECUTOR)** (applicant) **v** **RUSSELL CLIVE UHR** (first respondent) **ACTING MAGISTRATE ATHOL KENNEDY** (second respondent) **SIMON NICHOLSON (WORK HEALTH AND SAFETY PROSECUTOR)** (applicant) **v** **JEREMY DAVID FUTERAN** (first respondent) **ACTING MAGISTRATE ATHOL KENNEDY** (second respondent)
FILE NO/S:	C/2022/17, C/2022/18, C/2022/19
PROCEEDING:	Applications
DELIVERED ON:	23 December 2022
HEARING DATE:	2 December 2022
MEMBER:	Davis J, President
ORDER/S:	**In application C/2022/17:** **1. The time for filing the application for prerogative relief is extended to 8 November 2022.** **2. The costs of the applicant and first respondent are reserved to the application for prerogative relief.** **In application C/2022/18:**

1. **The time for filing the application for prerogative relief is extended to 8 November 2022.**

2. **The costs of the applicant and first respondent are reserved to the application for prerogative relief.**

In application C/2022/19:

1. **The application for an extension of time is dismissed.**

2. **By 4.00 pm on 1 February 2023, the first respondent shall file and serve written submissions on:**

   (a) what further orders (if any) ought to be made consequent upon dismissal of the application for an extension of time;

   (b) costs against the applicant.

3. **By 4.00 pm on 22 February 2023, the applicant shall file and serve written submissions in reply.**

4. **Each party may, by 4.00 pm on 8 March 2023, file an application for leave to make oral submissions on the question of further orders and costs.**

5. **In the event that no application to make oral submissions is filed and served by 4.00 pm on 8 March 2023, the question of further orders and costs shall be determined on any written submissions filed and without further oral hearing.**

CATCHWORDS: ADMINISTRATIVE LAW - JUDICIAL REVIEW - PROCEDURE AND EVIDENCE - TIME FOR APPLICATION - EXTENSION OF TIME - GENERALLY - where complaints were sworn against each of the respondents alleging offences against the *Coal Mining Safety and Health Act* 1999 (CMSH Act) - where the summons to each complaint required the respondent's attendance at the Magistrates Court - where the Magistrates Court has no jurisdiction to hear the complaints - where the Industrial Magistrates Court has jurisdiction to hear the complaints - where the magistrate struck out the complaints - where the prosecution appealed to the Industrial Court of Queensland and by separate appeal to the District Court - where the first respondents made application to strike out the appeals - where those applications were unsuccessful - where the applicant then sought to bring applications for prerogative relief against the respondents - where those applications were out of time - where the appeals were abandoned - where the applicant applied for an extension of time to bring the applications for prerogative relief - where each respondent said that the delay was significant - where each respondent pointed to prejudice - where the respondent, Futeran submitted that the charge as particularised showed no case

against him - whether time ought to be extended

Acts Interpretation Act 1954, s 36
Administrative Decisions (Judicial Review) Act 1977 (Cth)
Carbon Credits (Carbon Farming Initiative) Rule 2015 (Cth)
Coal Mining Safety and Health Act 1999, s 6, s 33, s 34, s 42, s 255
Criminal Code, s 1, s 2
Industrial Relations Act 2016, s 424, s 505, s 545
Judicial Review Act 1991, s 41, s 43, s 46
Justices Act 1886, s 47, s 48, s 53, s 222
Magistrates Act 1991, s 6
Petroleum and Gas (Production and Safety) Act 2004
Uniform Civil Procedure Rules 1999
Work Health and Safety Act 2011, s 25

CASES:

Bunning v Cross (1978) 141 CLR 54, followed
Chibanda v Chief Executive, Queensland Health & Anor [2018] QSC 128, cited
Gore v Carborough Downs Coal Management Pty Ltd & Ors [2022] ICQ 031, related
Hoffmann v The Queensland Local Government Superannuation Board [1994] 1 Qd R 369, cited
Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344, followed
Jago v District Court of New South Wales (1989) 168 CLR 23, followed
Kirk v Industrial Court (NSW) (2010) 239 CLR 531, cited
Lambert v Dalziell & Ors [1995] QSC 48, cited
Plenty v Dillon (1991) 171 CLR 635, cited
R v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13, cited
Re Wilcox; Ex parte Venture Industries Pty Ltd (1996) 66 FCR 511, cited
Royall v The Queen (1991) 172 CLR 378, followed
Smethurst v Commissioner of Police (Cth) (2020) 272 CLR 177, followed
Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2022) 403 ALR 604, followed
Walsh v Doherty (1907) 5 CLR 196, cited
Walton v Gardiner (1993) 177 CLR 378, followed
Williams v Spautz (1992) 174 CLR 509, cited

COUNSEL:

B J Power KC for the applicant in all applications
C J Murdoch KC with J A Bremhorst for the respondents in application numbers C/2022/17 and C/2022/18
P J Roney KC for the respondent in application number C/2022/19

SOLICITORS:

Office of the Work Health and Safety Prosecutor for the applicant in all applications

McCullough Robertson for the respondents in application numbers C/2022/17 and C/2022/18
Australian Business Lawyers & Advisors for the respondent in application number C/2022/19

[1] The applicant presently holds the position of the Work Health and Safety Prosecutor (WHSP) appointed under the *Work Health and Safety Act* 2011.[1] His predecessor, Mr Aaron Guilfoyle, commenced prosecutions against the first respondents and each of the proceedings were struck out by the second respondent who is an acting magistrate. The applicant has now commenced proceedings for prerogative relief compelling the second respondent to sit as an Industrial Magistrate[2] and to hear the charges.

[2] The applications for prerogative relief were filed out of time and the applicant needs an extension of time to do so.

Background

[3] The Carborough Downs Coal Mine (the coal mine) is situated on the Peak Downs Highway near Coppabella.

[4] Two incidents occurred at the mine.

[5] The first happened on 7 September 2019 when part of the roof of a site being excavated collapsed injuring a worker, Mr Cameron Best (the Best incident).

[6] On 25 November 2019, the second incident occurred. Material fell from a coal face killing a mine electrician, Bradley James Duxbury (the Duxbury incident).

[7] The *Coal Mining Safety and Health Act* 1999 (CMSH Act) has as its objects the protection of the safety and health of persons at coal mines and the reduction of the risk of injury or illness to any person resulting from coal mining operations.[3] The legislation seeks to fulfil those objectives by various way, including by the imposition of safety obligations upon persons working in or associated with coal mines.[4]

[8] Part of the regulatory scheme of the CMSH Act is the existence of criminal sanctions for the breach of safety obligations.[5]

[9] Eight complaints were sworn by Mr Guilfoyle alleging offences against the CMSH Act by various parties.

Defendant	Position Held	Incident
Gary Roy Jones	Coal mine worker	Best incident

1 Schedule 2, s 25 and following.
2 The second respondent in each application.
3 *Coal Mining Safety and Health Act* 1999, s 6.
4 *Coal Mining Safety and Health Act* 1999, s 33. Division 3 of Part 3 of the CMSH Act defines the safety obligations which are imposed.
5 *Coal Mining Safety and Health Act* 1999, s 34.

Defendant	Position Held	Incident
Bernard Vandeventer	Coal mine worker	Best incident
Jeremy David Futeran	Site Senior Executive	Best incident
Carborough Downs Coal Management Pty Ltd	Coal mine operator	Best incident
Jeremy David Futeran	Site Senior Supervisor	Duxbury incident
Carborough Downs Coal Management Pty Ltd	Coal mine operator	Duxbury incident
Kevin James Casey	Coal mine worker	Best incident
Russell Clive Uhr	Site Senior Executive	Duxbury incident

[10] The complaints concerning the Duxbury incident were sworn in November 2020. Those concerning the Best incident were sworn in January 2021.

[11] Significantly, all three of the present respondents face charges arising from the Duxbury incident.

[12] Two of the present respondents, Carborough Downs Coal Management Pty Ltd (Carborough)[6] and Mr Futeran, also face a complaint concerning the Best incident. Mr Uhr was not charged in relation to that incident. He only faces a charge in relation to the Duxbury incident.

[13] Prosecutions under the CMSH Act are conducted under the *Justices Act* 1886 in the Industrial Magistrates Court.[7] Prosecutions under some other legislation within the WHSP's responsibilities are conducted in the Magistrates Courts.[8]

[14] As is the usual practice, complaints and draft summonses were prepared and presented to a justice of the peace. In each case, the justice of the peace issued the summons[9] in accordance with the draft presented.

[15] In relation to each of the complaints relating to the Duxbury incident, the summons commanded the named defendant to appear in the Magistrates Court, not the Industrial Magistrates Court.

[16] Given that Parliament has established the office of a specialist prosecutor for workplace health and safety prosecutions, it is disappointing that Mr Guilfoyle could not manage to have three of the complaints returned before the correct court.

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6 There is evidence (affidavit of Anne Bernadine McIntyre) that Carborough Downs Coal Management Pty Ltd has changed its name to Fitzroy Coal Management Pty Ltd, but no party has asked for any formal correction, so I will continue to refer to "Carborough".

7 *Coal Mining Safety and Health Act* 1999, s 255.

8 *Petroleum and Gas (Production and Safety) Act* 2004, for example.

9 *Justices Act* 1886, s 53.

[17] Applications were made to strike out all eight complaints. As to the complaints arising from the Best incident, there were two points taken:

1. the complaint did not state on its face the Magistrates Court district in which the offence occurred; and

2. the complaint did not make express reference to s 255[10] of the CMSH Act or the Industrial Magistrates Court.[11]

[18] In relation to the three complaints the subject of the present applications, there was an additional ground raised for striking out, namely that the summons in each case compelled an appearance before the Magistrates Court. It is common ground that the Magistrates Court has no jurisdiction to hear the complaints.

[19] It has always been common ground that the complaints and summonses the subject of the present applications had been signed off by Mr Guilfoyle requiring each defendant to face a charge in a court which had no jurisdiction to hear it.

[20] The strike-out applications were heard on 9 December 2021 in the Magistrates Court by the second respondent. On 21 February 2022, the second respondent handed down reasons effectively upholding all three grounds for striking out the complaints concerning the Duxbury incident. No orders were made on that day. On 2 August 2022, orders striking out all eight complaints were made.

[21] The office of the WHSP appealed to this Court. That was done because appeals from an Industrial Magistrate come to this Court.[12] The argument was that the complaint in each case enlivened the jurisdiction of the Industrial Magistrates Court, so the second respondent was, in law, exercising that jurisdiction. In relation to the three complaints concerning the Duxbury incident, appeals were lodged against the current respondents, Carborough, Mr Futeran and Mr Uhr on 22 August 2022.

[22] Appeals were also lodged to the District Court, apparently on the basis that appeals lie from a Magistrates Court to the District Court.[13] Although no final view need be expressed, any appeal to the District Court faced major problems. If the complaint did attempt to enliven the jurisdiction of the Magistrates Court, then the second respondent was correct to strike it out as that court had no jurisdiction to hear it. In those circumstances, any appeal to the District Court must surely fail.

[23] On 4 October 2022, Carborough and Mr Uhr filed applications in this Court seeking to have the appeals to this Court struck out. On 7 October 2022, Mr Futeran filed a similar application.

[24] It was submitted on the strike-out applications that this Court had no jurisdiction to hear the appeals because appeals lie from the Industrial Magistrates Court to this Court, but not from the Magistrates Court. It was the second respondent purportedly sitting as the Magistrates Court who made orders striking out the three complaints.

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10 Which provides that prosecutions under the CMSH Act are taken in the Industrial Magistrates Court.

11 The complaints relating to the Best incident were each accompanied by a summons.

12 *Industrial Relations Act* 2016, s 556.

13 *Justices Act* 1886, s 222.

[25] I dismissed the strike-out applications and, in so doing, observed:

> "[26] The summons is not part of the complaint. The summons serves the purpose of securing the defendant's attendance. Arguably, having been in possession of a complaint enlivening the magistrate's powers as an Industrial Magistrate, that was the power he was, as a matter of law, exercising. Arguably, the title on the written order is a matter of form only.
>
> [27] However, the appellant may be seeking the wrong relief in the wrong proceeding. The magistrate is obliged to hear the complaints and proceed according to law. If the complaints enliven the jurisdiction of the Industrial Magistrates Court, but the magistrate instead purports to sit in the Magistrates Court and dismisses the complaints, prerogative relief in the nature of certiorari compelling the exercise of the Industrial Magistrates Court's jurisdiction may be the appropriate relief."[14]

[26] On 8 November 2022, the office of the WHSP filed applications for prerogative orders of the nature of *certiorari*. Those applications were filed in the three appeals to this Court. As a matter of form, they ought to have been new originating applications filed in the original jurisdiction of the Court.

[27] By this stage, the WHSP in each case had three separate concurrent proceedings on foot to attempt to address the consequences which have flowed (rightly or wrongly) from Mr Guilfoyle's original errors:

1. an appeal to this Court;
2. an appeal to the District Court;
3. applications in this Court for prerogative relief.

[28] The applicant accepted a need to obtain an extension of time to bring the applications for prerogative relief.

[29] The second respondent quite properly made a submitting appearance consistently with the principles explained in *R v Australian Broadcasting Tribunal; Ex parte Hardiman*.[15] The second respondent will take no further part in the proceedings. No costs are sought by or against the second respondent.

[30] All parties seem to have accepted that the extension could be given *nunc pro tunc*.

[31] On 25 November 2022, I made the following orders:

> "1. The applications filed in each appeal on 8 November 2022 be regarded for all purposes as applications commencing a claim for prerogative relief and stand alone independently of the appeals.

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14 *Gore v Carborough Downs Coal Management Pty Ltd & Ors* [2022] ICQ 031 at [26]-[27]; Mr Nicholson is now the Work Health and Safety Prosecutor.

15 (1980) 144 CLR 13.

2. By consent, appeals C/2022/17, C/2022/18 and C/2022/19 are dismissed.

3. The appellant in each appeal pay the respondents' costs of and incidental to each appeal to be assessed or agreed on an indemnity basis.

4. By 4:00pm on 30 November 2022, the respondent in each appeal file and serve written submissions on the applications for extension of time together with any material in support.

5. Costs of the mention on 25 November 2022 be costs reserved in the applications for prerogative relief."

[32] I was assured on 25 November 2022 that, by agreement between the parties, the appeals to the District Court were to be abandoned and costs orders made in favour of the respondents on an indemnity basis.

[33] There is disagreement between the parties as to when time began to run against the WHSP for the making of applications for prerogative orders. On any argument, however, the applications are out of time. The applications to extend time were heard on 2 December 2022.

The statutory provisions

[34] Prerogative powers are inherent in the superior court of a jurisdiction[16] such that their removal would not be constitutionally permissible.[17] The powers are now governed by the *Judicial Review Act* 1991 (JR Act).[18]

[35] The prerogative writs of *mandamus*, *prohibition* and *certiorari* may no longer be issued,[19] but the Supreme Court may grant relief of similar nature upon application.[20]

[36] Section 424(1)(e) of the *Industrial Relations Act* 2016 (IR Act) vests prerogative powers upon this Court. It provides:

"**424 Jurisdiction and powers**

(1) The court may—

(a) …

(e) if the court is constituted by the president, exercise the jurisdiction and powers of the Supreme Court to ensure, by prerogative order or other appropriate process—

(i) the commission and magistrates exercise their jurisdictions according to law; and

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16 In Queensland, the Supreme Court of Queensland.
17 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.
18 Part 5 and the *Uniform Civil Procedure Rules* 1999 prescribe the procedure.
19 *Judicial Review Act* 1991, s 41(1).
20 *Judicial Review Act* 1991, s 43 and see *Uniform Civil Procedure Rules* 1999.

(ii) the commission and magistrates do not exceed their jurisdictions. …"

[37] As to the timing of the making of an application, s 46 of the JR Act provides:

"**46 Time of making application**

(1) Subject to any other enactment, an application for review must be made—

(a) as soon as possible and, in any event, within 3 months after the day on which the grounds for the application arose; or

(b) if the court extends the period of 3 months— before the end of the extended period.

(2) If the relief sought in an application for review is a certiorari order in relation to any judgment, order, conviction or other proceeding, the day on which the grounds for the application arose is, for the purposes of subsection (1), taken to be the day of the making of the judgment, order, conviction or other proceeding."

Principles relevant to extensions of time

[38] In *Hunter Valley Developments Pty Ltd v Cohen*,[21] Wilcox J reviewed the authorities then available relevant to the exercise of an extension of time to bring an application for review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). There, his Honour explained:

"l. Although the section does not, in terms, place any onus of proof upon an applicant for extension an application has to be made. Special circumstances need not be shown but the court will not grant the application unless positively satisfied that it is proper so to do. The 'prescribed period' of twenty-eight days is not to be ignored (*Ralkon Agricultural Co. Pty Ltd v Aboriginal Development Commission* (1982) 43 ALR 535 at 550). Indeed, it is the prima facie rule that proceedings commenced outside that period will not be entertained (*Lucic v Nolan* (1982) 45 ALR 411 at 416). It is a pre-condition to the exercise of discretion in his favour that the applicant for extension show an 'acceptable explanation of the delay' and that it is 'fair and equitable in the circumstances' to extend time (*Duff* at 485; *Chapman v Reilly* unreported (Federal Court of Australia, Neaves J, 9 December 1983) at 7).

2. Action taken by the applicant, other than by making an application for review under the Act, is relevant to the consideration of the question whether an acceptable explanation for the delay has been furnished. A distinction is to be made between the case of a person who, by non-curial

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21 (1984) 3 FCR 344.

means, has continued to make the decision-maker aware that he contests the finality of the decision (who has not 'rested on his rights': per Fisher J in *Doyle v Chief of Staff* (1982) 42 ALR 283 at 287) and a case where the decision-maker was allowed to believe that the matter was finally concluded. Compare *Doyle*, *Chapman*, *Ralkon* and *Douglas v Allen* (1984) 1 FCR 287 with *Lucic* at 414-415 and *Hickey v Australian Telecommunications Commission* (1983) 48 ALR 517 at 519. The reasons for this distinction are not only the 'need for finality in disputes' (see *Lucic* at 410) but also the 'fading from memory' problem referred to in *Wedesweiller v Cole* (1983) 47 ALR 528.

3. Any prejudice to the respondent including any prejudice in defending the proceedings occasioned by the delay is a material factor militating against the grant of an extension: see *Doyle* at 287, *Duff* at 484-485, *Hickey* at 525-527 and *Wedesweiller* at 533-534.

4. However, the mere absence of prejudice is not enough to justify the grant of an extension: *Douglas*, *Lucic* at 416, *Hickey* at 523. In this context, public considerations often intrude (*Lucic*, *Hickey*). A delay which may result, if the application is successful, in the unsettling of other people (*Ralkon* at 550, *Becerra* at 12-13) or of established practices (*Douglas*) is likely to prove fatal to the application.

5. The merits of the substantial application are properly to be taken into account in considering whether an extension of time should be granted: *Lucic* at 417, *Chapman* at 6.

6. Considerations of fairness as between the applicants and other persons otherwise in a like position are relevant to the manner of exercise of the court's discretion: *Wedesweiller* at 534-535.

In considering the authorities it is, I believe, important to bear in mind the point made by Sheppard J in *Wedesweiller* at 531, relating to the diversity of decisions to which review may be sought under the Act:

> '... there will be some cases which may be decided upon considerations which affect only the immediate parties. It will be appropriate to consider whether the delay which has taken place has been satisfactorily explained, the prejudice which may be caused to an applicant by the refusal of an application, the prejudice which may be suffered by the government or a particular department if the application is granted and, generally, what the justice of the case requires. In other cases wider considerations will be involved.'

He went on to mention the reference to public interest made by Fitzgerald J in *Lucic* at 416.

> It is in relation to the former category of cases, that is, those 'which affect only the immediate parties' that the approach adopted by Bray CJ in *Lovatt v Le Gall* (1975) 10 SASR 479 at 485 in respect of private litigation but adopted in this context in both *Doyle* at 287 and *Duff* at 485, is apposite namely:
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> > 'If the defendant has suffered no prejudice, as when he was well within the limitation period of the plaintiff's claim, or where the excess period of time is small, or where he cannot show that he has lost anything by reason of the delay, it may well be that the court will not find it difficult to come to the conclusion that it is fair and equitable in the circumstances to grant extension.'
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> By contrast, in cases involving public administration, especially day to day matters such as personnel management, the public interest may well dictate refusal of an extension even after only a short delay."[22]

[39] Similar statements have been made in Queensland.[23]

[40] Recently, in *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[24] the High Court approved the judgment of Wilcox J in *Hunter Valley Developments*.[25]

[41] *Hunter Valley Developments* concerns an application for an extension of time to bring an application for judicial review.[26] In my view, the same principles would apply to applications for extension of time to bring an application for prerogative orders.

[42] Because these proceedings concern a criminal prosecution, there are additional considerations.

[43] In the cases concerning the exclusion of improperly obtained evidence[27] and in the cases concerning the granting of a stay of criminal proceedings,[28] the High Court acknowledged that there are public interest considerations which are sometimes inconsistent with the interests of an accused.

[44] There is a public interest in the prosecution of offenders.[29] This has some significance here. The CMSH Act, as already observed, has as its objects the protection of the safety and health of persons at coal mines and the reduction of the

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22 At 348-350.

23 *Chibanda v Chief Executive, Queensland Health & Anor* [2018] QSC 128, *Lambert v Dalziell & Ors* [1995] QSC 48, *Hoffmann v The Queensland Local Government Superannuation Board* [1994] 1 Qd R 369 at 370.

24 (2022) 403 ALR 604.

25 At [13] and [52].

26 The Commonwealth equivalent of Part 3 of the *Judicial Review Act* 1991.

27 *Bunning v Cross* (1978) 141 CLR 54 at 65 and *Smethurst v Commissioner of Police (Cth)* (2020) 272 CLR 177 at [65].

28 *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 30, 60, 61 and 72 and *Walton v Gardiner* (1993) 177 CLR 378 at 395-396.

29 *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 30, 60-61 and 72.

risk of injury or illness to any person resulting from coal mining operations.[30] Those objectives are, at least in part, promoted by the prosecution of those who breach safety obligations cast upon them.

[45] There is also public interest in the fair and just conduct of prosecutions. It is not necessary to descend to an examination of the types or extent of prejudice which may result, for instance, in a prosecution being stayed.[31] The discretion to extend time otherwise limited for the bringing of applications for prerogative relief encompasses, as relevant considerations, all prejudice and general unfairness to a respondent.

There are three separate applications

[46] There are, relevantly to the present applications, three separate prosecutions, three separate applications for prerogative relief and three applications for extensions of time.

[47] Each application for an extension of time must be decided on its merits. There are some features common to all, but some unique to each.

The merits of the applications for prerogative relief

[48] There has been debate as to the extent to which merits of the principal application ought to be explored on applications for extension of time to bring judicial review.[32]

[49] However, it is at least appropriate to look to see whether the claim for relief is arguable.[33]

[50] Each complaint follows the form of the section against which the offence is alleged. That is all that is required for a valid charge laid pursuant to the *Justices Act* 1886.[34]

[51] The complaint in each of the three cases charges an offence which the Industrial Magistrates Court, and only the Industrial Magistrates Court, has jurisdiction to hear. The summons which compels the parties to appear at the Magistrates Court is not part of the complaint and could not render the complaint a nullity.[35] The second respondent is an Industrial Magistrate by force of s 505 of the IR Act[36] and could have sat as the Industrial Magistrates Court.

[52] Arguably, the second respondent was obliged to sit as an industrial magistrate and deal with the matter according to law. That may have involved amending the

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

31 *Williams v Spautz* (1992) 174 CLR 509.

32 See generally, *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 403 ALR 604.

33 *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 403 ALR 604 at [18].

34 *Justices Act* 1886, s 47.

35 See generally, *Walsh v Doherty* (1907) 5 CLR 196 at 199, *Plenty v Dillon* (1991) 171 CLR 635 at 641.

36 *Acts Interpretation Act* 1954, s 36, Schedule 1, definition of "magistrate", *Magistrates Act* 1991, s 6(8).

summons[37] or otherwise securing the appearance of the respective defendants before the Industrial Magistrates Court.

[53] The application for prerogative relief is, in my view, clearly arguable.

How late is the application?

[54] The applications each seek orders in the nature of *certiorari* quashing the orders purportedly made in the Magistrates Court and referring the complaint to the Industrial Magistrates Court to be dealt with according to law.

[55] While *certiorari* cannot be used until there is an order to quash, *prohibition* may be available when the decision-maker is on the way to making a decision which, if made, is liable to be quashed by a remedy of the nature of *certiorari*.[38]

[56] By s 46(2) of the JR Act, time to seek remedy of a nature of *certiorari* began to run from the date the second respondent made the strike-out orders. Three months from those orders calculates to 2 November 2022, six days before the applications for prerogative relief were filed.

[57] The respondents submit that it was apparent from 19 August 2021 or, at the latest, 21 February 2022, that grounds for prerogative relief had emerged so time had begun to run. At least by the time the second respondent delivered reasons,[39] *prohibition* could have been sought. At that point, it had become clear that the second respondent intended to disavow the jurisdiction of the Industrial Magistrates Court by striking out the complaints.

[58] On 19 August 2021, the strike-out applications came before Magistrate Morton for mention. The learned magistrate purported to sit in the Magistrates Court. A Ms Broadbent appeared for the WHSP and Mr Bremhorst appeared for Carborough.[40]

[59] Ms Broadbent submitted to Magistrate Morton that the complaints were ones for offences against the CMSH Act and that the Industrial Magistrates Court, and not the Magistrates Court, had jurisdiction. Mr Bremhorst submitted that the summonses were returnable in the Magistrates Court and the strike-out application had been brought in the Magistrates Court so it was the Magistrates Court's jurisdiction, not the Industrial Magistrates Court's jurisdiction which had been enlivened.

[60] The learned magistrate made directions for the hearing of the strike-out applications and then there was this exchange:

> "MS BROADBENT: Your Honour, just for clarity, have you determined the jurisdiction? Will it be to the industrial or to the Magistrates - the Industrial Magistrates or the Magistrates Court?

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37 *Justices Act* 1886, s 48(1)(b).

38 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Lability*, sixth edition, Thomson Reuters 2017, and, see generally, *Re Wilcox; Ex parte Venture Industries Pty Ltd* (1996) 66 FCR 511, 533 at B-F.

39 21 February 2022.

40 There were other appearances.

> HIS HONOUR: Well, at this stage, as Mr Bremhorst has quite rightly pointed out, the summons is the Magistrates Court jurisdiction. If this matter is to be considered further, it will need to be done at the appropriate time."

[61] The only way to sensibly construe that exchange is that Magistrate Morton reserved the jurisdictional question. It could not sensibly be argued that the magistrate had refused to proceed as the Industrial Magistrates Court.

[62] On 9 December 2021, full argument was heard by the second respondent. As earlier observed, there were two arguments to the effect that the complaints were not in terms which engaged either the jurisdiction of the Magistrates Court or the jurisdiction of the Industrial Magistrates Court.

[63] Apart from those arguments (not relevant here), it was submitted on behalf of the current first respondents that:

1. the complaints charged offences under the CMSH Act;
2. those complaints could only be heard in the Industrial Magistrates Court;
3. the jurisdiction of the Industrial Magistrates Court had not been enlivened because the summons in each case compelled an appearance by the current first respondents in the Magistrates Court;
4. the Magistrates Court had no jurisdiction to entertain the complaints;
5. they ought to be struck out.

[64] On behalf of the WHSP, it was argued:

1. each complaint charged an offence under the CMSH Act;
2. those complaints could only be heard in the Industrial Magistrates Court;
3. the court should sit as the Industrial Magistrates Court and hear the complaints;
4. if necessary, the summonses could be amended pursuant to s 48 of the *Justices Act*.

[65] As previously observed, the second respondent gave reasons for judgment on the strike-out applications on 21 February 2022. For various reasons, including the fact that the complaints against the three present respondents were accompanied by summonses compelling the defendants' appearance at the Magistrates Court, not the Industrial Magistrates Court, the second respondent said that he intended to strike out the complaints. In summary, the second respondent said:

> "… in my view, [the complaints] fail to invoke the jurisdiction of the Industrial Magistrates Court at Mackay or elsewhere, and hence they are all to be struck out, for want of jurisdiction. So in other words, getting - without making the order, I have found eight complaints to be struck for two reasons, and three complaints to be struck out for three reasons. And that is the end of the matter."

[66] Although the formal orders were not made until 2 August 2022, it was obvious from 21 February 2022 that the second respondent did not intend to exercise the jurisdiction of the Industrial Magistrates Court which may have been enlivened by the complaints. Remedies in the nature of *prohibition* could then have been sought to prevent the strike-out orders being later made.

[67] At that point the right to seek *certiorari* had not arisen given that there was no order to quash.

[68] The appropriate approach is to consider the applications for extension of time to seek *certiorari* type remedies by finding that an extension of six days is required, but also taking into account the fact that the applicant could have brought an application for other prerogative type remedies almost nine months before he did.

Explanation for the delay

[69] Kathryn Milbourne is a barrister working for the office of the WHSP. She made three identical affidavits,[41] one of which was filed in each application.

[70] Ms Milbourne swore:

1. a decision was made on 22 August 2022 to appeal the decision of the second respondent made 2 August 2022;
2. appeals were filed;
3. before 4 November 2022, the office of the WHSP had no advice that applications for prerogative relief were appropriate;
4. no consideration had been given to that issue;
5. counsel's advice that prerogative relief should be sought was received on 4 November 2022;
6. the applications were filed on 8 November 2022.

[71] On behalf of Carborough and Mr Uhr, it was submitted that:

1. Mr Guilfoyle and his successors are lawyers; and
2. had available to them other experienced lawyers; and
3. they should have identified prerogative relief as the appropriate relief to seek.

[72] On behalf of Mr Futeran, it was submitted:

1. an application for prerogative relief was available from 19 August 2021;[42]
2. experienced lawyers were involved in the case for the WHSP;
3. it should "be presumed that the Applicant was fully cognisant throughout the progress of the matter of the availability of prerogative relief where there was jurisdictional error";
4. it should not be accepted that "no-one thought of it".

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41 Apart from formal particulars.

42 When the strike-out applications were mentioned.

[73] No counsel for any respondent sought to cross-examine Ms Milbourne. I accept her evidence at face value.

[74] What is clear is that within a short period of time after the second respondent struck out the complaints, the applicant appealed. Those appeals challenged the decisions to strike out the complaints. It is not logical to assume that the applicant's predecessors would have made a conscious decision not to seek prerogative relief if they knew that was the appropriate relief. I therefore reject the submission that any conscious decision was made as was submitted on behalf of Mr Futeran.

[75] The circumstances of these cases are unusual. The applicant was faced with orders made by the second respondent where the avenue of appeal depended on whether the second respondent was sitting as the Magistrates Court or the Industrial Magistrates Court. The applicant tried its best to challenge the decisions but did not adopt the most appropriate procedure. Once the suggestion was made that appeals might not be appropriate and that perhaps prerogative relief was, the appeals were abandoned and appropriate applications for prerogative relief were made.

[76] The prosecution of the three respondents has been calamitous. Various errors have been made from the point in time of preparation of the draft summonses. The mistakes have all been honest ones and the delays have been caused by those errors of judgment.

Prejudice to Mr Futeran

[77] Mr Futeran is a mechanical engineer who also holds a degree in business administration. He has been employed in the engineering profession for 15 years and has held senior positions.

[78] Mr Futeran left his employment at the mine on 24 September 2019 after the Best incident, but two months before the Duxbury incident.

[79] In his affidavit, Mr Futeran swore:

1. He had been working as an independent consultant since leaving the mine.
2. Several employment opportunities for senior positions meeting Mr Futeran's qualifications had become available, but he has been unable to secure an interview for any of these positions.
3. He is now reduced to having to perform consultancy work outside Australia. That has put great pressure on him and his family;
4. He opines that he is being shunned because he has been charged with an offence arising from the death of Mr Duxbury.

[80] Mr Futeran was not cross-examined on his affidavit, and I accept his evidence.

Prejudice to Carborough

[81] Underground coal mining releases greenhouse gases. As a result of that fact, Carborough must participate in a Commonwealth scheme. Carborough is registered with the Clean Energy Regulator and must report its emissions. It wishes to participate in the Emissions Reductions Fund and in order to do so must remain a

"fit and proper person" pursuant to the *Carbon Credits (Carbon Farming Initiative) Rule* 2015 (Cth).

[82] The Regulator has made inquiries of Carborough as to the status of the prosecution arising from the Duxbury incident. There is no evidence that similar inquiries have been made in relation to the prosecution of the Best incident.

[83] In the event that Carborough is determined not to be a fit and proper person, it will be unable to participate in the Emissions Reduction Fund. This will affect the viability of various projects and, if emissions are exceeded, create both civil and criminal liability.

[84] Carborough has financing arrangements which requires it to make disclosure to its financiers about matters which could have a material impact on its operations. The prosecution and its potential impact on Carborough's ability to participate in the Emissions Reduction Fund is such a matter. It is not said that at this stage the finance is in peril, but simply "the continuing proceeding is causing prejudice due to heightened financial and commercial risk perceived by financiers" and that the proceedings "creates uncertainty regarding [Carborough's] exposure to financial and commercial risk".

[85] Further, one of the corporate shareholders is attempting to sell its shares in Carborough. It is not said that the ongoing prosecution (and presumably its impact on the ability of the company to participate in the Emissions Reduction Fund) has placed any particular sale in jeopardy. What is said is: "… the ongoing nature of this matter is a relevant consideration for potential purchasers of shares in [Carborough] and creates uncertainty for its shareholders in terms of their ability to sell their shares, and as to the capital value of those shares".

[86] This evidence came via an affidavit sworn by Anne McIntyre. No-one sought to cross-examine Ms McIntyre.

Prejudice to Mr Uhr

[87] Mr Uhr has been continuously employed in the mining industry since 1988. He was a Site Senior Executive at the Carborough mine at the time of the Duxbury incident. He remains employed by Carborough.

[88] For Carborough, he held management roles. He was the Underground Mine Manager - Carborough Downs in 2017 and 2018 and then from 2018, until the Duxbury incident, he was General Manager - Ironbark No 1. Mr Uhr has remained in the employment of Carborough after the Duxbury incident, but a decision was made to move him to what is described as "a project role". That decision was made in February 2021, a few months after the prosecution of him commenced.

[89] Mr Uhr has sought to again take up the role as General Manager of both the Carborough mine and Ironbark No 1 mine. Carborough will not consider him for those positions while the prosecution is on foot. This has a significant financial impact upon Mr Uhr as the role in which he is presently employed does not give access to performance scheme bonuses. These are substantial. The other roles give him access.

[90] Mr Uhr is an active member of the Mine Managers Association of Australia (MMAA). The MMAA is a professional body for Australian coal mining managers. At quarterly meetings, safety issues are discussed, as are particular incidents and prosecutions. It is known within the industry that Mr Uhr is being prosecuted in relation to the Duxbury incident which is one being discussed through the MMAA. This, Mr Uhr believes, lowers his professional standing in the eyes of his peers.

[91] No party sought to cross-examine Mr Uhr.

Is there a case particularised against Mr Futeran?

[92] Mr Futeran submits that on the face of the complaint and the particulars, there is no case against him. The charge and complaint are:

> "THE COMPLAINT of AARON JOHN GUILFOYLE, Work Health and Safety Prosecutor, Level 1, 347 Ann Street, Brisbane in the State of Queensland, made this twenty-fourth day of November 2020, before the undersigned, a Justice of the Peace for the said State, who says that between about the twelfth day of August 2019 and about the twenty-fourth day of September 2019, near Coppabella in the said State, JEREMY DAVID FUTERAN was a site senior executive for a coal mine, namely the Carborough Downs Coal Mine and, pursuant to section 42(a) of the *Coal Mining Safety and Health Act 1999*, had an obligation to ensure the risk to persons from coal mining operations was at an acceptable level, and failed to discharge that obligation, contrary to section 34 of the said Act;
>
> AND the said contravention caused the death of a coal mine worker.
>
> Particulars
>
> 1. Carborough Downs Coal Mine ('the mine'), was a coal mine, as defined by section 9(1)(a) of the *Coal Mining Safety and Health Act 1999* ('the Act'), operating under Mining Leases ML 70339, ML 70340, ML 70374 and ML 70375.
> 2. The mine was located on Peak Downs Highway near Coppabella, Queensland.
> 3. Carborough Downs Coal Management Pty Ltd was the coal mine operator, engaged in the business of extracting coal.
> 4. Carborough Downs Coal Management Pty Ltd was an Australian registered company, ACN 108 803 461.
> 5. The mine utilised underground longwall mining techniques.
> 6. Longwall 9C ('LW9C') was commissioned at the mine on 13 August 2019.
> 7. The mine operated plant for longwall mining at LW9C which included:
>
> a. Shearer, model Eickhoff SL1000;

b. Roof support system;

c. Bretby, which was attached to the Shearer;

d. Coal clearance system, including the Armoured Flexible Conveyor (also known as the Armoured Face Conveyor) ('AFC').

8. Coal mine workers ('workers') at the mine included:

a. Mr Bradley James Duxbury ('Mr Duxbury'), who was employed as a longwall electrician;

b. Mr Kurt Raymond ('Mr Raymond') who was employed as a Shearer driver/operator;

c. Mr Robert Shailer ('Mr Shailer') who was employed as a longwall fitter.

9. The hazard to workers at LW9C was unstable and unsupported coal in LW9C, with the coal face in that longwall at risk of spall.

10. The risk of spall posed a risk to the safety of workers in LW9C.

11. The mine had a safety and health management system ('SHMS').

12. The SHMS prescribed the deployment, by automatic and/or manual means, of flippers to the coal strata of LW9C to control the hazard.

13. The SHMS included a Trigger Action Response Plan ('TARP'). The TARP provided that Level 3 Response (Red) was reached when two or more adjacent flippers were non-operational or ten or more non-adjacent flippers were non-operational across the longwall. When Level 3 Response (Red) was reached, the TARP required the implementation of a remedial plan, to be prepared by the Longwall Superintendent.

14. The SHMS prescribed certain areas as personnel safety zones in LW9C, including:

a. Restricted Access Zone, where entry by workers was prohibited unless approved with conditions; and

b. No Access Zone (also described in the SHMS as 'No-Go Zone'), where entry by workers was prohibited unless approved with isolations and personal locks and tags fitted.

15. In the course of their duties, workers were required to access the front walkway side of the AFC in LW9C, which is a Restricted Access Zone, and the longwall face side of the AFC in LW9C, which is a No Access Zone. One purpose for which such access was required was to carry out maintenance on the

Bretby. There was an increased risk to the safety of workers from coal spall in those areas.

16. The SHMS prohibited access to the Restricted Access Zone of the front walkway in LW9C unless:

    a. Permission to enter had been given by the ERZ Controller and/or Shield Operator after they had determined that it was safe to enter the area;

    b. A Take 5 had been completed, any required controls were in place, and workers had ensured that the face was not spalling and the flippers were deployed;

    c. The Shearer was at least five shields away from the location and, if the shearer was closer than five shields, it was stopped, with the cutting drums stopped, prior to entering the area;

    d. Isolation of shield movement had been completed on any shield identified by the Take 5 that could impact on worker's safety.

17. The SHMS prohibited access to the No Access Zone of the longwall face side of the AFC in LW9C, unless:

    a. Permission to enter had been given by the ERZ Controller or Shearer Operator after they had determined that it was safe to enter the area;

    b. A Take 5 had been completed and any required controls were in place;

    c. Shield flippers were deployed in the work area;

    d. A full isolation of the AFC and Shearer was in place;

    e. Isolation of shield movement had been completed on any shield identified by the Take 5 that could impact on worker's safety;

    f. Personal locks and tags had been attached.

18. By 1 November 2019, an increased risk of face spall had been identified by the defendant in LW9C due to geological faults.

19. On 25 November 2019, at about the location of roof shield flippers 129 and 130, Mr Duxbury, Mr Raymond and Mr Shailer commenced work to repair the Bretby.

20. Consecutive flippers in the vicinity of the area in which the work was being conducted were defective and were not effectively deployed.

21. Mr Raymond and Mr Shailer were situated in the front walkway side of the AFC in LW9C.

22. Mr Duxbury was situated in the longwall face side of the AFC in LW9C.

23. At approximately 11:48pm on 25 November 2019, coal fell from a spall at the coalface at about the location of roof shield flippers 129 and 130.

24. Mr Duxbury was struck and pinned under the coal and sustained fatal injuries.

25. The defendant failed to ensure the risk to persons, namely workers, from coal mining operations at the mine was at an acceptable level, in that he:

    a. Failed to ensure that all roof shield flippers at LW9C were capable of effective deployment prior to commissioning and the commencement of operations in LW9C; and/or

    b. Failed to ensure adequate maintainenance [sic] and/or repair of flippers throughout the operation of LW9C to ensure flippers were capable of effective deployment; and/or

    c. Failed to ensure the prescribed response under the TARP which was in force, when flippers were defective to the extent that they met the trigger for Level 3 Response (Red) under the TARP; and/or

    d. Failed to ensure workers complied with the SHMS, in that he:

        i. Failed to ensure workers did not enter a Restricted Access Zone and/or a No Access Zone when flippers were defective and/or not effectively deployed; and/or

        ii. Failed to ensure workers completed a Take 5 prior to entering a Restricted Access Zone and/or a No Access Zone.

    e. Failed to implement a SHMS which:

        i. Detected and ensured reporting by shift supervisors of the quantity and frequency of defects to flippers; and/or

        ii. Required repairs to flippers as soon as reasonably practicable; and/or

        iii. Required that operations in LW9C cease where repairs to flippers could not be completed as soon as reasonably practicable; and/or

        iv. Required that operations in LW9C cease until repairs to flippers were completed such as to reduce the TARP level below Level 3 Response (Red).

26. In order to meet his obligation to ensure the risk to persons from coal mining operations was at an acceptable level, the defendant should have implemented the control measures in paragraph 25.

27. The defendant's conduct exposed workers in LW9C, including Mr Raymond and Mr Shailer, to a risk of serious injury or death.

28. The defendant's conduct caused the death of Mr Duxbury."

[93] The complaint alleges that Mr Futeran was a Site Senior Executive from 12 August 2019 to 24 September 2019. The particulars then allege that the Duxbury incident occurred on 25 November 2019, two months after Mr Futeran ceased to be the Site Senior Executive.

[94] The charge alleges a failure to discharge the obligation imposed upon Mr Futeran by s 42(a) of the CMSH Act. That subsection provides, relevantly:

> "**42 Obligations of site senior executive for coal mine**
>
> A site senior executive for a coal mine has the following obligations in relation to the safety and health of persons who may be affected by coal mining operations—
>
> (a) to ensure the risk to persons from coal mining operations is at an acceptable level; …"

[95] 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."

[96] On a proper construction of s 34, the elements of the offence are:

1. A safety and health obligation falls upon the defendant.

2. That obligation is not discharged.

[97] An offence against s 34 is constituted by an omission[43] to fulfil the duty created by s 42(a).

[98] The offence is complete upon proof of those two elements[44] and subsections (a)-(d) provide for different circumstances of aggravation.[45] The circumstance of

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43 *Criminal Code*, s 2.

44 Section 34(e).

aggravation charged is that the breach caused Mr Duxbury's death.[46] Whether the circumstance of aggravation is made out requires proof of a causal connection between the breach and the event, which is the death.

[99] The complaint itself is clear. It alleges a breach of s 34 while Mr Futeran was Site Senior Executive. The particulars though are confusing. It is alleged that the longwall 9C was commissioned on 13 August 2019. That is while Mr Futeran was Site Senior Executive. He became Site Senior Executive on 12 August 2019. The hazard to workers is identified as "risk of spall",[47] which is essentially coal falling.

[100] A safety and health management system (SHMS) was implemented and within that was a Trigger Action Response Plan (TARP).[48] The SHMS itself is the subject of some criticism.[49]

[101] By the SHMS, "flippers" were to be deployed to control the hazard.[50] By the TARP, when two or more adjacent flippers were inoperative, or 10 or more non-adjacent were inoperative across the longwall, remedial action needed to be taken.[51]

[102] The SHMS prohibited access to certain areas where, relevantly here, the flippers were deployed.

[103] Paragraph 18 of the particulars alleges that "the defendant", obviously a reference to Mr Futeran, had identified an increased risk of spall "by 1 November 2019". Mr Futeran had left the role of Site Senior Executive on 24 September 2019. He was not identifying anything at the mine in November. He was not there.

[104] After alleging[52] that workers entered the prohibited area on 25 November 2019, the allegation is made that consecutive flippers in that area "were defective and not effectively deployed". In context, they are alleged to be defective (and, therefore, presumably in breach of the TARP) as at 25 November 2019. It is not alleged that the flippers were defective or not effectively deployed at any time prior to Mr Futeran's departure on 24 September 2019.

[105] The breaches of the s 42 obligation are alleged in paragraph 25 of the particulars. Paragraph 25(a) alleges a failure to ensure that the roof shield flippers were capable of effective deployment "prior to commissioning and the commencement of operations" of the longwall. This could be attributed to Mr Futeran because he began employment before the operations commenced, even though it was only one day before.

[106] As to particular 25(b), the breach is an omission, namely a failure to maintain the flippers "throughout the operation of [the longwall]". Mr Futeran was not Site

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45 *Criminal Code*, s 1, definition of "circumstance of aggravation".
46 *Coal Mining Safety and Health Act* 1999, s 34(b).
47 Particulars paragraph 10.
48 Particulars paragraphs 11, 12 and 13.
49 Particulars paragraph 25(e).
50 Particulars paragraph 12.
51 Particulars paragraph 13.
52 Particulars paragraph 19.

Senior Executive over that entire period. It is not specifically alleged that the failure pertained while Mr Futeran was Site Senior Executive.

[107] Section 25(c) alleges a failure to ensure a response under the TARP "when flippers were defective". There is no allegation that the flippers were defective at any time prior to 25 November 2019.

[108] Paragraph 25(d) alleges a failure to ensure workers complied with the SHMS. The breach by the workers is that they entered the restricted access zone when the flippers were defective and/or not effectively deployed and did not complete a "Take 5" before entering the restricted access zone. The reference to a "Take 5" is a mystery. There is no reference in the rest of the particulars to explain what a "Take 5" is.

[109] The only specific allegation that workers entered the restricted areas was on 25 November 2019.[53] Particulars paragraph 15 is a more general allegation, but it is not said that the workers were required to access the restricted access zones while Mr Futeran was Site Senior Executive.

[110] Paragraph 25(e) alleges defects, it seems, in the SHMS. It is not specially alleged when the SHMS was implemented and what Mr Futeran had to do with its implementation. The SHMS includes the TARP and presumably the existence and implementation of the TARP would be part of the commissioning of the longwall. Perhaps that can be attributed to Mr Futeran. One can only guess.

[111] As previously observed, three complaints were issued in relation to the Duxbury incident; one to Carborough, one to Mr Uhr and one to Mr Futeran. The particulars which accompany each of the three complaints are identical[54] apart from the allegations in paragraph 25.

[112] Carborough was the mine operator over the entire period from the commissioning of the longwall to the death of Mr Duxbury. Paragraph 25 of the particulars of the complaint against Carborough alleges breaches of Carborough's obligations throughout that period. Particulars paragraph 25(a) concerns failures in the commissioning of the longwall and other subparagraphs of 25 clearly enough relate to the date of Mr Duxbury's death.

[113] Mr Uhr was the Site Senior Executive between 23 September 2019 and 26 November 2019, the day after Mr Duxbury's death. There is no allegation against Mr Uhr concerning the commissioning of the longwall and the commencement of its operations. That reflects the fact that he was not the Site Senior Executive at that point.

[114] There may be other problems with the allegations against Mr Uhr. For example, paragraph 25(a)[55] alleges failures "throughout the operation of [the longwall]", whereas it is obvious that Mr Uhr was not the Site Senior Executive over some of that period.

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53 Particulars paragraph 19.

54 Apart from formal particulars.

55 Which is identical to paragraph 25(b) in the particulars against Mr Futeran.

[115] Paragraph 25 in the complaint against Carborough is identical to paragraph 25 in the particulars against Mr Futeran. There has seemingly been no attempt to reflect the fact that Mr Futeran was not the Site Senior Executive over much of the period which is relevant to the allegations against Carborough.

Findings on common considerations

[116] As already observed, there are some features which are common to all three applications for extension of time.

[117] I find that:

1. the applications for prerogative relief against each of Carborough, Mr Futeran and Mr Uhr are arguable;

2. prerogative relief could reasonably have been sought as early as 21 February 2022 when the second respondent delivered reasons on the strike-out applications;

3. it was not reasonable to expect an application to be made before that time as there was no real indication that any magistrate hearing the strike-out applications would disavow the jurisdiction of the Industrial Magistrates Court;

4. although the applications for remedies in the nature of *certiorari* are only six days late, it is a relevant consideration that other prerogative relief could have been sought over eight months previously;

5. the delays are explained by the negligence of Mr Guilfoyle[56] and the failure of others to appreciate that prerogative relief was the most appropriate remedy;

6. once advice was received that the appropriate remedy was prerogative in nature;

   (a) applications were promptly filed;

   (b) relatively quickly, the appeals were abandoned;

   (c) the applicant agreed to pay the respondents' costs of the appeals on the indemnity basis.

7. there is a significant public interest in the prosecutions proceeding as the CMSH Act promotes safety in coal mining through a scheme, including prosecution for offences;

8. Carborough, Mr Futeran and Mr Uhr knew, within a relatively short time after the second respondent struck out the complaints, that there would be a challenge to those orders;

9. Carborough, Mr Futeran and Mr Uhr each point to specific prejudice of the nature of commercial impact (in the case of Carborough) and employment prospects (in the cases of Mr Futeran and Mr Uhr).

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56 Nominating the wrong court in the summons.

10. There is no evidence to suggest that a fair trial cannot be achieved for each of the three respondents.

Exercise of discretion re Carborough

[118] In addition to the common features as I have identified them, Carborough points to prejudice arising as a result of the operation of the *Carbon Credits (Carbon Farming Initiative) Rule* 2015 (Cth).

[119] No determination has been made against Carborough that it is not a fit and proper person to participate in the Emissions Reductions Fund scheme. What is said is that the conviction might have that effect.

[120] There is no suggestion that a conviction is required in order to make the Duxbury incident a relevant consideration in the determination of whether Carborough is a fit and proper person to participate in the scheme. There is no conviction at this point and the Commonwealth are making inquiries. A failure to grant prerogative relief to the applicant is not a vindication of Carborough's position; neither is an acquittal. An acquittal just recognises a reasonable doubt as to guilt.

[121] As already observed, there is no evidence that Carborough's funding arrangements are in particular peril. The prejudice is much vaguer as it is said that the continuing prosecution heightens the financier's perceptions of financial and commercial risk.

[122] Even more vague is the prejudice said to be caused to any potential sale of shares in Carborough. There is no particular sale in jeopardy, just a suggestion that the ongoing prosecution might affect the value and saleability of the shares.

[123] It follows, in my view, that there is no solid evidence of particular prejudice.

[124] The applicant has an arguable case for prerogative relief which will result in Carborough being prosecuted for a breach of a regulatory statute whose objects are to promote safety in coal mining. The delay has been explained and Carborough has always known that a prosecution was being pursued.

[125] Notwithstanding that the applicant could have pursued prerogative relief over eight months earlier than he did, I am convinced that it is proper and appropriate to grant the extension of time.

Exercise of discretion re Mr Uhr

[126] In addition to the common features as I have identified them, Mr Uhr points to prejudice, being:

1. financial loss in that his employer will not offer him more lucrative roles while the prosecution remains on foot; and

2. Mr Uhr believes that the ongoing prosecution is damaging his reputation amongst his peers in his chosen profession.

[127] There is no suggestion that Carborough intends to terminate Mr Uhr's employment. His position then is that he is financially secure but not as well off as he would be if

the prosecution was concluded in his favour. Unlike Mr Futeran and Carborough, Mr Uhr only faces prosecution over the Duxbury incident, not the Best incident.

[128] A failure to grant prerogative relief to the applicant will effectively spell the end of the prosecution of Mr Uhr. The finalisation of the prosecution in that way is not a vindication of Mr Uhr's position and neither is an acquittal. An acquittal just evidences a reasonable doubt as to Mr Uhr's guilt.

[129] The applicant has an arguable case for prerogative relief which will result in Mr Uhr being prosecuted for a breach of a regulatory statute whose objects are to promote safety in coal mining. The delay has been explained and Mr Uhr has always known that a prosecution was being pursued.

[130] As with Carborough, the applicant's predecessors could have pursued prerogative relief over eight months earlier than they did. That is likely to extend the period over which Mr Uhr will be unable to achieve a more senior position, either with Carborough or with some other mining company.

[131] However, balancing all the relevant considerations as I have identified them, I am convinced that it is proper to grant the extension of time.

Exercise of discretion re Mr Futeran

[132] In addition to the common features as I have identified them, Mr Futeran points to prejudice arising as a result of the ongoing prosecution.

[133] Mr Futeran is in a different position to that of Mr Uhr. Mr Uhr has continuing employment with Carborough. Mr Futeran is effectively unemployable in Australia at the moment.

[134] A complication is that Mr Futeran also faces a charge in relation to the Best incident. Therefore, questions arise as to whether Mr Futeran's employment prospects are being adversely affected by the prosecution in relation to the Duxbury incident, the prosecution in relation to the Best incident, or both.

[135] As previously observed, Mr Duxbury died, and Mr Best suffered grievous bodily harm. They were two separate accidents. The circumstance of aggravation under s 34(b) of the CMSH Act is made out upon proof that the breach of the safety and health obligation caused death or grievous bodily harm. In that sense, the charge laid in relation to the Duxbury incident is no more legally serious than the charge laid in relation to the Best incident. Both attract the same maximum penalty.

[136] However, I draw the inference that Mr Futeran's alleged involvement in a mining death is likely to have more adverse implications for his employment prospects than his involvement in an incident where a worker was injured but not killed. Further, I draw the inference that even if Mr Futeran's employment prospects are adversely affected by the ongoing prosecution in relation to the Best incident, they must surely be improved if he is not also facing prosecution for the Duxbury incident.

[137] Mr Guilfoyle's initial mistake, and then the decision to bring appeals rather than seek prerogative relief, has contributed significantly to the present situation. Over two years from the swearing of the complaint and over three years from the date of

the Duxbury incident, the prosecution has not progressed at all. The delay may ultimately not be found to be wholly attributable to Mr Guilfoyle's negligence and subsequent decisions made by the prosecution. It may be ultimately found that the second respondent ought not to have dismissed the complaints.

[138] However, on any fair assessment, the prosecution of charges arising from the Duxbury incident has been calamitous. The errors have contributed to significant delays which have caused Mr Futeran significant prejudice.

[139] Then there are the problems with the particulars of the complaint against Mr Futeran.

[140] The particulars appear to be a "cut and paste" of the particulars of the complaint laid against Carborough. The particulars reflect no thought at all having been given to the fact that Mr Futeran left his position as Site Senior Executive of the mine some two months before the Duxbury incident.

[141] For the reasons previously explained, most of the breaches of safety obligations alleged in paragraph 25 of the particulars against Mr Futeran are doomed to fail. The case against Mr Futeran seems, at best, limited to the commissioning of the longwall[57] and any defects in the SHMS.[58] A case based on defects in the commissioning and defects in the SHMS faces the problem that the longwall was commissioned only the day after Mr Futeran commenced his role as Site Senior Executive.

[142] In order to prove the circumstance of aggravation, the applicant must prove a substantial causal connection between the alleged breaches of safety obligations falling upon Mr Futeran and the accident which caused the death.[59] It is impossible to form any concluded view on causation on the materials filed in the present applications. However, Mr Futeran had not been at the mine for two months by the time of the Duxbury incident. Others[60] were no doubt in a position to influence whether workers entered the prohibited area on 25 November 2019.[61] Others were no doubt in a position to ensure that the flippers were maintained.[62] Others were no doubt in a position to implement the TARP when flippers were defective.[63] Others were no doubt in a position to ensure that workers complied with the SHMS.[64] I draw the inference that the case against Mr Futeran to prove the circumstance of aggravation has obvious and significant difficulties.

[143] The case against Mr Futeran would have to be recast. For reasons already explained, many of the particulars in paragraph 25 would have to be abandoned or reframed. Further particulars (at least) would have to be delivered in relation to the allegations made in paragraphs 25(a) and 25(e).

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57 Particulars paragraph 25(a).
58 Particulars paragraph 25(e).
59 *Royall v The Queen* (1991) 172 CLR 378 at 398 and 423.
60 Mr Uhr, for instance.
61 Particulars paragraph 11.
62 Particulars paragraph 25(b).
63 Particulars paragraph 25(c).
64 Particulars paragraph 25(d).

[144] I have taken into account the public interest in the prosecution of those who offend against the CMSH Act. I have also taken into account the fact that the delays have been explained, although, not justified. Mr Futeran always knew that there would be a challenge to the second respondent's decision to strike out the complaint.

[145] Notwithstanding those factors, I am of the view that the continued prosecution of Mr Futeran in relation to the Duxbury incident is oppressive. He has established significant prejudice being suffered while the prosecution continues. The prosecution has been on foot for over two years with no real progress. If the extension of time is given, then the application for prerogative relief has to be heard and determined. There is no material suggesting that a prosecution brief has been delivered. That would have to occur. Dates for trial would have to be obtained. It is unrealistic to think that a trial would occur in the first half of 2023.

[146] Mr Futeran would then face a trial, at the earliest, over three and a half years after the Duxbury incident, over two and a half years since the prosecution began, in relation to a series of particularised allegations some of which obviously cannot be proved and others of which would have to be recast. All the while, he remains effectively unemployable within Australia.

[147] I am not satisfied in those circumstances that it is proper to grant the application against Mr Futeran and I therefore refuse it.

Costs

[148] The necessity for the application to extend time is caused solely by those prosecuting the complaints. Had the application for prerogative relief been brought in the Trial Division of the Supreme Court, I would have had no hesitation in ordering the applicant to pay the costs of all three applications on the indemnity basis.

[149] Section 545 of the IR Act is, relevantly, in these terms:

> "**545 General power to award costs**
>
> (1) A person must bear the person's own costs in relation to a proceeding before the court or commission.
>
> (2) However, the court or commission may, on application by a party to the proceeding, order—
>
> (a) a party to the proceeding to pay costs incurred by another party if the court or commission is satisfied—
>
> (i) the party made the application or responded to the application vexatiously or without reasonable cause; or
>
> (ii) it would have been reasonably apparent to the party that the application or response to the application had no reasonable prospect of success; or

> (b) a representative of a party (the ***represented party***) to pay costs incurred by another party to the proceeding if the court or commission is satisfied the representative caused the costs to be incurred—
>
> (i) because the representative encouraged the represented party to start, continue or respond to the proceeding and it should have been reasonably apparent to the representative that the person had no reasonable prospect of success in the proceeding; or
>
> (ii) because of an unreasonable act or omission of the representative in connection with the conduct or continuation of the proceeding.
>
> (3) The court or commission may order a party to pay another party an amount reasonably payable to a person who is not a lawyer, for representing the other party."

[150] The costs regime under the IR Act does not follow the usual rule of costs follow the event. In order to obtain costs of the "proceeding", a party must fall within s 545(2)(a)(i) or (ii).[65]

[151] The relevant "proceeding" may be either the applications for an extension of time or the principal applications for prerogative relief.

[152] The applicant obtained an extension of time against Carborough and Mr Uhr. In those circumstances, neither of those parties can rely on either of ss 545(2)(a)(i) or (ii). However, the application for prerogative relief has not been determined. If that "proceeding" fell within the circumstances prescribed by s 545(2)(a), Carborough and Mr Uhr may argue that the costs of the application for the extension of time are costs of the principal "proceeding" and a costs order in their favour ought to be made.

[153] It is therefore appropriate to reserve the costs of Carborough and Mr Uhr to the determination of the applications for prerogative relief.

[154] Mr Futeran has successfully defended the application for an extension of time. It should follow then that the application for prerogative relief against him ought to be dismissed. There may be other orders necessary.

[155] The application against Mr Futeran was decided in his favour in exercise of discretion where there were different factors favouring both sides of the argument. In those circumstances, while I express no concluded view, it may be difficult for Mr Futeran to rely on s 545(2)(a)(i) or (ii). He may (I do not know) wish to argue that the "proceeding", being the application for prerogative relief, is one that falls within s 545(2)(a)(i) or (ii) and that enlivens the discretion to make an award of costs in his favour.

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65 Subsections 545(2)(b) and (3) are not relevant here.

[156] The appropriate course is to make directions for the receipt of written submissions as to what further orders should be made in relation to Mr Futeran, including on the question of costs.

Orders

[157] I make the following orders:

In application C/2022/17:[66]

1. The time for filing the application for prerogative relief is extended to 8 November 2022.

2. The costs of the applicant and first respondent are reserved to the application for prerogative relief.

In application C/2022/18:[67]

1. The time for filing the application for prerogative relief is extended to 8 November 2022.

2. The costs of the applicant and first respondent are reserved to the application for prerogative relief.

In application C/2022/19:[68]

1. The application for an extension of time is dismissed.

2. By 4.00 pm on 1 February 2023, the first respondent shall file and serve written submissions on:

   (a) what further orders (if any) ought to be made consequent upon dismissal of the application for an extension of time;

   (b) costs against the applicant.

3. By 4.00 pm on 22 February 2023, the applicant shall file and serve written submissions in reply.

4. Each party may, by 4.00 pm on 8 March 2023, file an application for leave to make oral submissions on the question of further orders and costs.

5. In the event that no application to make oral submissions is filed and served by 4.00 pm on 8 March 2023, the question of further orders and costs shall be determined on any written submissions filed and without further oral hearing.

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66 Carborough Downs Coal Management Pty Ltd.
67 Russell Clive Uhr.
68 Jeremy David Futeran.