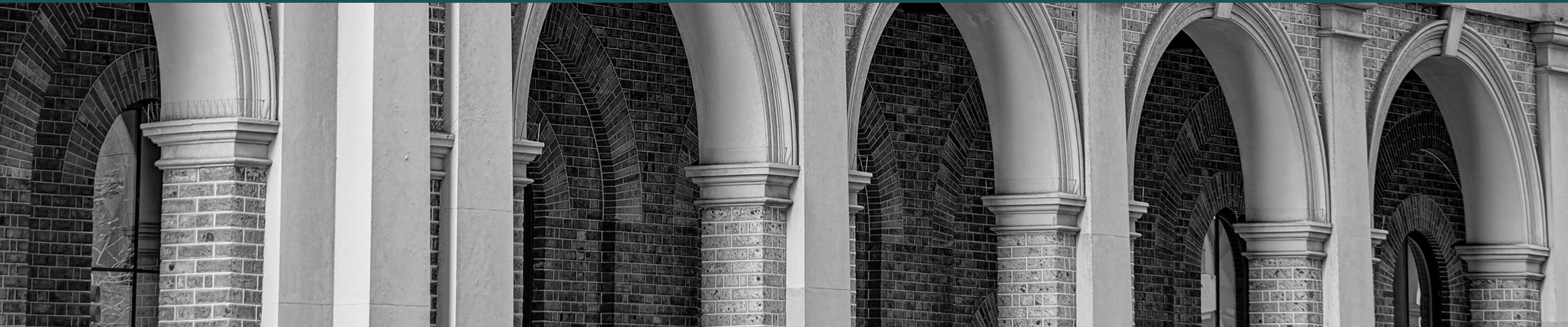




GREENWAY CHAMBERS

ROLE OF PARTICULARS IN WHS CRIMINAL PROCEEDINGS

MALCOLM SCOTT



11 Description of offences

The description of any offence in the words of an Act or statutory rule or other document creating the offence, or in similar words, is sufficient in law.



Work Health and Safety Act 2011 (NSW)

32 Failure to comply with health and safety duty–Category 2

A person commits a Category 2 offence if–

- (a) the person has a health and safety duty, and
- (b) the person fails to comply with that duty, and
- (c) the failure exposes an individual to a risk of death or serious injury or illness.

Maximum penalty–

- (a) in the case of an offence committed by an individual (other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking)–1,730 penalty units, or
- (b) in the case of an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking–3,465 penalty units, or
- (c) in the case of an offence committed by a body corporate–17,315 penalty units.

Summons

Details of Offence

On [date] at [address] in New South Wales, [company name] (ACN 000 000 000) (the “defendant”) being a person conducting a business or undertaking who had a health and safety duty under section 19(1) of the *Work Health and Safety Act 2011* (‘the Act’) to ensure so far as is reasonably practicable the health and safety of workers while the workers are at work in the business or undertaking, did fail to comply with that duty and the failure to comply with that duty exposed workers, in particular [name] to a risk of death or serious injury contrary to section 32 of the Act.



19 Primary duty of care

- (1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of—
 - a) workers engaged, or caused to be engaged by the person, and
 - b) workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking.
- (2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking

Risk

- Key particular involved
- Cannot be too specific
- Cannot be too broad

Role of further and better particulars

Clarification to enable a better understanding of the allegation brought

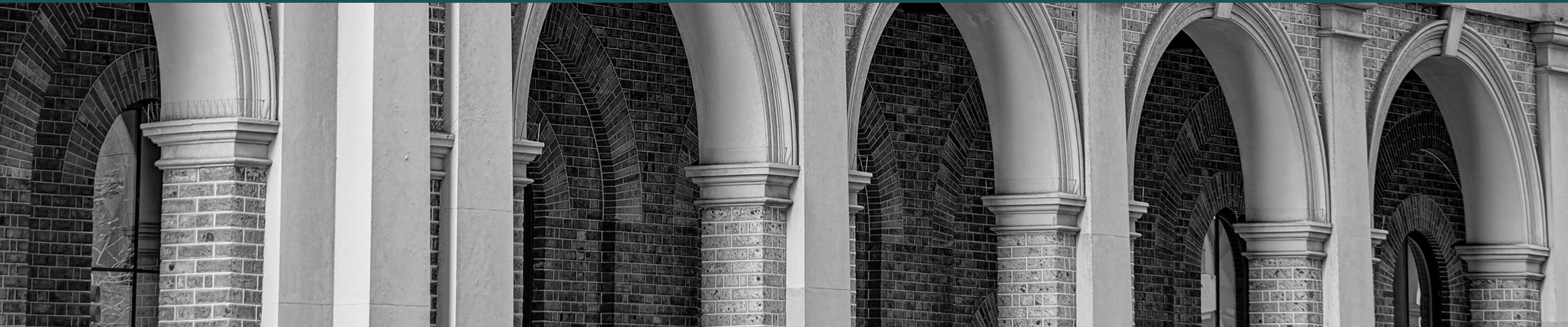




GREENWAY CHAMBERS

AMENDING A WHS CHARGE

INGMAR TAYLOR SC



Section 20 *Criminal Procedure Act (NSW)*

Power to Amend

(which applies to a WHS Summons: s15(2) of the CP Act)

20 Amendment of indictment

- (1) An indictment may not be amended after it is presented, except by the prosecutor—
 - (a) with the leave of the court, or
 - (b) with the consent of the accused.



Section 20 *Criminal Procedure Act*

Test to be applied

Leave to amend will be granted unless:

- to do so would “prejudice the right of the accused to a fair trial”:
R v Lykouras [2005] NSWCCA 8 at [26], “render the trial unfair”
MM v R [2011] NSWCCA 262, create “injustice” *R v Sepulveda*
[2003] NSWCCA 131;
- “the accused would be unfairly prejudiced” (*Sepulveda*, Dunford J at [77]; *SafeWork NSW v Solveco Pty Ltd*, Russell J at [50]);

Section 21 of the CP Act permits the Court to make orders to amend an indictment that is defective if it “can be amended without injustice”.

Howie J (with whom Sully and Simpson JJ agree) held at [25]:

It will only be a case where the accused will be irreparably prejudiced in meeting the charge as amended that leave should be refused.

No stricter test would be applied to amendment under s 20.

It is a “rare case” that Court would refuse the prosecutor leave

R v Lykouras [2005] NSWCCA 8 at [25], Howie J

“The point is that [the Court is] concerned with ensuring a fair trial to the accused and not with some broader concept of unfairness to restrict the Crown in its conduct of the prosecution as might be expected in a sporting contest.”

As a result “it would be **a very rare case** for a Court to refuse to allow the Crown to amend an indictment unless the Court is satisfied that to permit the amendment would result in **prejudice to the fair trial** of the accused on the amended indictment”: at [26].



Late applications

Lykouras - First day of the proceedings.

SolveCo - Defendant put on notice about a week before the hearing commenced; application made at the close of the Prosecution's opening.

Borokin - On day 13 of the trial, and after the principal witnesses had been cross-examined.

Howie J (with whom Sully and Simpson JJ agreed): "The only prejudice suffered by the [defendants] was that the counts in the indictment were to be determined on their merits."



Principles in summary

Solveco (Russell J)

Principles at [50]

- a. The primary issue: whether the defendant would be unfairly prejudiced.
- b. The court should consider whether any such prejudice could be overcome by another procedure [eg adjournment].
- c. A defendant has no right to have a charge prosecuted on one particular factual basis and no other, nor to have the question of guilt determined by reference to a single charge.

Principles in summary

Solveco (Russell J)

Principles at [50] (continued)

- d. The earlier an allegation is raised, the less likely it is that the new allegation will prejudice the right of an accused to a fair trial.
- e. It would be a very rare case indeed where a court would refuse to allow the prosecutor to amend an indictment before the trial commences.
- f. The circumstances in which the leave may be granted are not confined by the section, although the discretion must be exercised appropriately.

Costs

Limited power to award costs

Section 275F of the *Criminal Procedure Act* permits an award of costs if:

- a matter is adjourned, and
- “only if the court is satisfied that the other party has incurred additional costs because of the unreasonable conduct or delays of the party against whom the order is made”

Most variations to a charge will not necessitate an adjournment.



Implications

The Prosecutor should consider amending, even close to hearing, whenever it becomes clear that its evidence does not match the pleading or it identifies some potential defect.

A Defendant, when deciding whether to plead not guilty, needs to consider the risk that the prosecutor could amend to cure an identified defect, including after significant expenses have been incurred, and even during a hearing.

Makes defendants even less likely to disclose a defence in advance, unless it is one that cannot be cured by amendment.

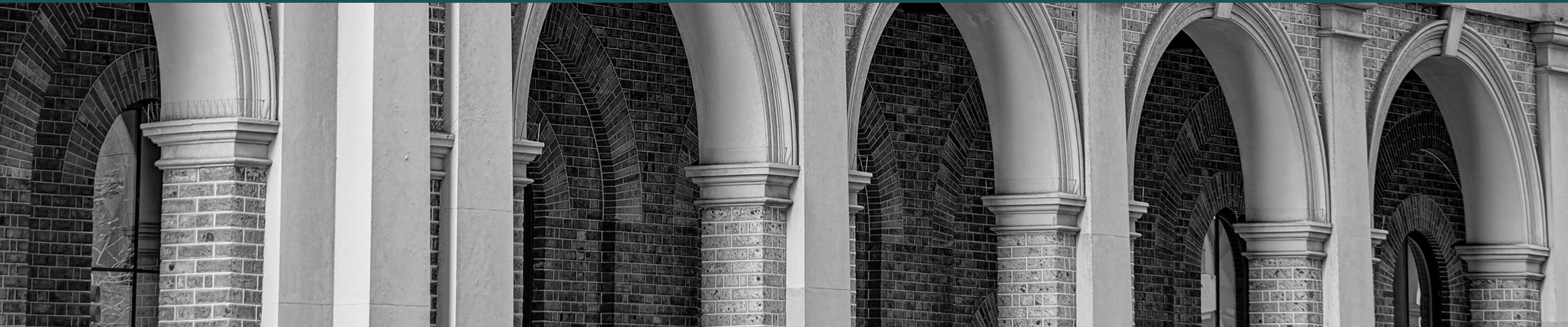




GREENWAY CHAMBERS

COSTS IN WHS PROCEEDINGS

JUSTIN PEN



The usual order

The [unsuccessful party] is to pay the costs of the [successful party] as agreed or as assessed

When will it be appropriate to depart from that usual order?



- Section 257B - discretionary power to order that an accused person pay the prosecutor's costs upon a conviction
- Section 257C - discretionary power to order that the prosecutor pay the accused person's costs "*if the matter is dismissed or withdrawn*"
- Section 257D - in WHS proceedings no need for a successful defendant to show some exceptional circumstance before obtaining an order for costs
- Section 257F - a separate discretionary power to award costs against a party arising from the matter being adjourned
 - a. Defendant's costs thrown away as a result of a prosecutor's amendment of an indictment?

Applicable principles

- Costs are compensatory, not a punishment for failure: *SafeWork NSW v Williams Timber Pty Ltd*
- If a person's capacity to pay a fine is in issue, the correct approach is to "reduce the fine to be paid by the offender, rather than to reduce the amount awarded as costs in favour of the prosecutor": *William Timbers* at [41].
- Costs ordinarily follow the event: *Bulga Underground Operations Pty Ltd v Nash*
- Costs may be discounted where there are multiple discrete issues and a party succeeds on some only

Some recent examples of non-standard costs orders

- An order that an unsuccessful defendant pay 75% of the costs of a successful prosecutor: *SafeWork NSW v Autocare Services Pty Limited (No 2)*
- An order that an unsuccessful prosecutor pay just 10% of the costs of a successful defendant: *Orr v Perilya Broken Hill Ltd*
- An order that a successful prosecutor pay costs to an unsuccessful defendant in relation to costs thrown away as result of the prosecutor's late service of an expert report: *SafeWork NSW v Poletti Corporation Pty Ltd*



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QUESTIONS?

