

TRANSCRIPT OF PROCEEDINGS

S ECI 2022 00427

SUPREME COURT OF VICTORIA

COMMON LAW DIVISION - TRIAL DIVISION

MELBOURNE

TUESDAY 21 JUNE 2022

BEFORE THE HONOURABLE JUSTICE McDONALD

INDEPENDENT CONTRACTORS OF AUSTRALIA INC TRADING AS SELF
EMPLOYED AUSTRALIA

v

VICTORIAN WORKCOVER AUTHORITY TRADING AS WORKSAFE VICTORIA

MR M. RINALDI appeared on behalf of the Plaintiff.

MR R.G.CRAIG with MR C.E.A. HIBBARD appeared on behalf of the
Defendant.

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4 or otherwise) be reproduced, stored in a retrieval system or
5 transmitted without prior written permission of the Authorised
6 Officer.

7 HIS HONOUR: I will take the appearances.

8 MR CRAIG: If the court please, I appear for the Authority, the
9 respondent in the matter, but the moving party today on
10 the application with Mr Hibbard of counsel.

11 HIS HONOUR: Thanks, Mr Craig.

12 MR RINALDI: If the court please, I appear for the defendant
13 who is the respondent to the application.

14 HIS HONOUR: Thanks, Mr Rinaldi. Yes, Mr Craig. I can
15 indicate to the parties I have read the outlines of
16 submission and the supporting affidavit so you can proceed
17 on the basis that I have some familiarity with the matter.

18 MR CRAIG: Thank you, Your Honour. Your Honour, can I indicate
19 that in the course of argument, I am also likely to take
20 Your Honour to the affidavit and originating motion in the
21 proceeding, that is the affidavit of Mr Phillips.

22 HIS HONOUR: Yes.

23 MR CRAIG: And originating motion commencing the proceeding.

24 HIS HONOUR: Thank you.

25 MR CRAIG: Your Honour, can I start by formally tendering the
26 affidavit of Mr Leader dated 27 April.

27 HIS HONOUR: Yes.

28 MR CRAIG: And accept Your Honour has read both our submissions
29 of 27 April and 1 June, and I rely on those.

30 HIS HONOUR: Yes.

31 MR CRAIG: Can I start by working through the scheme of s131 of
32 the Act with Your Honour.

33 HIS HONOUR: Yes.

34 MR CRAIG: Your Honour, that's annexed relevantly to our

1 written submission.

2 HIS HONOUR: Yes.

3 MR CRAIG: As Your Honour will see, s131 contains a gateway
4 provision whereby a person, that is anybody without fetter
5 can consider, that is form a subjective state of mind as
6 to the occurrence of an act, matter or thing constituting
7 an offence against the Act. So that the starting point -
8 sorry, Your Honour.

9 HIS HONOUR: I think my associate is looking at the annexure to
10 the plaintiff's submission.

11 MR CRAIG: Correct, Your Honour.

12 HIS HONOUR: We need to go to the defendant's submission. I
13 have got that in front of me.

14 MR CRAIG: So Your Honour will see that the commencing
15 sub-clause of the provision identifies that a person
16 unconfined in definition can form a subjective judgment
17 that the happening or occurrence of an act, matter of
18 thing, constitutes an offence against the Act other the
19 regulations.

20 HIS HONOUR: Yes.

21 MR CRAIG: And if no prosecution has been brought in respect of
22 that thing which the person subjectively considers
23 constitutes an offence, can request that the Authority
24 bring the prosecution.

25 Sub-section 2 and sub-s.(2A) divides the role of the
26 Authority thereafter into two separate parts, sub-clause
27 (2) concerns summary offences. Sub-clause 2A concerns
28 indictable offences and it is on sub-clause 2A that we
29 focus on in this proceeding.

30 Sub-clause 2A, Your Honour, places an obligation on
31 the Authority to communicate upon the completion of an

1 investigation of the matter. In subparagraph (a) of
2 clause 2A Your Honour will see that the legislation does
3 not replicate the language of act, matter or thing by
4 which the subjective judgment of the person is formed, but
5 identifies that the Authority is to communicate the
6 completion of an investigation of the matter.

7 That's the first thing we seek to draw to
8 Your Honour's attention.

9 The second thing that we - - -

10 HIS HONOUR: You say that's narrower, you say the reference to
11 matter in 2A is narrower than the compendious phrase 'act,
12 matter or thing'?

13 MR CRAIG: No, Your Honour. What we say is that focuses the
14 Authority on the subject or topic of the circumstances
15 giving rise to the request. For good reason, the
16 Authority might determine that the request identifies an
17 act, thing or circumstance which gives rise to a different
18 offence or gives rise to a need to enquire into a subject
19 or topic beyond that identified by the person.

20 So we say it places the obligation on the Authority
21 to over the subject or topic, which the subject of the
22 request consideration and investigate that subject or
23 topic. Subject or topic, of course, being the dictionary
24 definition of the word 'matter'. What the Authority does
25 not need to do, Your Honour, by the words of the
26 legislation, is investigate each act, matter or thing
27 which gives rise to the alleged subjective concern as to
28 the existence of an offence, but must, on the language of
29 the section, communicate the completion of an
30 investigation of the subject or topic raised by that
31 request.

1 There are a number of good reasons for that, we say,
2 Your Honour. The first is there may be a number of
3 requests from a range of parties, all capable of being
4 identified under the same umbrella, the same subject or
5 topic. The language of the section identifies that any
6 person can bring a request of this type, so there's
7 clearly going to be a degree of unsophistication about the
8 way in which the offence or the act, matter or thing might
9 be formulated and so there's a need to investigate in the
10 Authority the ability to investigate the subject or topic
11 raised by that request. There's also the prospect of
12 vexatious requests, such that if a request is made
13 repetitively the Authority is able to point to an
14 investigation of the subject or topic under which the
15 request might be housed.

16 And so we say there are a number of good reasons in
17 policy that the Authority is imbued with a responsibility
18 to investigate the subject or topic and communicate the
19 investigation of that subject or topic upon completion and
20 whether or not a prosecution is arising from that
21 investigation. And so that's our submission as to the
22 significance of the word 'matter'.

23 The second thing we over for Your Honour in this
24 conduct is that the focus of the section is on a
25 prosecution, it doesn't have to be a prosecution with
26 respect to the offence subjectively considered by the
27 person and forming the subject of the request. That
28 reinforces, in our respectful submission, that one is
29 moving from a subjective consideration, which is the
30 gateway, into a consideration of the subject or topic, and
31 the Authority as investigator and prosecutor has to form a

1 view as to whether a prosecution should be brought, and if
2 no prosecution is brought, that is not one single
3 prosecution is brought in respect of the matter, to give
4 reasons about that.

5 HIS HONOUR: Paragraph 1(b) talks in terms of no prosecution
6 having been drawn in respect of the act, matter or thing.

7 MR CRAIG: Yes.

8 HIS HONOUR: So it is the absence of a prosecution in respect
9 of the act, matter or thing which then, (a), enlivens the
10 entitlement for a request to be made, and (b), then
11 enlivens the obligations under 2, relevantly 2A, 2B and
12 2C.

13 MR CRAIG: Yes. And subparagraph (b), clause 1, supports our
14 construction. Because, of course, subparagraph 1 is
15 talking about the **subjective consideration and observation**
16 **of the person making the request**. And so if what was
17 intended was that the Authority would then have to
18 investigate the occurrence of the act, matter or thing, as
19 specified and subjectively considered by that person,
20 sub-clause 2A would say that. **But sub-clause 2A chooses**
21 **different language**, and that must be, we say, consistent
22 with the presumption that it is intended to have different
23 work to do, given different work. And we say that
24 different work is to investigate in the Authority the
25 capacity to over the subject or topic raised by the
26 request and to communicate that an investigation in
27 respect of that subject or topic has been completed and a
28 prosecution arises from that investigation into the
29 subject or topic.

30 HIS HONOUR: Do you say that the matter in Mr Phillips'
31 letters, his two letters of September and December 2021 -

1 I will go back a step. I presume it could be put against
2 you that assuming the focus is, as you say, on the matter,
3 why isn't the relevant matter an allegation that each of
4 the 26 individuals has contravened of the Act, because
5 that's the allegation that is made, so why isn't that the
6 matter, the obligation is to investigate that matter?

7 MR CRAIG: In my respectful submission, Your Honour, and I will
8 make this good by reference to the requests, the subject
9 or topic of the request is the hotel quarantine program
10 and the acts, matters or things said to constitute the
11 offence are then enumerated under that general subject or
12 topic. And so consistent we say with the obligations of
13 the Authority to investigate the subject or topic
14 identified by the request, the proper construction of the
15 matter is an obligation to investigate the hotel
16 quarantine program.

17 And that's the central controversy between us, and
18 that's what we actually seek to have resolved by reference
19 to a separate question, because if we are right about
20 that, it should bring this litigation to an end.

21 HIS HONOUR: Do you concede, and don't concede it if you don't
22 want to, but do you in fact concede that WorkSafe has not
23 conducted an investigation as to whether the individuals
24 named in Mr Phillips' correspondence have contravened the
25 Occupation Health and Safety Act.

26 MR CRAIG: I certainly don't concede that and it is a very good
27 reason as to why the separate question is appropriate
28 because if I am right about this, that is that the subject
29 matter is the subject or topic of the request then you
30 don't need to get to that second stage of detailed enquiry
31 which we do dispute the contention that there was no

1 relevant investigation within the meaning of the
2 legislation, and one doesn't get into the questions of
3 public interest immunity that are going to naturally
4 infect that enquiry about disclosure of investigative
5 sources, investigative methods and the like.

6 HIS HONOUR: Your first question seems fairly clear on the face
7 of your first point, that it is a mixed - it is a mixed
8 question of fact and law, do you accept that? Has the
9 defendant conducted an investigation of the matter
10 complained of? Well it would seem on the face of it to
11 raise a question of fact as to, well, what is the actual
12 investigation, if any, which has taken place? And then
13 there's the questioned of, well, is that investigation an
14 investigation of the matter complained of in the request.

15 MR CRAIG: Can I answer Your Honour's question in two parts,
16 and it might be convenient if I do that after taking you
17 through Mr Phillips' material. Can I take Your Honour to
18 Mr Phillips - - -

19 HIS HONOUR: As I am fond of saying, Mr Craig, you have
20 probably heard me say it before, that does seem to be the
21 pointy end of the stick.

22 MR CRAIG: Your Honour, it is the pointy end, and it is why I
23 want to address it with the benefit of Your Honour being
24 taken through some of the correspondence.

25 HIS HONOUR: Okay.

26 MR CRAIG: Can I ask Your Honour to take up Mr Phillips'
27 affidavit. And in particular Your Honour will, by way of
28 introductory matters, see Mr Phillips' role at paragraph
29 1, the executive director of Self-Employed Australia, a
30 not-for-profit association, and at paragraphs 6 through to
31 10 the circumstances in which Self-Employed Australia came

1 to take an interest in the hotel quarantine program.
2 Pausing there, Your Honour will see the heading of this
3 section of the affidavit, 'Breaches of the OHS Act in the
4 planning and operation of the hotel quarantine program.'
5 So the subject matter that is concerning Mr Phillips and
6 is embedded throughout the requests that follow, is the
7 planning and operation of the hotel quarantine program,
8 and Mr Phillips identifies that following the Coate
9 Enquiry into the hotel quarantine program, Your Honour
10 will see what is said at paragraphs 9 and 10 of the
11 affidavit.

12 At p15 of the exhibit, Mr Phillips exhibits the
13 request made to the Authority under s131 of the Act.

14 HIS HONOUR: Yes.

15 MR CRAIG: And Your Honour will see there, in the opening
16 paragraph, Mr Phillips' subjective consideration as to
17 occurrences, acts and omissions, to use his language,
18 constituting alleged indictable offences. And the
19 attachment or the second page of the request then
20 identifies each of the entities and persons under a
21 heading, 'List of entities, officers and persons I request
22 to be prosecuted including the offences I consider to have
23 been constituted by the occurrences, acts and omissions in
24 relation to the hotel quarantine containment program.'

25 At paragraph 2 of the letter, returning to the first
26 page, Your Honour will see that, again, Mr Phillips
27 reiterates that that subject matter of the request are the
28 occurrences, acts and omissions, and we emphasise this, in
29 relation to the planning, development, control, operation
30 and management of the hotel quarantine program.

31 So the subject or topic of this request, that is

1 what we submit is the matter within the terms of s131(2A)
2 is the Victorian Government's hotel quarantine program.

3 If Your Honour then goes to p22 of the exhibit, on 7
4 October 2020, WorkSafe communicates with Mr Phillips, and
5 at paragraph 3 of that letter Your Honour will see that
6 Mr Phillips is told that WorkSafe is currently conducting
7 an investigation into the program. And what Mr Phillips
8 is told is that he will be updated every three months, as
9 is the statutory obligation, as to the status of the
10 investigation and any decisions about whether any
11 prosecutions will be brought.

12 If Your Honour then goes to p27 of the exhibit
13 bundle, there's a further letter from Mr Phillips in
14 which, again, Your Honour, the focus is the hotel
15 quarantine program, and Your Honour sees that from the
16 first sentence of the opening paragraph. And in the
17 fourth paragraph, a contention that there was a failure to
18 provide and maintain safe systems of work in relation to
19 the hotel quarantine program.

20 At p35, Mr Phillips is again told that the
21 investigation into the quarantine program was ongoing, and
22 that he would be advised of the outcome once it was
23 completed.

24 In September 2021, what Mr Phillips then did was
25 write to each of the attorneys-general, the Ombudsman and
26 the Solicitor-General. It is not necessary to go to all
27 of those letters for today's purposes, Your Honour, but it
28 is useful to go to just one of them, and that's at exhibit
29 p68. And you will see Mr Phillips write here to the
30 Attorney-General in the second paragraph, under the word
31 'background', 'WorkSafe accepted my request and has been

1 investigating ... (reads) ... undisclosed earlier date.'
2 So Mr Phillips is expressing an understanding that the
3 investigation is into the hotel quarantine program.

4 On p87 of the bundle then, Your Honour, Mr Phillips
5 writes to WorkSafe and communicates that he has become
6 aware that WorkSafe has decided to commence prosecutions
7 against the Department of Health, and exhibits on p90 and
8 91, a communication from WorkSafe and a media release. I
9 would like to take Your Honour first to the letter to
10 Mr Phillips. You will see, Your Honour, first
11 introduction that WorkSafe commenced its investigation
12 into this matter, being the hotel quarantine program in
13 mid-2020, and has continued to provide you with progress
14 reports every three months in accordance with s131(2A) of
15 the Act. What WorkSafe then does is advise that
16 WorkSafe's investigation into this matter is completed,
17 and a prosecution has been brought against the Department
18 of Health as the responsible agency of the Crown. And
19 that WorkSafe has now brought a prosecution in respect of
20 the matter.

21 Now, Your Honour, the media release dealing with the
22 charges against the Department of Health is on p91.
23 Your Honour will see, the first paragraph of the media
24 release is that the charges relate to Victoria's hotel
25 quarantine program, and that the 17 breaches of s21(a) of
26 the Act are alleged, in that the department failed to
27 provide and maintain as far as reasonably practicable, a
28 working environment that was safe and without risks to
29 health for its employees. And a further 41 breaches
30 alleged in respect of s23(1) of the Act, in that it is
31 alleged that the Department of Health failed to ensure, so

1 far as was reasonably practicable, that persons other than
2 employees were not exposed to risks to their health and
3 safety arising from conducts of its undertaking.

4 If Your Honour then goes to the bottom of the page,
5 Your Honour will see reference to this complex
6 investigation took 15 months to complete, and involved
7 tens of thousands of documents and multiple witness
8 interviews. And that a review of the material from last
9 year's COVID-19 hotel quarantine enquiry provided relevant
10 context and information that formed parts of the
11 investigation.

12 Over the page, Mr Phillips exhibits the second page
13 of the media release, and Your Honour will see in the
14 second paragraph on that page, 'Enquiries into other
15 entities ... (reads) ... and agencies have concluded.'

16 Now, what Mr Phillips does as a consequences of
17 receiving that notification, that is that the
18 investigation of the matter is complete and that a
19 prosecution will be brought, is write the letter at tender
20 bundle 95, at Exhibit 95. And Your Honour will see that
21 in the second-last paragraph of that letter what
22 Mr Phillips, in effect, does is join issue on the proper
23 construction of what WorkSafe's obligation was under
24 s131(2A).

25 If Your Honour then goes to p98, that's a letter
26 from the Director of Public Prosecutions to WorkSafe in
27 which the Director identifies that because a prosecution
28 has been undertaken in respect of the hotel quarantine
29 program, the Director is no longer required to or has any
30 power to take steps under s131(4) of the Act, that is the
31 Director construes her obligations and the completion of

1 our obligations in the same way that we submit Your Honour
2 should do under the preliminary question.

3 So if Your Honour returns to s131 of the Act,
4 Your Honour will see that the Director's role is
5 introduced at subparagraph 3 and 4. First, at
6 subparagraph 3, that if a prosecution will not be brought
7 or no prosecution has been brought within nine months, the
8 Authority must prefer again, and we focus on these words,
9 the matter, to the DPP. So the matter has consistent
10 terminology from subparagraph 2A into subparagraph 3, the
11 obligation of referral, is not the request or the
12 consideration of the acts, matters or things, alleged to
13 constitute the offence, but the matter which is under
14 investigation by the Authority. And so if no prosecution
15 had been brought, an obligation would have arisen on the
16 part of WorkSafe to refer the subject or topic of the
17 hotel quarantine enquiry to the Director of Public
18 Prosecutions for considerations.

19 Subparagraph 4 then imposes on the Director a
20 requirement to consider, again, the matter, and the
21 Director has to determine whether a prosecution should be
22 brought.

23 HIS HONOUR: So this correspondence, it is headed, 'Referral
24 pursuant to s131 by Mr Phillips'. So the letter, where do
25 I find the letter of 29 September 2021 from Mr Roston?

26 MR CRAIG: Your Honour, that may not be in the exhibit bundle,
27 that is a letter from Roston to the Director. I will just
28 double check that.

29 HIS HONOUR: I think that's potentially significant, Mr Craig,
30 to put this letter into context.

31 MR CRAIG: Yes. The short point, though, Your Honour, is on

1 the face of the Director's letter, what is observed is
2 that the Director has observed that WorkSafe has brought a
3 prosecution in relation to the hotel quarantine program
4 and that the Director takes the view a consequence that no
5 obligation therefore arises on her part under sub-s.(4) of
6 the Act.

7 HIS HONOUR: I would be slow to be drawing any firm conclusions
8 at all without seeing the letter of 29 September,
9 Mr Craig.

10 MR CRAIG: If Your Honour pleases.

11 HIS HONOUR: If you want to press that submission, you will
12 need to provide me with a copy of that letter.

13 MR CRAIG: If Your Honour pleases.

14 HIS HONOUR: You have heard what I have said.

15 MR CRAIG: I do. And so Your Honour will see, in our
16 respectful submission, having worked through the
17 correspondence of Mr Phillips's affidavit, that the facts
18 annexed in Annexure B to our written submission are not in
19 issue. And our learned friends don't say to Your Honour
20 they are in issue. Each of those facts is uncontested,
21 and we say to Your Honour each of those facts, taken on
22 their own, are sufficient to dispose of the preliminary
23 questions, because once it is accepted that there is an
24 investigation into the hotel quarantine program, there has
25 been within the meaning of the Act an investigation of the
26 matter under s131(2A), and each of the orders sought and
27 relief prosecuted under the originating motion cannot be
28 achieved once that proper construction of the Act is
29 identified.

30 So contrary to our learned friend's submission,
31 there is no factual controversy required to resolve the

1 separate questions, because the investigation of the
2 matter proceeds on the basis that the matter is the hotel
3 quarantine program and it is accepted and understood that
4 the hotel quarantine program was investigated.

5 Now, what our learned friends want to do,
6 Your Honour, is issue 20 subpoenas and have a six day
7 trial, on their estimate, in relation to all of the
8 investigations done by WorkSafe of each of the identified
9 parties in the request, and to seek to interrogate that
10 investigative process and reasoning behind the prosecution
11 of the Department of Health in contradistinction to the
12 other identified entities and individuals.

13 And we say that is a wholly inappropriate course, in
14 circumstances where, on the identified facts, the relief
15 that they seek cannot be granted. And I want to make that
16 proposition good by reference to the originating motion,
17 if I might.

18 HIS HONOUR: Just before you go to that, what, if anything, do
19 you say turns on the fact that the relevant provisions of
20 the Occupational Health and Safety Act which are alleged
21 to have been breached by the individuals who are listed in
22 Mr Phillips's letter of 29 September 2020, the
23 individuals, all of the individuals - there's about 20 of
24 them. The allegation is that the provisions which have
25 been breached are ss.26, 32, 39G and 144 as opposed to
26 s.21 and various sub-sections, s.22 and various
27 sub-sections, s23, 26, 32 and 385 in respect of the
28 entities. So there are allegations of breaches of
29 different provisions of the Act in respect of the
30 individuals compared to the entities.

31 MR CRAIG: Yes.

1 HIS HONOUR: I am not expressing any concluded view at all but
2 I would have thought that is a relevant matter, a relevant
3 consideration as to what the matter is. If the allegation
4 is of a breach of a different provision of the Act, isn't
5 that a different matter, Mr Craig?

6 MR CRAIG: In our submission, no. That's the central
7 controversy. But what Your Honour fastens on is what the
8 Authority needs to do and what Your Honour needs to do on
9 the trial of the preliminary question, is determine, on
10 the face of the request, and by reference to matters known
11 to the Authority, what is the subject or topic requiring
12 investigation.

13 Now, Your Honour, what's plain on the face of the
14 legislation is that sub-clause 1 starts with a subjective
15 consideration of what offences might be.

16 HIS HONOUR: Yes.

17 MR CRAIG: But in our respectful submission, the focus on the
18 matter necessarily confers on the Authority the ability to
19 identify the objective subject or topic raised by the
20 request because, as Your Honour knows, this isn't a
21 referral from a discrete body trained in the law or in
22 prosecuting offences, these are referrals coming from
23 individuals from a wide range of parts of society in which
24 the relevant section numbers may or may not be right, may
25 or may not be complete, there may be multiple requests
26 coming in from multiple organisations or persons covering
27 the same subject or topic but raising different potential
28 offences.

29 And so what we say to Your Honour is nothing turns
30 on the precise identification of the offence in question
31 for the purpose of determining the matter; what WorkSafe

1 is charged with doing is actually investigating the
2 subject or topic raised by the request. Because to do
3 otherwise would be to narrow, to unduly fetter or narrow
4 WorkSafe's obligation. The matter in that context
5 broadens it to make sure that WorkSafe isn't an obligation
6 to examine the raison d'être of the complaint, the subject
7 and topic raised by the claim.

8 So to take an example, one might, in a completely
9 different field, have a complaint raised about the
10 provision of a safe place of work in relation to the
11 collapse of a wall. And the subject or topic that
12 WorkSafe is investigating is the collapse of the wall and
13 the surrounding workplace environment and circumstances on
14 that day that led to the collapse. They are confined in
15 their investigation to investigate the offence identified
16 by the person who forms the subjective consideration.

17 And so our respectful submission is nothing turns on
18 the identification of the specific offence for the purpose
19 of determining WorkSafe's obligation. WorkSafe's
20 obligation is to investigate the subject or topic raised
21 by the request, which is naturally a more general and
22 broader concept. And that's the central debate.

23 Your Honour can appreciate, we hope, that debate can
24 be heard and determined very quickly. Because one is not
25 going to bring further facts or matters before the court;
26 what we want to have decided is admitting and accepting
27 that the investigation into the hotel quarantine program
28 occurred, which our learned friends must accept because
29 they accept the Department of Health has been charged and
30 they don't take issue within their submissions, accepting
31 all of the correspondence that's been issued, was that

1 investigation an investigation of the matter within the
2 terms of the Act. And we say that's a straightforward
3 question, capable of being resolved within one day.

4 Can I take Your Honour to why that disposes of the
5 litigation? If Your Honour takes up the originating
6 motion, Your Honour will see that paragraph 1 of the
7 relief sought by the plaintiff is an order in the nature
8 of mandamus, that the defendant investigate the
9 occurrences of the remaining acts, matters or things.

10 Now, Your Honour, if the subject of the obligation,
11 that is the matter, was the hotel quarantine program, that
12 allegation and that claim must fall away. That is,
13 proposed order 1 and ground 3A of the originating motion
14 must fall away, because there has been an investigation
15 of the hotel quarantine program. So that deals with
16 proposed order 1 or proposed claim 1.

17 Proposed claim 2 is an obligation or seeks an order
18 in the nature of mandamus requiring the Authority to give
19 reasons as to why it is not prosecuting the remaining
20 individuals identified. Now, again, if one goes to the
21 statutory text, that obligation only arises if no
22 prosecution has been brought in respect of the matter.
23 And we say a prosecution is being brought in respect of
24 the matter, that is the prosecution of the Department of
25 Health.

26 HIS HONOUR: Just so I am clear on this, where in your written
27 submissions do you articulate exactly what it is that you
28 say the matter complained of in Mr Phillips'
29 correspondence is, what do you say the matter is?

30 MR CRAIG: Your Honour, we say the matter is the hotel
31 quarantine program.

1 HIS HONOUR: Have you put that in your written submissions? I
2 am just trying to pin you down in writing, if I may.

3 MR CRAIG: Yes. I will double check that, Your Honour. We may
4 not have, Your Honour.

5 HIS HONOUR: It is a pretty big omission, Mr Craig, if you will
6 pardon me saying so, given the last half hour of your
7 submissions. I want to be precise.

8 MR CRAIG: Yes.

9 HIS HONOUR: I want to know precisely what your submission is
10 on that point, all right.

11 MR CRAIG: Yes.

12 HIS HONOUR: If you want to put it in writing after the
13 hearing, I will give you leave to do that.

14 MR CRAIG: Thank you, Your Honour. Of course, Your Honour,
15 that is a submission as to the proper construction of the
16 term. The question we identify for Your Honour is what is
17 the matter to which the obligation attaches, and on the
18 hearing of the preliminary question, our submission will
19 be that which I have articulated to Your Honour, that is
20 that the matter to which the obligation to inform attaches
21 is the hotel quarantine program.

22 HIS HONOUR: All right, if that's your submission, that's your
23 submission. But you put that in writing, please. So your
24 submission is that for question 1, has the defendant
25 conducted an investigation of the matter complained of in
26 the request dated 29 September 2020, the matter complained
27 of means, is, the hotel quarantine program.

28 MR CRAIG: Yes.

29 HIS HONOUR: That's your submission.

30 MR CRAIG: Yes.

31 HIS HONOUR: You don't need to put that in writing, that's in

1 the transcript.

2 MR CRAIG: Thank you. Your Honour will see at paragraph 12 of
3 our written submission, perhaps a lit bit cryptically, we
4 do set out our position. Your Honour will see we are
5 identified by reference to Exhibit KP1 90 to 92, that
6 includes some of the correspondence to which I took
7 Your Honour, that we identified on p90 that prosecutions
8 had been brought with individuals associated with the
9 initial iteration of the hotel quarantine program, and
10 that the investigation into that matter commenced in
11 mid-2020, and that the investigation into that matter was
12 completed and a prosecution had been brought.

13 So we haven't, in a sense, shied from that position,
14 Your Honour, that's our consistent position in the
15 correspondence communicated to SEA that the matter
16 requiring consideration objectively arising on the request
17 issued by Mr Phillips was the hotel quarantine program.

18 HIS HONOUR: Thank you.

19 MR CRAIG: Your Honour, clearly, in our respectful submission,
20 there is utility in having that determined because if
21 that's right, proposed claim 1 falls away, there is no
22 obligation attaching to any other requirement of
23 investigation. Proposed claim 2 falls away because it
24 cannot be sensibly contended that a prosecution has not
25 been brought in respect of the matter. And if Your Honour
26 goes to proposed claim number 3, the obligation of
27 referral, no obligation of referral arises under s131(3)
28 of the Act to the Director because again a prosecution has
29 been brought with respect to the matter.

30 So the matter is central to the disposition of our
31 learned friend's claim. If our construction is right,

1 their claim must fail. And one can deal with that in one
2 day, half a day, having regard to the fact we rehearsed a
3 number of the arguments with Your Honour today, and in our
4 respectful submission, that's a ripe question of
5 construction for determination having regard to the fact
6 that it can be dealt with on the basis of the facts
7 already contained in our Annexure B and our learned
8 friends's affidavit material.

9 HIS HONOUR: My personal experience both at the Bar and as a
10 judge is that the question of what constitutes a matter
11 can be a very thorny one, Mr Craig, and as we know in
12 context and constitutional context, there's an awful lots
13 of pages in Commonwealth Law Reports taken up to
14 addressing what is a matter. Do you say none of those
15 cases are relevant?

16 MR CRAIG: They are relevant in this sense, Your Honour.

17 HIS HONOUR: I will just say one more thing, because sitting
18 here at the moment, without having refreshed my memory in
19 relation to all those cases, I would have thought a matter
20 would embrace, on one view, that a matter would embrace an
21 allegation of a specific - of a breach of a specific
22 provision of an Act.

23 MR CRAIG: It is a broader concept. So consistent with my
24 submission that the obligation is to investigate the
25 subject, or the topic raised by the request. And so
26 Your Honour needs - - -

27 HIS HONOUR: I don't remember ever seeing the word 'topic' in
28 any of the cases I have read understand the meaning of a
29 matter in a constitutional sense.

30 MR CRAIG: Quite, Your Honour, we are obviously not dealing
31 with the matter in a constitutional sense here, we are

1 talking about a matter in a different piece of State
2 legislation and starting with the dictionary definition,
3 the dictionary definition of a matter is a subject or
4 topic.

5 So starting from first principles, and recognising
6 that what the Authority has to do at the outset is
7 identify the matter requiring investigation, and
8 recognising the ordinarily broad import of the term 'a
9 matter', and recognising the Authority's function in this
10 regard to protect workplace health and safety, and
11 recognising where these requests originate from, all these
12 things, we say, informs that the proper construction of
13 the word 'a matter' or 'the matter' is a broad concept of
14 the subject or topic raised by the request.

15 And Your Honour doesn't need - in recognising
16 complexity, Your Honour, it is important to observe that
17 it is not factual complexity, because under the scheme of
18 the legislation, what the Authority has to be able to do
19 is identify the matter which it is investigating. It has
20 to be observable on the face of the materials presented to
21 it. And so one isn't embracing or embarking upon a
22 detailed factual enquiry whereby the facts can change what
23 the matter is. On the present case what is being
24 identified is a series of allegations in a request
25 relating to the subject matter of the hotel quarantine
26 enquiry.

27 And we say that inexorably leads to the conclusion
28 that what WorkSafe was under an obligation to do was
29 investigate and report on the hotel quarantine enquiry.

30 HIS HONOUR: You seem to be relying primarily upon the
31 dictionary definition of matter.

1 MR CRAIG: Well, we say, Your Honour, that clearly informs the
2 way in which it might be construed, together with the fact
3 that a different phraseology is used in each of those
4 sub-sections of the Act, together with the origin of the
5 request, as I have submitted to Your Honour. The origin
6 of the request can be any member of the public, there can
7 be multiple requests, undercover of the same subject
8 matter but raising different sections. There is the
9 prospect of the vexatious requests.

10 And so if one looks at, in our submission - we will
11 develop this at the hearing of the separate question - if
12 one looks at the objects of the Act and the roles and
13 responsibilities of the Authority, we say our construction
14 of the word 'the matter' is consistent with the
15 achievement of the objects of the Act and ensuring that
16 what is proposed in the Authority is the obligation to
17 look at the big picture rather than confine itself to what
18 a specific person considers to be the relevant offence, or
19 the relevant act or omission. This is a broader
20 obligation at a higher level of generality.

21 HIS HONOUR: If you look at 131(a), what you describe as the
22 gateway, if you take the edification of the offences by
23 the individuals, which are attached to the letter of 29
24 September 2020, it seems fairly clear that for the
25 purposes of 131(a), Mr Phillips considers that the
26 occurrence of an act, matter or thing constitutes an
27 offence by those individuals who are named against the Act
28 and he has identified the relevant sections of the Act,
29 which he says have been breached and he has asked for a
30 prosecution to be brought against those individuals.
31 That's pretty clear, isn't it?

1 MR CRAIG: Yes, Your Honour.

2 HIS HONOUR: But you say that, well, that's just the gateway,
3 when you get to what the Authority is required to do, it
4 is required to investigate the matter.

5 MR CRAIG: Yes, and the legislation - - -

6 HIS HONOUR: The matter being, it is required to investigate
7 whether or not - it is required to investigate the hotel
8 quarantine program. It is not required to investigate
9 whether the individuals have committed the alleged
10 offences.

11 MR CRAIG: Its obligation is to investigate the program and to
12 determine whether a prosecution will be brought. And the
13 legislation, in my respectful submission, using very
14 different language in 2A and following.

15 HIS HONOUR: I just want to be clear on your submission. Your
16 submission is that where an individual passes through the
17 gateway of 131 by alleging that another individual has
18 committed an offence against a specific provision of the
19 Act, as has occurred here, there is no obligation on the
20 Authority to investigate that alleged contravention of the
21 Act by that individual.

22 MR CRAIG: That would follow, Your Honour, because the
23 obligation of investigation attaches to the subject or
24 topic identified, yes. For the very reason that I
25 identified for Your Honour, that this reposes in a person
26 the ability to form a subjective judgment, but the
27 obligation of investigation attaches to a more general
28 broader subject matter, and the obligation attaches to
29 communicate whether a prosecution, wholly untethered.

30 HIS HONOUR: There just seems to be a bit of disconnect between
31 - on your submission there would be a bit of a disconnect

1 between the introductory words of 2A and (a), because 2A,
2 if the offence the subject of a request, so without naming
3 any of the individuals, numerous of the individuals are
4 alleged to have breached s26 of the Occupational Health
5 and Safety Act, which is an indictable offence. That's
6 clearly the case. So the opening words of 2A. We have an
7 identified offence, s26, it is an indictable offence, the
8 Authority must, within three months after receiving the
9 request, report in writing to the person who has made the
10 request advising that the Authority's investigation of the
11 matter is complete.

12 So your submission is that notwithstanding the fact
13 that the offence which has been identified is a breach of
14 s26, an indictable offence, and the Authority must report
15 back within three months, it doesn't actually have to have
16 conducted any investigation at all into whether or not
17 there has been a breach of s26.

18 MR CRAIG: Your Honour and I are at slight cross-purposes.

19 Offence in that section, again, is a gateway to the
20 obligation of the Authority, and so the identifiable
21 offence having been identified, the Authority then has to
22 investigate the matter, has to look at the subject. And
23 that's consistent, we say, with the obligation to look at
24 things in a broader more holistic subject orientated - - -

25 HIS HONOUR: It doesn't have to investigate whether or not the
26 alleged offence - - -

27 MR CRAIG: A specific sub-section of the Act has been breached,
28 it is investigating the subject or topic and forming a
29 view as to whether any form of prosecution should be
30 brought.

31 What this legislation is doing is effecting a

1 transition between the subjective consideration of the
2 complaining member of the public, potentially, or the
3 requesting member of the public, and placing on the
4 Authority an obligation to look at the holistic subject
5 matter and determine whether a prosecution should be
6 brought.

7 And we say that is entirely consistent with our
8 statutory function, but also the fact that this isn't a
9 filter, as it were, from a police informant, for example,
10 or another form of trained referring or informing party.
11 By reference to the identification alleged, indictable
12 offence, our obligation is to investigate the subject
13 matter.

14 HIS HONOUR: Can I ask you, have you identified any authorities
15 in relation to the consideration of a matter outside of
16 the well-known constitutional framework?

17 MR CRAIG: None that I can point to in the specific context,

18 now. Can I reflect on that and perhaps deal with that in
19 reply, if that's convenient to Your Honour.

20 HIS HONOUR: But it does seem to me that your - I think you
21 would not be enlivening all of those cases that arise in
22 the constitutional context.

23 MR CRAIG: Well, a matter in the constitutional context,
24 obviously, requires consideration of the claims forming
25 the underlying controversy.

26 HIS HONOUR: The matter is the controversy.

27 MR CRAIG: Correct.

28 HIS HONOUR: On one view of it, you see, that's against you,
29 because the justiciable controversy here is there an
30 allegation that all of these individuals have breached

31 s26. So it seems, Mr Craig, that you would not be relying

1 on those cases; you are relying on a dictionary
2 definition.

3 MR CRAIG: But, Your Honour, in a sense, closing the Authority
4 into an investigation of 'a justiciable controversy' can't
5 serve the objects and purpose of the Act. Because, as I
6 say to Your Honour, what it does is it actually takes the
7 subjective consideration of the individual and allows them
8 to define - - -

9 HIS HONOUR: That's fine, I just want to be clear what your
10 submission is, Mr Craig.

11 MR CRAIG: Thank you, Your Honour.

12 HIS HONOUR: I am not trying to force you into a position. But
13 I do want to understand what your submission is as to
14 whether or not any guidance is to be obtained as to the
15 meaning of 'matter' in s131(2A) from the raft of cases
16 which have considered the concept of a matter in the
17 constitutional sense and which, broadly speaking, it is a
18 justiciable controversy.

19 MR CRAIG: Now, Your Honour, the circumstances in which the
20 language is used in this section are clearly different,
21 and there is no 'justiciable controversy', what is there
22 is an obligation to report on an investigation. And so
23 obviously these are matters that we will develop on the
24 hearing of the preliminary question, but there would be
25 sound reasons, in our respectful submission, not to close
26 the Authority's obligation of investigation and reporting
27 to that which is identified by a member of the public as
28 being a breach of the Act.

29 HIS HONOUR: It seems to me it is very important for me to get
30 as grasp of exactly how you are putting your case here,
31 Mr Craig, because you are pushing the efficiency,

1 efficient use of judicial resources agenda, but it is very
2 apparent from sitting here, and the exchange we are
3 having, that you are in fact raising a very complicated
4 legal issues.

5 Now, once you get into the legal concept of matter,
6 it is complicated and there's a raft of Authority which
7 has dealt with it, and frankly, the suggestion that you
8 could deal with this question in half a day strikes me as
9 improbable, to say the least. And you haven't actually -
10 you haven't been able to identify, it seems, any Authority
11 on point. I would imagine there, on the point in terms of
12 Occupational Health and Safety Act, as to the meaning of
13 matter - - -

14 MR CRAIG: It hasn't been considered.

15 HIS HONOUR: It hasn't been considered.

16 MR CRAIG: That's the issue, Your Honour. So it is uniform
17 section across the country and it hasn't been considered
18 across the country so that is a non-question.

19 HIS HONOUR: Okay.

20 MR CRAIG: And of course adopting a Project Blue Sky approach,
21 Your Honour is confronted with the context and purpose of
22 this legislation. And so Your Honour will say to me, at
23 the hearing of the preliminary question, 'These cases
24 don't help me, Mr Craig, very much because what I have got
25 to do is construe the meaning of the word in the context
26 and purpose of the Act.' And that's what we are focusing
27 on, Your Honour. There has been a clear departure in the
28 use of the language and so, with respect to
29 Your Honour - - -

30 HIS HONOUR: It seems to me you would be driven to concede that
31 the preliminary question that you are raising raises a

1 difficult issue of statutory construction. Do you accept
2 that?

3 MR CRAIG: I accept that there is a contest on the proper
4 construction of this clause, but, Your Honour, we say
5 there are sound reasons, which I have identified today, as
6 to why the matter must have the meaning for which we
7 contend. Now, Your Honour says to me, it is a difficult
8 question of statutory construction, accepting that to be
9 so for the purpose of the argument, that's no reason not
10 to decide it, Your Honour. In fact it is a sound reason
11 to decide it. Because what Your Honour doesn't want to do
12 is embark on a situation where it is dealt with as part of
13 a six day, 20 subpoena trial, and one is going to the
14 Court of Appeal on all issues and it is determined that
15 the construction of the Act is miscarried and various
16 enquiries that should have been made weren't made or
17 various enquiries were completely wasted.

18 HIS HONOUR: All I am trying to get a sense of how, assuming in
19 your favour, that there was a separate question, as to
20 what's actually going to be involved.

21 MR CRAIG: Yes.

22 HIS HONOUR: In terms of disposing of that question and, as I
23 am raising with you, it seems in that assessment, a
24 relevant consideration is that the question of
25 construction which you raise strikes me as a difficult
26 one.

27 MR CRAIG: And, Your Honour, we say that is a reason to take it
28 as a separate question, not avoid it, because if it is a
29 difficult question, one must interpolate it is more likely
30 to be appealed and so the clarity of a Court of Appeal
31 judgment on the proper construction sooner rather than

1 later is in the best interests of all the parties.

2 And the counter factual here, Your Honour, is very
3 unsatisfactory. It is an all issues judicial review
4 proceeding on competing constructions of the Act,
5 subpoenas to 20 or so individuals and departments, six
6 plus days of trial and - - -

7 HIS HONOUR: Because the prospect of interlocutory appeals is
8 generally one of the matters which weighs against the
9 splitting of the trial, and you quite reasonably, I think,
10 acknowledge, that if this issue is hived off, whichever of
11 the parties is dissatisfied with the result, is highly
12 likely to appeal.

13 MR CRAIG: In our respectful submission, Your Honour, the
14 consequence of winning on the separate question is - - -

15 HIS HONOUR: Is that a yes?

16 MR CRAIG: I think I must accept that, in fact, I advance that
17 submission.

18 HIS HONOUR: Yes.

19 MR CRAIG: But the proposition I am advancing, Your Honour, is
20 that the consequence of success on our part is dismissal
21 of the proceeding. That must follow. And so what is not
22 dealing with interlocutory appeals per se which don't
23 dispose of the entirety of the proceeding; if we succeed,
24 as we say we will, proceeding is dismissed, our learned
25 friends go upstairs, if they contest it, and if they lose,
26 that's the end of the matter; if they win, we have got the
27 guidance of the Court of Appeal on the proper construction
28 of the section. In our respectful submission, that is a
29 far preferable course to several months, if not years, of
30 dispute in circumstances where that same prospect of
31 appeal arises at the end of a long contested trial. If

1 Your Honour pleases.

2 Is there anything further I can assist Your Honour
3 with?

4 HIS HONOUR: Well, I am not going to press you to keep talking
5 if you don't want to, Mr Craig, if you have finished your
6 submissions. I have asked you a few questions, I am not
7 trying to cut you off.

8 MR CRAIG: Thank you, Your Honour. I will just check with
9 Mr Hibbard. If Your Honour pleases, those are our
10 submissions.

11 HIS HONOUR: Thank you, Mr Craig. Yes, thanks, Mr Rinaldi.

12 MR RINALDI: Your Honour, we rely on the written submissions
13 that have been filed for the plaintiff, respondent to the
14 application, and I have noted Your Honour's mention that
15 you have had the opportunity to read those.

16 HIS HONOUR: I have read them, thanks, Mr Rinaldi. I think
17 really what it boils down to is, Mr Craig says, well, if
18 the notion of a matter in s131 is construed as he
19 contends, that is that the matter complained of in
20 Mr Phillips' letter is the hotel quarantine program, if it
21 is so construed, he says that's the end of the case
22 because the objective fact is that that matter has been
23 investigated. So he is basically saying the hook here is
24 the meaning of the matter.

25 MR RINALDI: Yes.

26 HIS HONOUR: In s131. If it is construed as he says, that's
27 the end of the case. So do you take issue with that
28 proposition? Because I see your submission where you say,
29 well, the question as formulated - as I understand your
30 submission, it is that the question as formulated, it
31 raises a question of fact, that is, you know, what is the

1 investigation which has been undertaken, and you say, the
2 answer to that question really would be informed by
3 discovery and a lot of evidence about actually who did
4 what and what they looked at. And I get all of that.

5 MR RINALDI: Yes.

6 HIS HONOUR: But if Mr Craig is correct that the matter
7 complained of by Mr Phillips for the purposes of s131 and
8 the obligation to investigate is the hotel quarantine
9 program, he says, well, objectively, that matter has been
10 investigated. I think that's sort of the battleground,
11 isn't it?

12 MR RINALDI: Yes, I think so, Your Honour. And the difficulty
13 with Mr Craig's argument which he advanced valiantly is
14 that it ignores the subject of the request. And as
15 Your Honour is already alive to and have noted already,
16 there's a disconnect. So what enlivens the request is
17 probably most sharply thrown into relief by looking at
18 paragraph 11(a) of the defendant's primary submissions.
19 And you will note that Mr Craig has referred to dictionary
20 definitions, we haven't actually been taken to any
21 dictionary definitions that say that a matter is a subject
22 or a topic. And obviously the whole thrust of his
23 argument and the interests of his client is to make it
24 broader and to say, well, we have investigated the hotel
25 quarantine program, whatever that is.

26 HIS HONOUR: Yes.

27 MR RINALDI: Because we have charged one entity. In 11(a), my
28 learned friends say that those sub-sections, 131(2A) and
29 2A(a) speak of WorkSafe investigating a matter. So their
30 whole hook, the whole foundation of their argument, as
31 Your Honour has already noted, is to differentiate between

1 the word 'matter' used in those later sub-sections of
2 s131, and its origin.

3 In the second sentence of 11(a) of my learned
4 friend's submissions, they say that they do not require,
5 that is those sub-sections, WorkSafe to investigate an
6 occurrence or offence or prosecution.

7 With respect, I disagree. Section 131, taken as a
8 whole, in context, which it has to be taken as under the
9 Project Blue Sky principles, does require the
10 consideration of occurrences because that is the seminal
11 phrase in s131(1). That's where it all begins from,
12 that's what gets the ball rolling in this case.

13 HIS HONOUR: I understand that. I understand that you
14 obviously disagree with Mr Craig in terms of how you
15 construe the meaning of 'matter' in s131, but I think an
16 important point is, assuming against you that the word is
17 construed, and the section is construed as Mr Craig
18 contends, it would seem, sitting here at the moment - I
19 want to hear your submission - but it would seem to me
20 that Mr Craig is right, if the point is construed in his
21 favour and the obligation to investigate the matter was
22 discharged which an investigation into the hotel
23 quarantine program, that the relief you seek in the
24 originating motion falls away.

25 MR RINALDI: Your Honour, I wouldn't concede that the
26 prosecution of one entity, the Department of Health,
27 answers the question posed, proposed question number 1,
28 which is set out at paragraph 14 of my learned friend's
29 submissions, has the defendant conducted an investigation
30 of the matter, assuming for these purposes, as Your Honour
31 said, that the matter means the subject or topic of the

1 hotel quarantine program, I wouldn't concede that that
2 factual question, that mixed which of fact and law, has to
3 be answered in the affirmative.

4 Justice Brooking, which interestingly is the very
5 last submission that my learned friend has made in their
6 reply submissions, makes that point very clear in Jacobson
7 v Ross, and you will see it at paragraph 1 of our
8 submissions in rely of my learned friends, you will also
9 see it in our submissions quoted at paragraph 6, **that the**
10 **separate question approach is possible only where the**
11 **question to be determined is one of law, not one of mixed**
12 **law and fact, that is demurrer type of approach.** What we
13 have here isn't a demurrer, Your Honour, and it is not a
14 **summary dismissal application, it is an application for a**
15 **separate question** and that's to be considered according to
16 the authorities when a separate question is of utility,
17 and they are set out in paragraph 2, the principles are
18 set out in paragraph 2 of our written submissions in
19 reference to Murphy v Victoria, and as the first principle
20 noted by the court in that case, is that **the separate**
21 **trial should be ordered under rule 47.04, only with great**
22 **caution and only in a clear case.**

23 This simply isn't such a clear case. The type of
24 clear case that normally lends itself to this procedure is
25 one which is a question of law that truncates the trial or
26 perhaps disposes of the matter.

27 Now, taking my learned friend's argument at its
28 highest, if the question of law is the meaning of matter,
29 that is the complex question of statutory interpretation
30 to which Your Honour referred, then that is not something
31 which can clearly be dealt with in the absence of

1 evidence, having regard to the separate question that's
2 proposed. And more importantly, in my submission, the
3 submission that my learned friend makes that one can
4 ignore the subject matter of the request and just, in the
5 case of WorkSafe, investigate what you think is relevant,
6 not the fact that there's been allegations of
7 contraventions of a number of nominated sections of the
8 Occupational Health and Safety Act by 27 entities,
9 including individuals, that just doesn't pass muster
10 because when you look at the scheme of s131, it is
11 critical to look at that, where the whole process begins.
12 And that is, s131(1), set out in various places, the
13 annexure to my learned friend's submissions, the annexure
14 to hours. Section 131(1) the commencement of all this is,
15 'If a person considers' - and my learned friend accepts
16 that the person doesn't need to be any one in particular,
17 so there is no issue of standing here. 'If a person
18 considers that the occurrence of an act, matter or thing
19 constitutes an offence against this Act.'

20 So Mr Phillips, on behalf of Independent Contractors
21 of Australia Incorporated, trading as Self-Employed
22 Australia, has considered, on 29 September, when he has
23 written the first request, that the occurrence of acts,
24 matters or things constituted offences against the
25 Occupational Health and Safety Act by the entities and
26 individuals listed on the second page of his request.
27 That's the beginning.

28 In many ways, Your Honour, if one was redrafting,
29 and I certainly don't want to tell the current President
30 of the Court of Appeal how it should have been drafted,
31 for the Maxwell Report that gave rise to this legislation,

1 but one could say, one could easily have defined, because
2 the effect of these provisions, read together in context,
3 is that that the phrase, 'the occurrence of an act, matter
4 or thing', if one was perhaps drafting an agreement, one
5 might define that with a capital M and call it matter.

6 That's, in effect, what the legislature has done, in
7 my submission, in s131, when it refers to the matter in
8 131(2A)(a), the Authority's investigation of the matter is
9 complete, that's used in the sense of the composite phrase
10 in 131(1)(a), because it is harking back to that, because
11 that's the beginning of the process and it is inseparable
12 from it.

13 HIS HONOUR: Your contention, just let me be clear on this,
14 your contention is that if you look at the letter of 29
15 September 2020 and if you look at all of the individuals -
16 I will just focus on the individuals for the time being -
17 that, effectively the contention that those individuals
18 have breached the identified provisions of the
19 Occupational Health and Safety Act is a matter, is that
20 your contention, is a matter for the purposes of s131?

21 MR RINALDI: Yes.

22 HIS HONOUR: And there was an obligation to investigate.

23 MR RINALDI: Yes, Your Honour.

24 HIS HONOUR: And then you want not just investigation, and to
25 prosecute.

26 MR RINALDI: And if no prosecution, give reasons why a
27 prosecution won't be brought, which is 131(2A)(a)(ii) and
28 then if one is not to be brought, refer it to the DPP
29 under 131(1), 131(3).

30 HIS HONOUR: It does seem to me - and I know you are only
31 meeting the application which is before the court, but it

1 does strike me that the defendant here could have
2 formulated a question of law that it would be very
3 difficult for you to resist the proposition that if the
4 question of law was determine in the defendant's favour,
5 it would dispose of the case. For instance, if the
6 question of law was - if it simply identified one of the
7 individuals who was named in the long list there, if the
8 question of law was, does the contention that X
9 contravenes s25, s26, s39G and s144, constitute a matter
10 for the purposes of s131, that's a straight question of
11 law, you know, does an allegation of a breach of these
12 sections constitute a matter - - -

13 MR RINALDI: Yes, which we would say it does because it is the
14 occurrence of an act, matter or thing.

15 HIS HONOUR: You would say it does.

16 MR RINALDI: But - - -

17 HIS HONOUR: But if that question was determined against
18 you - - -

19 MR RINALDI: If that was the separate question, it would be a
20 straight question of law.

21 HIS HONOUR: It would be a straight question of law.

22 MR RINALDI: It wouldn't be about whether an investigation had
23 occurred.

24 HIS HONOUR: No.

25 MR RINALDI: Which is the way the question is presently framed.

26 HIS HONOUR: No. If you take out of the question the reference
27 to investigation, it is a straight question of law, and if
28 the straight question of law is determined adversely,
29 determined against you, it seems, unless I am missing
30 something, it seems the relief you are seeking - I am
31 struggling to see how you would succeed in getting that

1 relief. That's the gravamen of your whole case, isn't it,
2 the gravamen of your case is you have identified 27
3 entities/individuals.

4 MR RINALDI: Yes.

5 HIS HONOUR: The Department of Health has prosecuted only one
6 of those entities. Sorry, WorkSafe has prosecuted one of
7 those entities, the Department of Health.

8 MR RINALDI: Yes.

9 HIS HONOUR: And you are saying, well, hang on, what about the
10 other 26.

11 MR RINALDI: Indeed.

12 HIS HONOUR: We have - we, your client, have contended that
13 those other 26 entities/individuals have also - have
14 contravened specific provisions of the Act.

15 MR RINALDI: Yes.

16 HIS HONOUR: And you, WorkSafe, are obliged to investigate that
17 and prosecute and you haven't.

18 MR RINALDI: Or tell us why you don't.

19 HIS HONOUR: Now, if it be the case that the
20 contention/allegation that those other
21 entities/individuals have breached the provisions of the
22 Act, if that is not a matter for the purposes of s131, it
23 seems to me your relief doesn't get off the run way. I am
24 sorry, and I don't want to be unfair to you, Mr Rinaldi,
25 because I realise that, you know, this isn't the case you
26 are meeting.

27 MR RINALDI: No.

28 HIS HONOUR: This isn't the case you are meeting. But it seems
29 to me that if the focus was on matter rather than
30 investigation, that there might be, you know, there might
31 be some utility in addressing that matter by way of a

1 separate hearing.

2 MR RINALDI: Certainly which accept, Your Honour, that matter
3 is a question of law. If you look at the way proposed
4 question 1 is framed at paragraph 14 of my learned
5 friend's submission, the matter is the legal component of
6 that mixed law and fact question, and the 'has the
7 defendant conducted an investigation' is the factual
8 component.

9 HIS HONOUR: Yes, but the problem with the way question 1 is
10 formulated is that it is a bit woolly in the sense that it
11 takes you back to - it begs the question, what is the
12 matter complained of.

13 MR RINALDI: Yes.

14 HIS HONOUR: You actually, if you identified with some
15 precision - you would only need to identify one of the
16 individuals/entities to make good the question of law,
17 because the answer to that would flow automatically to the
18 other 26.

19 MR RINALDI: Yes.

20 HIS HONOUR: I am loathe, and I am not going to, but I am
21 loathe to name any one of the individuals, but if a
22 question of law was formulated by reference to - doesn't
23 have to be one of the individuals, it could be one of the
24 entities.

25 MR RINALDI: Indeed.

26 HIS HONOUR: So if the question of law was, has X - no, the
27 question of law would be, does the identification of X as
28 an entity considered by Mr Phillips to have contravened
29 sections X, Y, Z, does that constitute a matter.

30 MR RINALDI: Yes.

31 HIS HONOUR: It does seem there could be a formulation of a

1 question of law which could dispose of the proceeding.

2 MR RINALDI: That at least would be a legal question, solely.

3 It could potentially dispose of the proceeding, it could
4 also lead to the vices that have been identified in the
5 discussion between Mr Craig and Your Honour, such as
6 interlocutory appeals and the reason why the first
7 principle from Murphy v Victoria is that separate trials
8 under rule 47.04 should only be ordered with great caution
9 and only in a clear case is because of those sort of
10 considerations. Where it is clearly to the benefit of the
11 parties and not to the disadvantage of one of the parties
12 in the case where evidence might affect the balance
13 between the parties on the argument, substantive argument
14 in the case. We say that is the case here.

15 So it is essentially a question of whether the, if
16 you like, cutting to the chase, that might be seen to be
17 achieved by crafting an appropriate question solely of
18 law, is an appropriate exercise of the discretion under
19 rule 47.04, having regard to the principles that are
20 referred to in all of the cases, including Murphy v
21 Victoria and indeed, the one that my learned friends rely
22 on, Brompton Lodge, which we refer to in paragraph '3 of
23 our submissions.

24 In the circumstances of this case, where the
25 proposed question is clearly not appropriate for the
26 procedure because it is a mixed fact and law, and given
27 the uncertainties of what investigations have occurred and
28 the requirement for evidence to achieve justice between
29 the parties, this is not a case where the court should
30 stick its neck out, in my respectful submission, and make
31 the unusual order of a separate question.

1 The separate question cases, as I said at the
2 outset, are typically clear, separate, discrete and
3 usually not complex statutory interpretation questions
4 which can dispose of either the whole of the matter or a
5 substantial part of it. This case is not one of those.

6 It is a matter for Your Honour's discretion but it
7 is not a case that Your Honour should exercise your
8 discretion in ordering that procedure, in my respectful
9 submission. It is not - in effect, what my learned
10 friends really seek to do is to say you can't win the case
11 - it is like a summary dismissal application or a
12 demurrer, assuming we only investigated one entity, that's
13 enough, and if that's right, you can't win the case.
14 Well, they haven't brought it as a summary dismissal
15 application, such application should be brought early,
16 according to the practice note, in this list, and hasn't
17 been done in that way. It is not appropriate to order it
18 as a separate question as an alternative to that without
19 having to nail their colours to the mast or have an
20 admitted fact, which hasn't been admitted in this case.

21 HIS HONOUR: So if we just go back to s131 of the Act.

22 MR RINALDI: Yes, Your Honour.

23 HIS HONOUR: Have you got that at hand, Mr Rinaldi?

24 MR RINALDI: Yes, I have.

25 HIS HONOUR: So if a person considers that an act, matter or
26 thing constitutes an offence against this Act, so if we
27 line that up with Mr Phillips' letter of 29 September, at
28 p2, he says - the heading is, 'The list of entities,
29 officers, persons and employees I request to be prosecuted
30 including the offences I consider to have been constituted
31 by the occurrences, acts or omissions in relation to the

1 Victorian Government Hotel Quarantine Containment
2 Program.' So lining that up with s131, Mr Phillips
3 considers that occurrences, acts or omissions in relation
4 to the Victorian Government Hotel Quarantine Containment
5 Program by the named entities.

6 MR RINALDI: Yes.

7 HIS HONOUR: And the named entities and individuals.

8 MR RINALDI: Yes.

9 HIS HONOUR: Constitutes an offence.

10 MR RINALDI: Or in this case, offences.

11 HIS HONOUR: Or offences.

12 MR RINALDI: That's the matter which the rest of the section

13 deals with, in my submission. There's no question. And
14 for Mr Craig to submit that nothing turns on how the
15 person making the request puts it, in a sense, he was
16 submitting or in essence he was submitting that WorkSafe
17 can investigate the subject or topic that they think is
18 relevant - that submission simply doesn't line up with the
19 Act, it is not in accordance with the Act and it shouldn't
20 be accepted. Mr Craig described it as a more general and

21 broader concept, that's indeed what it is, and it is a
22 clear departure from the Act. It shouldn't be permitted.
23 And that's the whole thrust of his submissions today.

24 So what we are faced with, even if we can narrow it
25 down to a legal question, it is, as Your Honour has
26 correctly identified, in my respectful submission, a
27 complex question of statutory interpretation and that
28 shouldn't be done in the absence of evidence in the
29 context of a case like this, and it shouldn't be done as a
30 separate question which may be appealed; it should be
31 simply brought on as a trial as soon as possible.

1 That was the approach that Justice Richards took in
2 the case of - - -

3 HIS HONOUR: Was that Brompton Lodge?

4 MR RINALDI: No, Your Honour. That was the case - I am just
5 looking for it - Harding v Sutton, in 2021, whether it is
6 in the combined list, I am not sure, I think it should be.
7 It is number 11 in the combined list, Your Honour. So
8 Her Honour held in that decision that the authorities led
9 her to not consider factual matters that were dependent
10 upon evidence as part of a separate question, but to
11 simply use case management procedures to have an early
12 trial as the more appropriate course, and that's at
13 paragraphs 204 to 211 of that decision. In Her Honour's
14 final decision, at 211, declining to order that the
15 proposed question be tried separately.

16 That was a question of law in that case, which is
17 set out at 204 of Her Honour's decision about the meaning
18 of s38 of the Charter of Human Rights and Responsibilities
19 Act.

20 HIS HONOUR: Sorry, just to go back, because I did try and - I
21 tried to pin Mr Craig down on what he says the matter is.

22 MR RINALDI: Yes.

23 HIS HONOUR: For the purposes of s131. He says relevantly the
24 matter is the hotel quarantine program.

25 MR RINALDI: Yes.

26 HIS HONOUR: What do you say the matter is?

27 MR RINALDI: We say the matter - matters, because there are
28 more than one - are the occurrences of the acts, matters
29 or things that constitute an offence under the
30 Occupational Health and Safety Act, and that Mr Phillips,
31 on behalf of Self-Employed Australia, has enlivened or

1 referred to 27 matters which the Authority, otherwise
2 known as WorkSafe, is required to investigate, decide
3 whether to prosecute - this is under 131(2A), given
4 reasons why a prosecution won't be brought if it is not,
5 which it hasn't given in respect of the other 26 entities
6 that it hasn't prosecuted, leaving aside the Department of
7 Health, and under sub-s.(3), if a prosecution won't be
8 brought or hasn't been brought within nine months after
9 the request, refer the matter to the Director of Public
10 Prosecutions if the party requests them to do so. Which
11 Mr Phillips has done.

12 So the matter, throughout all of those sub-sections,
13 Your Honour, or matters in this case, are the suspected
14 contraventions by the entities and persons named on p2 of
15 the 29 September 2020 letter from Mr Phillips, being the
16 occurrences of acts, matters or things that constitute
17 offences as nominated particular provisions of the
18 Occupational Health and Safety Act.

19 HIS HONOUR: The suspected contraventions of the Act.

20 MR RINALDI: Yes.

21 HIS HONOUR: The suspected contraventions of the Act by
22 Mr Phillips, which he considers to have been constituted
23 by occurrences, acts and omissions in relation to the
24 Victorian Government Hotel Quarantine Containment Program.

25 MR RINALDI: That's right. The program is not the matter; the
26 occurrences of acts, matters or things are the matters in
27 this case. One of them has been prosecuted, the other 26
28 have not. And the application for orders in the nature of
29 mandamus is to seek to have WorkSafe consider the other
30 26, make a decision, investigate, prosecutor not, refer to
31 the DPP, if not prosecuting.

1 HIS HONOUR: So can I just get a sense from you, Mr Rinaldi, as
2 to how this trial is going to actually run in the sense
3 that you are successful. So what's put against you is
4 that, from Mr Craig's perspective, he is saying well if
5 this preliminary question is addressed, it has got very
6 significant savings of time.

7 MR RINALDI: If it goes a particular way and depending on the
8 appeals, yes.

9 HIS HONOUR: Yes. How do you see the case - it is a six day
10 estimate.

11 MR RINALDI: Yes.

12 HIS HONOUR: And what evidence would you be wanting to lead in
13 support of your case?

14 MR RINALDI: It would be - there would have to be subpoenas to
15 the parties listed on p2 of the request.

16 HIS HONOUR: I don't quite understand that, why would that be
17 so? Your case is that there's an obligation on WorkSafe
18 to prosecute - - -

19 MR RINALDI: To (a), investigate.

20 HIS HONOUR: Your case, as I understand it, is simply that
21 WorkSafe has not properly investigated - - -

22 MR RINALDI: Yes.

23 HIS HONOUR: The matter, being - - -

24 MR RINALDI: Suspected contravention.

25 HIS HONOUR: The suspected contravention of the Occupational
26 Health and Safety Act by the named entities and
27 individuals.

28 MR RINALDI: That's right.

29 HIS HONOUR: Well, they either have or they haven't. You
30 wouldn't get the answer to that by subpoenaing all of
31 those individuals; you get the answer to that through

1 HIS HONOUR: Yes, again, you don't need - you get that from
2 WorkSafe.

3 MR RINALDI: Potentially. And we have issued a notice to admit
4 which is currently disputed in order to try to truncate
5 that process, but it may be that discovery - - -

6 HIS HONOUR: Certainly doesn't seem, sitting here at the
7 moment, Mr Rinaldi, that there would be any utility to be
8 served by the issuing of subpoenas on the 26 parties who
9 have not been prosecuted.

10 MR RINALDI: That of course would depend on what comes out of
11 the discovery and whether we get, you know, the
12 information from WorkSafe or whether we need to ask the
13 people at the other end of the process.

14 HIS HONOUR: WorkSafe is a model litigant. I am not going to
15 assume they are going to keep it in the bottom drawer and
16 not tell you, Mr Rinaldi, come on, let's be realistic.
17 Obviously WorkSafe would, as a model litigant, would be
18 required to disclose everything in its possession
19 regarding the investigation which has taken place,
20 including the question of whether or not there's any
21 contact made with any of the named individuals.

22 It seems to me, and, you know, that might be a point
23 in your favour.

24 MR RINALDI: Yes. It may obviate the need for those subpoenas
25 and truncate the hearing length.

26 HIS HONOUR: Seems to me that there would be no - at the
27 moment, sitting here at the moment, I couldn't see any
28 reason why you would be issuing subpoenas to those
29 individuals. Once the question of what the relevant
30 matter is, if that issue is determined in your favour then
31 - there is an element of speculation there as to what the

1 extent of the evidence would be, but - - -

2 MR RINALDI: It will depend a lot on discovery.

3 HIS HONOUR: There will either have been an investigation as to
4 whether or not named individuals and entities other than
5 the Department of Health have contravened provisions of
6 the Act or there won't be.

7 MR RINALDI: Yes. That's right.

8 HIS HONOUR: That's how the cards will fall in relation to that
9 matter.

10 MR RINALDI: Yes.

11 HIS HONOUR: Sitting here at the moment, it seems to me that it
12 is difficult to anticipate what the parameters of the
13 trial may be, very much depends as to what material is
14 disclosed.

15 MR RINALDI: It does, yes.

16 HIS HONOUR: Would be disclosed during the course of discovery
17 but I would have thought that the evidence in terms of the
18 number of witnesses from WorkSafe would be of - probably
19 need only one or two individuals.

20 MR RINALDI: Yes, probably. So if we obviate the need for the
21 subpoenas then certainly it becomes perhaps a two day case
22 rather than a six day case.

23 HIS HONOUR: All right.

24 MR RINALDI: But I have nothing further to submit on the
25 separate question application, Your Honour, unless you
26 have any further questions to me in relation to it.

27 HIS HONOUR: No, I don't, thanks very much Mr Rinaldi.

28 MR RINALDI: If Your Honour pleases, thank you.

29 MR CRAIG: Your Honour, can I start with the separate
30 questions. Your Honour will have seen in our reply
31 submission at footnote 3 that we identify, no doubt,

1 matters well known to Your Honour that it is ultimately a
2 matter for Your Honour and within Your Honour's discretion
3 to determine the appropriate preliminary question.
4 Justice Harper described in Bridge v Marine Engineering
5 the summons under 47.04 as being draft set of preliminary
6 questions. I think it is fair to say the parties are ad
7 idem for the purposes of s131(2A) is to be determined by
8 reference to the request dated 29 September. And so a
9 question Your Honour could set down for determination is
10 by reference to the request dated 29 September 2020, what
11 was the matter for the purposes of s131(2A)? And that
12 would resolve the principal area in controversy.

13 Your Honour should not assume that discovery of the
14 type that was discussed between Your Honour and my learned
15 friend would be appropriate and permissible in this kind
16 of case, in my respectful submission. The relief that our
17 learned friends seek is relief that - if Your Honour goes
18 to the originating motion.

19 HIS HONOUR: Just go back a step. Mr Craig, I give you fair
20 notice, I am really not attracted by the proposition that
21 I will head back to my chambers and start redrafting the
22 questions, all right. If you want to make an application
23 to adjourn the case, if you want to reformulate your
24 question, that you want to formulate a question of law and
25 perhaps do that in consultation with Mr Rinaldi as to what
26 would be an agreed formulation of a question of law, you
27 can make that application. But that inevitable would come
28 at a price because Mr Rinaldi has come here today to meet
29 the case that he has been asked to meet. He has not been
30 asked to meet footnote 3 in your reply submission.

31 Now, it does seem to me that it would be open to you

1 to formulate a question of law by reference to the alleged
2 offences as set out at p2 of the letter of 29 September
3 2020, and it does seem to me that Mr Rinaldi has quite
4 properly conceded that if he did so, his complaints about
5 there being a mixed question of fact and law would fall
6 away. But I am not going to do that, Mr Craig.

7 MR CRAIG: If Your Honour pleases.

8 HIS HONOUR: That's it. So if you, I don't know, want to stand
9 the matter down for ten minutes, get some instructions.
10 If you want to have the opportunity to reformulate a
11 question of law, if you want to do that, I will certainly
12 - I think I would be sympathetic for you having the
13 opportunity to do so, but I give you fair notice that
14 there would be - there would be cost consequences of that,
15 of course, because Mr Rinaldi has come to meet what he has
16 come here to meet. Do you want to stand the matter down?

17 MR CRAIG: Might I stand the matter down?

18 HIS HONOUR: Yes, sure. Do you want to come back at 2.15?

19 MR CRAIG: Your Honour, I don't think I will need that long.

20 Can I come back in 10 minutes, if that's convenient.

21 HIS HONOUR: Let's make it 15 minutes.

22 MR CRAIG: Thank you, Your Honour.

23 HIS HONOUR: We will adjourn the court until 20 to 1.

24 (Short adjournment.)

25 HIS HONOUR: Yes, thanks Mr Craig.

26 MR CRAIG: Thank you, Your Honour. We are conscious of our
27 responsibilities as a litigant in the court and we are
28 conscious of our responsibilities under the Civil
29 Procedure Act, and so having regard to what fell from
30 Your Honour in the exchange with my learned friend,
31 Mr Rinaldi, we do seek to take the opportunity to

1 formulate a further question for Your Honour's
2 consideration.

3 The proposal that I have discussed with my learned
4 friend is that we will provide him with a proposed
5 question by Monday of next week. We will confer with him
6 through the balance of next week.

7 HIS HONOUR: Yes.

8 MR CRAIG: And then we would file any if further written
9 submissions by Friday 1 July, if I have got my maths
10 correct. So, no, it would be Friday 8 July, Your Honour.

11 HIS HONOUR: Yes.

12 MR CRAIG: He would file any responsive submissions by Friday
13 15 July, with Your Honour to determine the application on
14 the papers, if that was a convenient course to
15 Your Honour.

16 HIS HONOUR: Yes, that would be convenient. All right.

17 MR CRAIG: Your Honour, the only thing I can make submissions
18 to Your Honour about is the suggestion that there would be
19 a wide ranging discovery obligation attaching to my client
20 around the investigation, and I am happy to deal with this
21 at another time, I don't have to dwell on it with
22 Your Honour now.

23 HIS HONOUR: No. I don't think you do. I think I was making
24 the point which was one which I presume would be well
25 received at your end of the Bar table, that I did not see
26 this as a case, sitting here at the moment, where there
27 would be any basis for issuing subpoenas, left right and
28 centre, to the individuals who were alleged to have
29 committed offences under the Act because that doesn't
30 really seem to be the issue. The issue is around what
31 investigation, if any, has taken place, and I am not

1 expressing any concluded view at all about whether or not
2 discovery, wide ranging discovery would be permissible but
3 I am simply making the point, Mr Craig, it seems to me
4 that WorkSafe is the repository of the information about
5 the extent of any investigation which has taken place in
6 respect of those named individuals.

7 MR CRAIG: Yes. There are probably a number of things I just
8 need to alert Your Honour to. The first is Your Honour
9 heard how my learned friend formulated the matter. When
10 Your Honour looks at 131(2A), the rights that accrue are
11 communication about the completion of an investigation and
12 about reasons for non-prosecution. There's no entitlement
13 on the part of any person to underlying investigatory
14 materials, that is an interrogation of the investigation.
15 That's the first point.

16 The second point is our learned friends candidly
17 submit to Your Honour they don't know whether an
18 investigation took place. So this entire proceeding is a
19 fishing expedition that our learned friends seek to
20 interrogate investigatory processes outside their
21 entitlements under the Act, and Your Honour will no doubt
22 need to be careful in engaging with any discovery request.

23 And the third thing that we do need to alert
24 Your Honour to is that there are very real issues of
25 public interest immunity that attach to this kind of case
26 because, as Your Honour knows, methods of investigation
27 and sources of information in investigatory process, give
28 rise to claims of public interest immunity.

29 So what our learned friends are really trying to do
30 through this discovery process is neither - this purported
31 discovery process, neither permitted under the Act or an

1 obligation on my client under the Act, but also gives rise
2 to very real public interest immunity concerns.

3 So it is another reason, in my respectful
4 submission, to engage with the separate question because
5 difficult questions as to the scope of their entitlement,
6 public interest immunity and discovery obligations can be
7 wholly avoided if, as I have submitted to Your Honour, our
8 construction of the Act is accepted.

9 HIS HONOUR: Yes, okay. No doubt that's a debate that can be
10 had at a later time, Mr Craig.

11 MR CRAIG: If Your Honour pleases.

12 HIS HONOUR: Mr Rinaldi, are you content with the time able as
13 indicated by Mr Craig?

14 MR RINALDI: Yes.

15 HIS HONOUR: Can I just confirm those dates again. So Mr Craig
16 is going to formulate a proposed question.

17 MR CRAIG: A proposed question and provide that to our learned
18 friend by Monday, Your Honour. Monday is the 27th of
19 June.

20 HIS HONOUR: Yes.

21 MR CRAIG: We will confer with our learned friends about the
22 content of that question, in particular in relation to
23 whether it elucidates the controversy between us as to
24 what is the matter.

25 HIS HONOUR: Yes.

26 MR CRAIG: The purpose of s131(2A). In the event that there is
27 no agreement so as to proceed on the matter as a separate
28 question, we will file any further submissions by Friday 8
29 July and they will file any responsive submissions by
30 Friday 15 July with the parties beings content for
31 Your Honour to determine the matter on the papers.

1 HIS HONOUR: All right. Thank you. That's recorded in the
2 transcript so I don't need to make any formal directions
3 to that effect, if that's agreed.

4 MR RINALDI: I am content with that approach, Your Honour.
5 Otherwise, I just seek the costs of today.

6 HIS HONOUR: Yes, I don't think you can resist that, can you,
7 Mr Craig?

8 MR CRAIG: No, I can't resist an order that the costs of and
9 incidental to today, Your Honour, be paid my client.
10 Obviously the overall disposition of the summons remains a
11 matter for Your Honour's determination on the papers.

12 HIS HONOUR: Yes. So Mr Rinaldi, are you content with an order
13 that I will order - so I will order one, that the
14 proceeding be - let me see. Well, there won't be a
15 further hearing, will there, on the proposed timetable?

16 MR CRAIG: No, of course Your Honour will - - -

17 HIS HONOUR: It will be determined on the papers.

18 MR CRAIG: And, Your Honour, we recognise you may say you'd
19 like to see us again.

20 HIS HONOUR: Yes.

21 MR CRAIG: But it is present contemplated - - -

22 HIS HONOUR: It is possible. I just simply adjourn the
23 proceedings sine die, I think, today, but I would make an
24 order that the defendant pay the plaintiff's costs of
25 today's - costs of and incidental of today's hearing on a
26 standard basis to be taxed in default of agreement.

27 MR CRAIG: If Your Honour pleases.

28 HIS HONOUR: Can you content with that order?

29 MR RINALDI: Thank you.

30 HIS HONOUR: To avoid any debate about it or argument about it,
31 where does that leave the costs of the written

1 submissions, Mr Craig? A fair bit of work has been done
2 on those written submissions.

3 MR CRAIG: We say they would be excluded, Your Honour, because
4 what we have done is identify for Your Honour, consistent
5 with our obligations under the Act, a question requiring
6 early resolution; through argument with me and with my
7 learned friend, issues have crystallised which have been
8 inarticulated in our learned friend's submission, and
9 exposed through argument with Your Honour.

10 HIS HONOUR: Yes.

11 MR CRAIG: Those costs should be reserved for determination by
12 Your Honour following the disposition of the summons.

13 HIS HONOUR: All right. I don't think that's going to
14 prejudice you, Mr Rinaldi. I will reserve the costs
15 otherwise falling outside the scope of that order, which
16 will - obviously there will be an issue about your written
17 submissions and the extent to which there's been,
18 effectively, costs thrown away there by addressing matters
19 you didn't need to address. I will address the issue of
20 the costs otherwise in my final determination of the
21 matter. Are you content with that course?

22 MR RINALDI: Yes, so the third order to probably be,
23 Your Honour, something like the costs of the defendant's
24 summons be otherwise reserved.

25 HIS HONOUR: Yes. I will simply make another order that costs
26 otherwise reserved. So the orders will be, one, the
27 proceeding be adjourned - the hearing of the plaintiff's
28 summons dated, whatever the date, I will put that in, will
29 be adjourned sine die. Two, the defendant to pay the
30 plaintiff's costs of and incidental to today's hearing on
31 a standard basis to be taxed in default of agreement.

1 Three, costs otherwise reserved.

2 MR RINALDI: Do we need Your Honour to put in for number two
3 something about including costs thrown away or it is that
4 getting too complicated? Your Honour mentioned costs
5 thrown away by responding to - - -

6 HIS HONOUR: No, you don't. I am mindful of the issues,
7 Mr Rinaldi, so you don't need to put it in there.

8 MR RINALDI: Thank you, Your Honour.

9 HIS HONOUR: I thank the parties for their helpful submissions.
10 If it be the case that having seen the submissions - yes,
11 well, just go back a step. If you reach an agreed
12 position that a question of law as formulated by the
13 defendant, if there's an agreed position, well, yes, that
14 matter should be determined as a separate question of law.

15 MR RINALDI: Which wouldn't bind Your Honour's discretion, but
16 no doubt it would weigh heavily.

17 HIS HONOUR: No. If you reach an agreed position on that then
18 obviously there will then need to be further programming
19 in relation to the hearing of that question of law. So I
20 think the position would be, Mr Rinaldi and Mr Craig, that
21 if you do reach agreement until relation to the further
22 question which Mr Craig is going to convey to you,
23 Mr Rinaldi, by 27 June.

24 MR RINALDI: Yes.

25 HIS HONOUR: If you could then obviously send the terms of that
26 question to my chambers and inform my chambers that an
27 agreed position has been reached.

28 MR RINALDI: Yes. I think whether or not an agreed position
29 has been reached would be apparent from our written
30 submissions in reply on 15 July.

31 HIS HONOUR: But you might not actually - well, I guess what I

1 am canvassing with the parties is if you - - -

2 MR RINALDI: If we do.

3 HIS HONOUR: If you reached an agreed position, you have got an
4 agreed position, you won't need to put in submissions, I
5 don't think. If you reach an agreed position that you are
6 satisfied and you consent to there being a hearing on the
7 proposed question - - -

8 MR RINALDI: Which is a different question to consenting to the
9 form of the question being an amendment to the summons.

10 HIS HONOUR: Yes. But if you - it seemed to me that it is
11 possible that Mr Craig might formulate a proposed question
12 and you accept that - you consent to that matter then
13 going ahead as a separate question. Obviously, ultimately
14 the court has got to make its own determination.

15 MR RINALDI: Yes.

16 HIS HONOUR: It is not bound by the consent.

17 MR RINALDI: No.

18 HIS HONOUR: But that consent would probably be a weighty
19 consideration.

20 MR RINALDI: Yes.

21 HIS HONOUR: I don't think the parties need to be exchanging
22 written submissions. If you reach - - -

23 MR RINALDI: In the event that that - - -

24 HIS HONOUR: If you reach agreement both as to the form of the
25 question and you can consent.

26 MR RINALDI: Then we might as well consent on the proposed set
27 of directions. Obviously Your Honour is still not bound
28 to go that way.

29 HIS HONOUR: Yes. It would be sensible to keep moving things
30 along.

31 MR RINALDI: Keep it moving.

1 HIS HONOUR: If you then actually agree on - try and agree
2 between yourselves on directions with a view to the matter
3 coming on for hearing.
4 MR RINALDI: Yes.
5 HIS HONOUR: And you could send those through my chambers.
6 MR RINALDI: If there isn't consent then in terms of - - -
7 HIS HONOUR: If there isn't consent there will obviously have
8 to be - - -
9 MR RINALDI: Then in terms of a decision - - -
10 HIS HONOUR: There will have to be a further hearing, a further
11 exchange, I mean.
12 MR RINALDI: Yes, and there's no point putting forward
13 directions for the trial, probably, at that point.
14 HIS HONOUR: No. So I think just be a little bit flexible and
15 obviously don't engage in work you don't need to, all
16 right.
17 MR RINALDI: Thank you, Your Honour.
18 HIS HONOUR: Thanks very much. Just adjourn the court sine
19 die.
20 ADJOURNED SINE DIE