CITATION:	*WORK HEALTH AUTHORITY NT v AUSTRALIAN GREEN PROPERTIES PTY LTD* [2019] NTLC 035
PARTIES:	WORK HEALTH AUTHORITY NT v AUSTRALIAN GREEN PROPERTIES PTY LTD
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CRIMINAL
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JUDGMENT OF:	JUDGE ELISABETH ARMITAGE

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Work Health and Safety - work health and safety duty; exposure to risk of serious injury or death; must ensure; so far as is reasonably practicable; workplace; cattle station; car crash; pastoral permit; judicial notice; strict liability

Criminal Code Act ss 43BA, 43BK, 43BP; *Evidence (National Uniform Legislation) Act* s 143; *Motor Vehicles Act* ss 119, 137B; *Work Health and Safety Act (National Uniform Legislation) Act* NT 2011 ss 5, 8, 12, 12A, 14, 16, 17, 18, 19, 28, 32, 244

Thiess Pty Ltd and Hochtief AG v Industrial Court of NSW (2010) 78 NSWLR 94; *Carrington Slipways Pty Ltd v Callaghan* (1985) 11 IR 467; *WorkCover Authority of NSW v TRW* [2011] NSW IR Comm 52; *Riley v Australian Grader Hire Pty Ltd* [2011] NSW IR Comm 31; *Baida Poultry v The Queen* [2012] HCA 14; *WorkCover*

Authority of NSW (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd [2001] NSW IR Comm 278; *WorkCover Authority of NSW (Inspector Byer) v Cleary Bros (Bombo)* [2001] NSW IR Comm 278

Tooma, M, *Tooma's Annotated Work Health and Safety Act*, 2011, Law Book Co., 2017, (2nd Ed)

MVR Information Bulletin R3, www.mvr.nt.gov.au

REPRESENTATION:

Counsel:

	Complainant:	Mr Mark Thomas
	Defendant:	Mr Tom Anderson

Solicitors:

	Complainant:	WorkSafe NT
	Defendant:	Peacokes Solicitors

Judgment category classification:	A
Judgment ID number:	[2019] NTLC 035
Number of paragraphs:	117

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21815193

BETWEEN

WORK HEALTH AUTHORITY NT

Complainant

AND

AUSTRALIAN GREEN PROPERTIES PTY LTD

Defendant

REASONS FOR JUDGMENT

(Delivered 14 October 2019)

JUDGE ARMITAGE

1. The defendant, Australian Green Properties Pty Ltd (AGP), owns and operates Epenarra Station (the Station), a remote cattle station located about 400 km north east of Alice Springs. Mr Daniel Jarmin (aged 26) and his girlfriend, Miss Haley Baker-Covey, both of the United Kingdom, started working at the Station in May 2016. This matter concerns the death of Mr Jarmin on 24 August 2016 who was killed in a single vehicle car crash when he was returning to the Station. It is alleged that AGP did not adequately comply with a work health and safety duty and that its failure to do so exposed Mr Jarmin to a risk of death or serious injury.

The facts

2. When Mr Jarmin and Ms Baker-Covey first arrived at the Station, Mr Ben McGlynn managed the cattle station and Ms Vicki McGlynn managed the Epenarra Station Store (the Store). Mr Jarmin and Ms Baker-Covey were employed in the Store which stocked food and sundry items, and serviced residents of the Station and a small nearby Aboriginal community. However, in about May 2016 the McGlynns resigned, and in about July 2016 Mr Alan Cunningham commenced managing the cattle station and his partner, Ms Chelsea Carr, managed a Power and Water contract. In performance of her Power and Water duties, Ms Carr regularly used a white 1996 80 Series Toyota LandCruiser (the LandCruiser), with a Northern Territory pastoral permit, P6190.[1] This LandCruiser was also used for the Store[2] and was referred to as the shop/power and water car.[3] Mr Cunningham, Ms Carr, Ms Baker-Covey and Mr Jarmin all lived at the Station. After the McGlynns left, Ms Baker-Covey and Mr Jarmin jointly managed and worked in the Store. Another employee, Ms Gail Russell, lived in Cobar and managed and attended to AGP's accounts. Ms Baker-Covey and Mr Jarmin communicated with Ms Russell on the phone and in writing in relation to running the Store.

3. On 23 August 2016 a planned delivery of food and goods was made to the Store but the fresh produce that had been ordered was mistakenly overlooked and not delivered. Although it was not viable for a second delivery to be made to the Station, Ms Baker-Covey and Mr Jarmin arranged for the missing produce to be left at the Wauchhope Hotel (the Hotel) for collection the following day. In a telephone call, the collection of the fresh produce was discussed with Ms Russell and she had knowledge of the planned trip.[4] In addition Ms Russell knew that Mr Jarmin would likely be driving the LandCruiser and Ms Russell reminded him to make sure there

[1] Ex 14 Certificate under s 119 *Motor Vehicles Act*
[2] T 169 C Carr
[3] Ex 15 Email from C Carr to G Russell; Ex 22 Statutory Declaration Ms Baker-Covey dated 31 August 2016 at [14]
[4] T 191 (G Russell)

were tools to change a tyre because she was aware that tools had not been in the vehicle on a previous trip.[5]

4. On 24 August 2016 at about 9.45 am Mr Jarmin left the Station to go to the Hotel to pick up the missing fruit and vegetables for the Store. The distance from the Store to the Hotel is approximately 147 km. The route comprises 120 km of unsealed road along the Epenarra Road to the Stuart Highway, and then 27 km travelling south on the Stuart Highway to the Wauchope Hotel. Mr Jarmin was driving the LandCruiser. When he left the Station, there was a serviceable spare wheel on the rear door and another one underneath the chassis. He had tools to change a tyre. However, the tools necessary to access the spare wheel under the vehicle were not in the LandCruiser.

5. Because the spare tyre on the rear door of the LandCruiser was serviceable when Mr Jarmin left the Station[6] but the tyre on the rear door was shredded when the LandCruiser was examined following the crash[7], it can be reasonably inferred (and the inference was not disputed) that Mr Jarmin had a flat tyre on the way to the Hotel, and that he replaced the first flat tyre with the spare tyre from the rear door of the LandCruiser. He put the newly flat and shredded tyre on the rear door of the LandCruiser.

6. CCTV[8] depicts Mr Jarmin arriving at the Hotel at about 11:38 am. Ms Baker-Covey received a Facebook message from Mr Jarmin at 11:45 letting her know that he had arrived in Wauchope. He drank two beers at the Hotel, ate a meal, and purchased some takeaway alcohol. Mr Jarmin told Ms Chloe McKenna[9], a member of the bar staff, that he had covered the distance from Epenarra Station to the Hotel in about one hour and 45 minutes.

7. At 12:24 pm Ms Baker-Covey received a Facebook message from Mr Jarmin letting her know that he was planning to leave Wauchope in 10 minutes. At 12:38 pm Ms

[5] T 192 (G Russell); see also Ex 22 at [60]
[6] T 166, 168 (C Carr)
[7] Ex 4 Statement Garry Ryan dated 19 December 2016 at [12]
[8] Ex 11 USB of CCTV Footage; see also Ex 10 CCTV Review
[9] Ex 6 Statutory Declaration Chloe McKenna dated 7 September 2016

Baker-Covey received another message from Mr Jarmin telling her that he had got a flat tyre (by inference his second flat tyre) and was fixing it. Consistent with the Facebook messages, Ms McKenna said that after leaving the hotel Mr Jarmin returned about 20 minutes later and said he had a flat tyre. At 12:57 pm CCTV footage shows, and Ms McKenna also saw, Mr Jarmin speaking to some men seemingly asking them for help or advice about his second flat tyre.

8. At 1:00 pm Mr Jarmin sent a text to Ms Baker-Covey in which he said he was "stuck" and he didn't have the right tools to get the "bottom wheel out". He said he "got a flat", was "fixing it" and it was a "nightmare".[10] At 1:05 pm the CCTV records Mr Jarmin purchasing a tube of Holts TyreWeld[11], an emergency tyre repair product designed for tubeless tyres. The CCTV footage records Mr Jarmin returning to the hotel at 1:14 pm and purchasing a second tube of TyreWeld. However, the tyres on Mr Jarmin's LandCruiser were split rim tube tyres. TyreWeld was not compatible with those tyres and would not have provided a quick fix.

9. At 1:25 pm the CCTV records a white LandCruiser, most likely Mr Jarmin's, heading north past the Hotel in the direction of the turn off to the Epenarra Road and the Station. In the CCTV the front driver's side tyre appears to be deflated. At 2:13 pm the CCTV footage records a white LandCruiser heading south back to the hotel. At 2:14 pm the CCTV depicts Mr Jarmin at the bar of the Hotel requesting an airgun handpiece and then walking in the direction of the air hose near the fuel browsers. At 2:19 pm the CCTV shows Mr Jarmin returning the airgun to bar staff, and at 2:20 pm a white LandCruiser, most likely Mr Jarmin's, heading north again towards the turn off to the Station.

10. It can be reasonably inferred from the evidence that having used the TyreWeld Mr Jarmin started on his return journey but discovered his attempted tyre fix was not successful and the tyre was still flat. He returned to the Hotel, pumped up his flat tyre, and recommenced his return journey. I note that the trouble with the second flat tyre delayed Mr Jarmin's departure from the Hotel by about one and a half

[10] Ex 21 Copy of Facebook Message received by Ms Baker-Covey
[11] Ex 20 Photo of TyreWeld tube with instructions

hours when compared against the time of his planned departure as messaged to Ms Baker-Covey.

11. 42 kms from the Hotel and at a location 15.4 kms along the Epenarra Road towards the Station, Mr Jarmin was involved in a single vehicle crash. As it travelled through a gradual right hand bend, the LandCruiser rolled landing on its roof. Mr Jarmin was ejected from the vehicle and was found deceased a few metres from the LandCruiser. He died from blunt force injuries caused by the crash.[12] A passing motorist found Mr Jarmin's body at 3.10 pm.

The pastoral permit

12. Pastoral permits may be granted in the Northern Territory by the Registrar of Motor Vehicles: s 137B *Motor Vehicle Act* (MVA). Such a permit must not be given unless the Registrar of Motor vehicles is satisfied that the vehicle complies with approved standards: s 137B (6) MVA. Although the LandCruiser was covered by such a permit I was provided with very little precise information from the Prosecutor about such permits, the legal parameters for using vehicles subject to such permits, or the approved minimum safety standards for passenger cars under such a permit. I understood from the evidence that a permit allowed a vehicle to be used for work purposes on a property and on some public roads, perhaps those adjoining a property. In evidence in chief, Mr McGlynn said pastoral permits were allocated to a property for farm use and he thought vehicles operating under such a permit could travel up to 150 - 200 km from the garaging address.[13]

13. It is apparent from her evidence that Ms Russell did not understand that the LandCruiser had a pastoral permit, nor what such a permit might mean. She mistakenly believed the LandCruiser was registered for normal road use.[14]

14. As I was provided with very little information about the pastoral permit I was curious to know whether there was any relevant legislation, regulations or rules. I

[12] Ex 12 Provisional Cause of Death Report of John Rutherford dated 30 August 2016
[13] T 106 (B McGlynn)
[14] T 189, 190, 195 (G Russell)

did not find anything other than the Motor Vehicle Registry Information Bulletin[15] which explains, inter alia, the limits of use, the responsibilities of the owner, and the approved minimum safety standards for passenger cars subject to a pastoral permit.

15. Section 143 of the *Evidence (National Uniform Legislation) Act* specifies matters of law about which a judge may take judicial notice:

> s 143 (1) Proof is not required about the provisions and coming into operation (in whole or in part) of:
>
> (a) an Act, an Imperial Act in force in Australia, a Commonwealth Act, an Act of a State or an Act or Ordinance of a Territory; or
>
> (b) a regulation, rule or by-law made, or purporting to be made, under such an Act or Ordinance; or
>
> (c) a proclamation or order of the Governor-General, the Governor of a State or the Administrator or Executive of a Territory made, or purporting to be made, under such an Act or Ordinance; or
>
> (d) an instrument of a legislative character (for example, a rule of court) made, or purporting to be made, under such an Act or Ordinance, being an instrument that is required by or under a law to be published, or the making of which is required by or under a law to be notified, in any government or official gazette (by whatever name called).

16. I am not satisfied that the Motor Vehicle Registry Information Bulletin falls within the provisions of s 143 of the *Evidence (National Uniform Legislation) Act*. However, if it did, I would decline to take judicial notice of it in these proceedings. These are criminal proceedings. Matters relevant to and upon which the Prosecution seeks to rely to prove its case should be disclosed to the Defence so that they can be challenged, tested, addressed in evidence, and in submissions. As the Bulletin was not relied on in the hearing, and as the Defence did not have an opportunity to deal with it in the proceedings, I do not take judicial notice of it. Accordingly, while the information contained in the Bulletin might have informed me on relevant matters concerning pastoral permits, neither the Bulletin nor the information it contains is relied on in this decision.

[15] MVR Information Bulletin R3, www.mvr.nt.gov.au

The state of the LandCruiser

17. Mr Jarmin had used the LandCruiser a number of times to drive to the Aboriginal community near the Station and was told by the McGlynns that it was only to be used around the Station.[16] However, after the McGlynns left, on two occasions before the crash day, Mr Jarmin drove the LandCruiser from the Station to the Hotel. The first was on the afternoon of 3 August 2016, Mr Jarmin drove with Ms Baker-Covey as passenger and Ms Baker-Covey drove the car back the following day. Ms Baker-Covey said she had concerns about the vehicle. She complained that both seatbelts did not work, there was no side mirror on the driver's side and one of the front lights popped out and had to be put back.[17] When she wanted to borrow a car again on 17 August 2016 to collect Mr Jarmin, Ms Baker-Covey sent an email to Ms Russell requesting use of a "vehicle that is roadworthy" and complained that the LandCruiser did not feel safe because the seatbelt did not work, the front headlight kept falling out and "it's not registered".[18] Ms Russell did not respond to the email at the time because she was dealing with a family funeral.[19] Ms Baker-Covey repeated her concerns about the LandCruiser to Ms Carr.[20] The next day Ms Baker-Covey spoke to Ms Russell on the phone. It does not appear that the complaints about the LandCruiser were discussed but Ms Russell was aware that Ms Baker-Covey was planning to pick up Mr Jarmin the following day. Ms Baker-Covey said she travelled in the LandCruiser without any issues and met Mr Jarmin. The following day, when they were planning to return, the passenger side rear tyre was flat. Mr Jarmin and two other men changed the tyre using the spare tyre from the rear door and tools provided by the other men as the tools in the LandCruiser were not the correct tools for changing the tyre.[21] On the return journey, Mr Jarmin drove. At one point Ms Baker-Covey said they stopped the car because of vibration and checked the tyres but they seemed to be okay and they continued the trip

[16] Ex 22, Statutory Declaration of Ms Baker-Covey dated 31 August 2016 at [14]; T 108-109, 113 (B McGlynn)
[17] Ex 22 at [25-26]
[18] Ex 3, Email Ms Baker-Covey to Ms Russell dated 15 August 2016
[19] T 194 (G Russell)
[20] Ex 22 at [35]
[21] Ex 22 at [51], [55]

without incident.[22] In a phone conversation on 19 August 2016 Ms Baker-Covey told Ms Russell the correct tools for changing a tyre were not in the LandCruiser.[23]

18. Mr McGlynn gave evidence and said that he had checked the LandCruiser in February or March of 2016. He thought it was in poor condition and thought it should be traded in rather than repaired, as he did not consider that repair would be economical. He considered the LandCruiser to be very rough on the corrugated road but considered it was sound enough for the Power and Water checks, which covered an area of about 5-8 km around the Station and which were normally conducted driving at a speed of 30-40 kph. Mr McGlynn made the decision, which he formally communicated to staff, that the LandCruiser was not to leave the Station complex.[24] Mr McGlynn considered that the LandCruiser was a high risk of breakdown over a 120 km stretch.[25]

19. Ms McGlynn said she drove the LandCruiser at about 30 kph to do the Power and Water checks but did not consider it was safe to drive on the Epenarra Road or at a speed above 70 kph.[26]

20. Both Mr McGlynn and Ms McGlynn gave evidence that they did not allow Mr Jarmin to take the LandCruiser when he drove to the Hotel during their management of the property. They lent him a different vehicle. Mr McGlynn showed Mr Jarmin how to change a tyre and instructed him not to go faster than 80 kph[27] on the Epenarra Road.

21. Ms Isabel Raszewski provided a statement.[28] She worked at the station for four months in early 2016. She told Ms McGlynn that she thought the LandCruiser was "unsafe" and she said Ms McGlynn referred to it as a "heap of crap".

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[22] Ex 22 at [57-58]
[23] Ex 22 at [60]
[24] T 106-108 (B McGlynn)
[25] T 114 (B McGlynn)
[26] T 128 (V McGlynn)
[27] T 111-112 (B McGlynn); 129 (V McGlynn)
[28] Ex 5, Statement of Isabel Raszewski dated 8 February 2017 at [24-25]

22. Ms Carr gave evidence concerning her use of the LandCruiser in 2016. Ms Carr did not notice any mechanical faults in the LandCruiser and had used it on the morning of the crash.[29] Ms Carr said the driver's seatbelt was working and the rear spare tyre was serviceable.[30]

23. Mr Cunningham gave evidence. He said he had little to do with the LandCruiser but had performed some minor maintenance on it to keep it running.[31] Mr Cunningham expressed opinions that Mr Jarmin should not have been driving the LandCruiser and he thought Mr Jarmin might have been assisted by a 4WD course.[32] However, as there was no basis provided for either of those opinions I gave them no weight.

24. Following the crash the LandCruiser was inspected by Mr Garry Ryan, a Senior Vehicle Inspection Officer of the Queensland Police Service. Mr Ryan gave evidence and provided a statement.[33] In summary he found that:

    (i) The spare wheel on the door of the LandCruiser was destroyed consistent with it having been driven for 25-50 km when flat. (This is consistent with other evidence which pointed to Mr Jarmin having a flat on the way to the Hotel and with him replacing it with the serviceable spare tyre that was on the rear door of the LandCruiser.)

    (ii) There was no equipment in the LandCruiser to access the spare wheel located under the chassis.

    (iii) All seatbelts were operational except the front passenger seat which had been jammed by the left hand "B" pillar being pushed over in the crash. The driver's belt was not stretched which indicated it was not being worn at the time of the crash.

    (iv) Three tyres were inflated but the right front tyre was deflated. Inspection indicated the tyre had been run deflated for a short distance, about 500 metres. There were three small pinholes on the side of the tube caused by friction from a chipped rim or from foreign material.

    (v) Tyre tread depth was satisfactory but nearing replacement.

    (vi) The brakes were sound and without leaks.

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[29] T 164, 167 (C Carr)
[30] T 167, 169 (C Carr)
[31] T 173 (A Cunningham)
[32] T 176 (A Cunningham)
[33] Ex 4, Statement of Garry Ryan dated 19 December 2016

(vii) Save for accident damage the steering, electrical systems and electrics were intact.

25. Mr Ryan concluded that :

> "As a result of my inspection of the vehicle I am of the opinion that the vehicle was free of any mechanical defects that may have been contributory to the cause of the incident." [34]

26. Mr John Luke, a qualified mechanic, inspected the LandCruiser and provided a report.[35] In summary he concluded that the vehicle showed signs of age and would not have passed a registration inspection due to wear and tear of the rear upper and lower trailing arm bushes and leaking in the left front and rear shock absorbers and swivel hubs. However, Mr Luke said:

> "I do not believe that any of these faults were a direct contributor to this crash but do show that this vehicle should not have been registered or driven on Northern Territory roads."[36]

The crash investigation

27. Detective Sergeant Michael Schumacher carried out a crash investigation. In his Statutory Declaration[37] Det. Sgt Schumacher set out his qualifications and experience, and noted:

(i) The road was gravel, dirt and rock, was corrugated but not heavily so, and 8 metres wide.

(ii) The crash occurred on a sweeping right hand corner where the road descended gradually into a dry creek crossing.

(iii) Tyre marks indicated the vehicle was in a yaw immediately preceding the crash.

(iv) Marks on the vehicle indicated it had rolled at least one and a half times.

(v) The front driver's tyre mark was marginally wider than the other tyre marks suggesting it was less inflated than the other tyres. On inspection of the car about 9 hours after the crash, the front driver's side tyre was deflated but not totally flat and the tyre bead had not been broken. In evidence Det. Sgt

[34] Ex 4 at [17]
[35] Ex 9, Report of John Luke undated
[36] Ex 9 at [9]
[37] Ex 17 Statutory Declaration Michael Peter Schumacher dated 5 December 2018

Schumacher clarified that the front driver's tyre was about half flat with an estimated pressure of 15 psi.[38]

(vi) The driver's seat belt was not fastened, was fully functioning, and there was no distortion of the webbing. In his evidence Det. Sgt Schumacher confirmed that it was his opinion that Mr Jarmin was not wearing a seatbelt at the time of the crash.[39]

(vii) As Mr Jarmin's body was located less than two metres from the vehicle Det. Sgt Schumacher considered it likely that he was thrown from the vehicle as it rotated.

28. In cross-examination Det. Sgt Schumacher agreed with the proposition that the LandCruiser would have been able to negotiate the curve if it had been travelling at 80 kph.[40] In re-examination he agreed that the speed of the LandCruiser at impact might have been 100 kph.[41] It was Det. Sgt Schumacher's opinion that the deflating tyre may have contributed to the crash because it would have affected the steering by causing a pull to the right.[42] However, so far as the age of the vehicle was concerned, Det. Schumacher considered 80 Series LandCruisers to be "perfectly competent…a very confident vehicle".[43]

29. In its case, the Defence commissioned Mr John Robert Jamieson to carry out an investigation into the crash. Mr Jamieson produced two reports[44] which set out his impressive qualifications and experience and he gave evidence. Mr Jamieson considered the nature of the curve, the yaw marks, the unsealed road surface and likely friction of the gravel surface on the road and concluded that the LandCruiser was travelling at a speed in the range of 100-120 kph which was too fast to successfully negotiate the unsealed curve. He opined:

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[38] T 259 (M Schumacher)
[39] T 258 (M Schumacher)
[40] T 271 (M Schumacher)
[41] T 276 (M Schumacher)
[42] T 278 (M Schumacher)
[43] T 279 (M Schumacher)
[44] Ex 18 Traffic Engineering Investigation into the crash involving AGP Pty Ltd on Kurundi Road, Davenport, Northern Territory, Australia on 24 August 2016 dated 20 November 2018; Ex 19 Supplementary Investigation into the crash involving AGP Pty Ltd on Kurundi Road, Davenport, Northern Territory, Australia on 24 August 2016 dated 8 December 2018

> "While it was considered "possible" that a partially deflated front tyre may have contributed to the crash, it is considered most likely that the crash occurred due to the excessive speed of the LandCruiser."[45]

30. Concerning the role of the deflating tyre, Mr Jamieson pointed to the following in support of his opinion that it likely did not contribute to the crash:

    (i) The examination of the tyre showed that the side walls were not obviously damaged which indicated that it had not been driven on in a seriously deflated condition.

    (ii) The tyre left a yaw mark prior to leaving the carriageway which supported the "proposition that it was at least partially inflated, and possibly even serviceably inflated[46]" at the time of the crash.

    (iii) The nature of the right hand curve meant the main weight-bearing tyres would have been the left front then left back tyres and not the front right tyre.[47]

    (iv) "Had the right front tyre been significantly deflated, the driver would have noticed it on the 15 km approach to the actual curve and would have therefore been driving appropriately slowly." [48]

    (v) During the approximate 9 hour delay between the crash and Det. Sgt Schumacher's examination, the tyre would have continued to deflate. Therefore at the time of the crash it must have had more than 15 psi. Thereafter it continued to deflate because although Det. Sgt Schumacher found it to be partially inflated, it was fully flat when examined by Mr Ryan.[49]

    (vi) If the front right tyre was partially deflated, the LandCruiser could still have successfully negotiated the curve travelling at a speed of 70-80 kph.[50]

31. Mr Jamieson opined that it is not uncommon for motorists to drive on partially deflated tyres. An analysis of NSW Mass Crash Data revealed that partially flat tyres or blowouts rarely resulted in a crash.[51]

32. Mr Jamieson considered the LandCruiser to be in poor condition but noted that Mr Ryan had not identified any mechanical issues that contributed to the crash.[52]

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[45] Ex 18 p 18
[46] Ex 18 p 15
[47] Ex 19 p 4, 5
[48] Ex 18 p 17
[49] Ex 19 p 4, 5
[50] Ex 19 p 5
[51] Ex 19 p 5
[52] Ex 18 p 17

33. Mr Jamieson opined that "given the nature of the roll-over, had the driver been wearing his lap sash restraint, he almost certainly would not have been ejected from the vehicle, but possibly have been injured from the roof crush."[53] In evidence Mr Jamieson agreed that there was a risk of death even if a seatbelt was worn.[54]

34. Mr Jamieson also analysed the available evidence concerning distance and travel time and provided an opinion on the likely speed Mr Jarmin was driving from the Station to the Hotel. Taking into account the first tyre change, Mr Jamieson concluded Mr Jarmin's average speed on the dirt would have been about 89 kph but noted that in order to achieve such an average "a driver needs to be regularly travelling at much higher speed in order to make up speed lost for slower corners, acceleration and so on".[55] This analysis provides some support for the opinion that Mr Jarmin was travelling in excess of 80 kph at the time of the crash.

The charge

35. Concerning Mr Jarmin's death, AGP is charged with an offence against s 32 of the *Work Health and Safety Act (National Uniform Legislation) Act NT 2011* (the "Act") as follows:

> "On 24 August 2016 on the Kurrundi (Epenarra) Road, 15 km east of the Stuart Highway in the Northern Territory of Australia, being a PCBU having a health and safety duty under section 19(1)(a) of the Work Health and Safety (National Uniform Legislation) Act to ensure so far as is reasonably practicable that the health and safety of workers engaged by you whilst the workers are at work in the business or undertaking, failed to comply with that duty and thereby exposed an individual to whom that duty was owed, namely Daniel Jarmin, to a risk of death or serious injury or illness."

36. In the charge, the acronym PCBU means a person conducting a business or undertaking: s 5. AGP, as a body corporate conducting a business at the Station, is considered a person under the Act: s 244 of the Act and s 43BK of the *Criminal Code Act*.

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[53] Ex 19 p7
[54] T 297 (J Jamieson)
[55] Ex 19 pp 8-10

37. Part IIAA of the Criminal Code applies to an offence against the Act: s 12A. Offences under the Act are offences of strict liability: s 12. The onus is on the prosecution to prove each of the physical elements of the offence beyond a reasonable doubt.

38. An offence against s 32 consists of three physical elements, namely that:

    (i) AGP was subject to a health and safety duty; and
    (ii) AGP failed to comply with that duty; and
    (iii) AGP's failure to comply with the duty exposed an individual to a risk of death or serious injury or illness.

39. Concerning the first element of the offence the issue to be determined was whether or not AGP owed Mr Jarmin a health and safety duty at the time of the crash.

40. Concerning the second element, the Prosecutor provided written particulars of the purported failings of AGP to comply with its health and safety duty. The particulars were sometimes repetitious and confusing. In summary I understood that the Prosecution alleged: firstly, that the LandCruiser was not legally permitted nor mechanically equipped to engage safely in the trip that was undertaken; secondly, the LandCruiser lacked the necessary equipment for the journey to be undertaken safely and was not properly maintained; thirdly, that Mr Jarmin was not trained to drive on dirt roads, to deal with punctures, or to access and change tyres. It was for the Prosecution to prove each or any of these alleged failings.

41. Finally if the Prosecutor established an omission or failure by AGP to comply with a duty, the Prosecutor was required to prove that that failure (or combination of failures) **exposed** Mr Jarmin to a **risk** of death or serious injury. What is meant by exposed and risk is not defined in the Act. They are ordinary words. According to the Macquarie Dictionary Fifth Edition: expose means "to lay open to danger, attack, harm etc"; and risk means "exposure to the chance of injury or loss; a hazard or dangerous chance".

42. In *Thiess Pty Ltd and Hochtief AG v Industrial Court of NSW* (2010) 78 NSWLR 94, the NSW Court of Appeal considered the meaning of exposure and risk as used

in the *Occupational Health and Safety Act NSW* 2011. Spigelman CJ (with Beasley and Basten JJA agreeing) said:

> "In my opinion the word 'risks' in s 8(2) also refers to the possibility of danger. The word 'exposed' refers to a person who is sufficiently proximate to the source of the risk at the relevant time or times for that risk to possibly impinge upon his or her health and safety".[56]

43. It is exposure to a possibility or chance of danger that must be proven, not that the risk results in actual danger or injury.[57]

44. I accept the submissions of the Defence Counsel, that even if a breach of duty by AGP was proven, in addition the Court had to be satisfied beyond reasonable doubt that the breach (or breaches) exposed Mr Jarmin to a risk of death or serious harm. The prosecution would fail if the third element or indeed any element of the offence was not proved beyond reasonable doubt. No alternative or back-up charges were laid and alternative verdicts are not provided for under the Act.

45. Concerning risk, I accepted the expert evidence and reasoning of Mr Jamieson about the likely minimal contribution of the deflating tyre to the crash, including the possibility that it played no role in the crash. On his evidence, the crash was adequately explained by speed alone. I note that Mr Jamieson also gave evidence that deflating or deflated tyres rarely cause crashes. In my view, Mr Jamieson's evidence created a reasonable doubt as to what, if any role, the deflating tyre played in the crash.

46. Accordingly, I was not prepared to infer from the congruence of the deflating tyre and the crash itself, that the deflating tyre gave rise to a risk of death or serious harm.

Other matters arising under the Act and the *Criminal Code* Act

47. Under the Act a duty cannot be transferred to another person: s 14. More than one person can concurrently have the same duty: s 16 (1). Each duty holder must

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[56] *Thiess Pty Ltd and Hochtief AG v Industrial Court of NSW* (2010) 78 NSWLR 94 , per Spigelman CJ (with Beasley and Basten JJA agreeing) at [67]

[57] Tooma, M, *Tooma's Annotated Work Health and Safety Act,* 2011, Law Book Co., 2017, (2nd Ed) pp 41-42

comply with their duty to the standard required by the Act even if another duty holder has the same duty: s 16(2).

48. Pursuant to s 28 of the Act workers are also subject to work health and safety duties.

s 28: While at work, a worker must:

(a) take reasonable care for his or her own health and safety; and

(b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and

(c) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act; and

(d) co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to the health or safety at the workplace that has been notified to the workers.

49. In this case Defence Counsel pointed to the speed of Mr Jarmin's driving as being the likely cause of the crash and his likely failure to follow AGP's direction concerning the maximum speed that should be driven on the Epenarra Road. They also pointed to his failure to properly, or at least adequately, fix or replace the flat tyre before setting out on the fatal return journey.

50. If Mr Jarmin was driving at a speed unsafe for the conditions, without a seatbelt, and on a deflating tyre, he may well have breached his own health and safety duty. However, even if Mr Jarmin's actions were in breach of his duty and causative of or contributed to the crash, that does not provide an answer to the charge, because AGP could not transfer its duties to Mr Jarmin and AGP's duties ran concurrently with the worker's. Accordingly, whether or not Mr Jarmin breached his own duty is not to the point. Had AGP done enough to warn and guard against the danger of Mr Jarmin speeding? Were there factors other than speed which exposed Mr Jarmin to a risk of death or serious injury? If there were other factors that exposed Mr Jarmin to such a risk, did those factors arise because AGP had failed to meet its health and safety duty to Mr Jarmin? The questions remain, did AGP owe a duty to Mr Jarmin, did AGP fail in respect of its duty, and if so, did that failure also expose Mr Jarmin

to a risk of death or serious injury (even if that failure did not cause or contribute to the actual crash)?

51. Section 43BA of the *Criminal Code Act* deals with the concept of intervening conduct or events. It provides:

> s 43BA: A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if:
>
> (a) the physical element is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and
>
> (b) the person could not reasonably be expected to guard against the bringing about of that physical element.

52. However s 43BP of the *Criminal Code Act* provides:

> s 43BP: A body corporate cannot rely on section 43BA in relation to a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

53. If Mr Jarmin was driving at an unsafe speed against AGP instruction, that might be considered an intervening conduct. However, as AGP is a body corporate and Mr Jarmin was their employee, the defence of intervening conduct is not available in this case.

The first element of the offence: Did AGP owe Mr Jarmin a health and safety duty?

54. The health and safety duty is found in s 19 of the Act which provides:

> s 19 (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.

(3) Without limiting subsections (1) and (2), a person conducting a business or undertaking must ensure, so far as is reasonably practicable:

(a) the provision and maintenance of a work environment without risks to health and safety; and

(b) the provision and maintenance of safe plant and structures; and

(c) the provision and maintenance of safe systems of work; and

(d) the safe use, handling and storage of plant, structures and substances; and

(e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and

(f) the provision of any information, training, instructional supervision that is necessary to protect all persons from risks to the health and safety arising from work carried out as part of the conduct of the business or undertaking; and

(g) that the health of workers and the conditions of the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.

55. Workplace is defined in s 8 of the Act as follows:

s 8 (1): A ***workplace*** is a place where work is carried out for the business or undertaking and includes any place where a worker goes, or is likely to be, while at work.

In this section:

place includes:

(a) **a vehicle**, vessel aircraft or other mobile structure; and

(b) …

56. The Prosecutor pointed to the words "must ensure" in s 19(1) of the Act to emphasise the mandatory and positive nature of the health and safety duty and referred to *Carrington Slipways Pty Ltd v Callaghan* (1985) 11 IR 467 at p 470 in which Watson J said, "'Must ensure' means to guarantee or make certain".

57. In addition the Prosecutor emphasised that the duty extended to careless, hasty and even disobedient employees. In *WorkCover Authority of NSW v TRW* [2011] NSW IR Comm 52 at [13], Boland J said:

> "I note what could only be described as the foolhardiness of the two fitters in proceeding to assemble and operate the thermal lancing equipment without

> proper training and without donning the protective clothing that was available… However, the duty to provide a risk free work environment is a duty owed not only to the careful and observant employee, but also to the hasty, careless, inadvertent, inattentive, unreasonable or disobedient employee in respect of conduct that is reasonably foreseeable: *Dunlop Rubber Australia Pty Ltd v Buckley* (1952) 87 CLR 313 at 320; *Mclean v Kidman* (1984) 155 CLR 306 at 311-312".

58. The Prosecutor also referred to *Riley v Australian Grader Hire Pty Ltd* [2011] NSW IR Comm 31 at [15] in which the Full Bench of the Industrial Relations Commission of NSW said:

> "[The employer's duty] requires employers to be diligent and proactive to ensure the safety of employees. Those obligations are not diminished because of the error or negligence of any employee, although such matters may reflect on the degree of culpability of the employer for the purpose of sentencing."

59. Defence Counsel submitted that even though strict liability applies to the offence, the duty created by s 19 is not absolute in its terms. The duty is to ensure, **so far as is reasonably practicable**, the health and safety of workers when at work.

60. Concerning the management of risks, section 17 of the Act provides:

s 17: A duty imposed on a person to ensure health and safety requires the person:

(a) to eliminate risks to health and safety, so far as is reasonably practicable; and

(b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

61. Section 18 of the Act defines what is meant by "reasonably practicable" as follows:

s 18: **Reasonably practicable**, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters **including**:

(a) the likelihood of the hazard or the risk concerned occurring; and
(b) the degree of harm that might result from the hazard or the risk; and
(c) what the person concerned knows or ought reasonably to know about:
  (i) the hazard or the risk; and
  (ii) ways of eliminating or minimising the risk; and
(d) the availability and suitability of ways to eliminate or minimise the risk; and
(e) after assessing the extent of the risk in the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or

minimising the risk, including whether the cost is grossly disproportionate to the risk.

62. The considerations identified in s 18 are inclusive and not exhaustive.

63. As to what is meant by the term "reasonably practicable" the Prosecutor referred to *Baida Poultry v The Queen* [2012] HCA 14 at [15], where the majority of the High Court considered the term as used in s 21 of the Victorian *Occupational Health and Safety Act* and said:

> "All elements of the statutory description of the duty were important. The words 'so far as is reasonably practicable' direct attention to the extent of the duty. The words 'reasonably practicable' indicate that the duty does not require an employer to take every possible step that could be taken. The steps that are to be taken in the performance of the duty are those that are reasonably practicable for the employer to take to achieve the identified end of providing and maintaining a safe working environment. Bare demonstration that a step could have been taken and that, if taken, it might have had some effect on the safety of the working environment does not, without more, demonstrate that in employer has broken the duty imposed under s 21(1). The question remains whether the employer has so far as is reasonably practicable provided and maintained a safe working environment."

64. The Prosecutor also referred to the decision of *WorkCover Authority of NSW (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd* [2001] NSW IR Comm 278 at [87-88] in which Walton J reviewed English and Australian authorities in which the term "reasonably practicable" had been judicially considered. Walton J said:

> "It is evident from these authorities that what is required by section 53 (a) of the Act is a balancing of the nature, likelihood and gravity of the risk to safety occasioning the offence with the costs, difficulty and trouble necessary to avert the risk. At one end of the scale, it could not be reasonably practicable to take precautions against a danger which could not have been known to have been in existence: see *Jayne v National Coal Board* [1963] 3 All ER 220 at 224 and *Shannon v Comalco Aluminium Ltd* at 362. Similarly, if the happening of the event is not reasonably foreseeable then it will generally not be reasonably practicable to make provision against that event: see *WorkCover Authority of NSW (Inspector Mayo- Ramsey) v Maitland City Council* (1998) 83 IR 362 at 381; *WorkCover Authority of NSW v Kellogg (Aust) Pty Ltd* at 259 and *Austin Rover Ltd v Inspector of Factories* at 267 per Lord Goff and 635-636 per Lord Jauncey of Tullichettle."

> "At the other end of the scale, there will be cases such as the present in which known obvious risks to safety exist", and
>
> "In my view where there is a known risk which entails the potential for serious risk to persons in the workplace, the defendant will generally have to demonstrate that the costs, difficulty or trouble occasioned by the measures significantly outweigh the risk".

65. Was Mr Jarmin at work at the time of the crash? While evidence was led in chief to establish that Mr Jarmin was at work, the cross examination pointed to an alternate scenario, namely that Mr Jarmin was in fact undertaking a personal trip to purchase alcohol for personal use and so was not at work.

66. However, at the close of the case, AGP admitted that: Mr Jarmin was a worker under s 7 of the Act; it owed Mr Jarmin a health and safety duty under s19 (1)(a) of the Act with respect to the business of the Store; and at the time of the crash Mr Jarmin was at work, noting that a work place includes a vehicle: s 8.

67. Noting the admissions of AGP, I was satisfied that beyond reasonable doubt that AGP owed a work health and safety duty to Mr Jarmin.

The second element of the offence: Did AGP fail to comply with the health and safety duty it owed to Mr Jarmin?

The third element of the offence: If AGP failed to comply with the duty, did that failure expose Mr Jarmin to a risk of death or serious injury or illness?

68. It is convenient to consider the second and third elements of the offence together.

69. The Prosecutor somewhat confusingly and repetitiously particularised AGP's failures to comply with its health and safety duty in the charge as follows:

> **"Particulars:**

As the person conducting a business or undertaking you failed to ensure the health and safety of workers engaged, or caused to be engaged, by you, in particular Mr Daniel Jarmin, whilst the said worker was at work in the business or undertaking, in that you failed to take the following reasonably practicable measures to eliminate, or alternatively, minimise, if not reasonably practicable to eliminate the risks to health and safety of workers, by not:

a. Ensuring the provision and maintenance of a work environment without risk to health and safely, namely by failing to ensure that the work task engaged in by the worker on 24 August 2016, which was engaging in a return trip to Wauchope Hotel from Epenarra Station (for the purpose of collecting fruit and vegetables), was conducted safely, by failing to supply to the worker a motor vehicle that was legally permitted to be on the Epenarra Road and which was mechanically equipped to engage safely in such a journey.

b. Ensuring the provision and maintenance of safe plant and structures, namely by failing to ensure that the motor vehicle supplied to Mr Jarmin for the purpose of the trip to the Wauchope Hotel, namely a Toyota LandCruiser NT pastoral registration 6190, was:

    (i) equipped with a fully functional spare tyre or tyres, which were accessible to the driver, whereby the driver could use the spare tyre to replace a punctured tyre;

    (ii) in a mechanically suitable condition whereby it was fully equipped to deal safely with traversing the Epenarra Road (which involved, inter alia, a 240 km return journey on an unsealed outback road);

    (iii) properly maintained whereby the motor vehicle was in a condition to deal safely with the conditions arising out of driving on an outback road such as the Epenarra Road.

c. Ensuring the provision of any information, training, instructional supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking, namely by:

    (i) failing to provide clear instructions to Mr Jarmin as to how to safely driving outback conditions in a four-wheel-drive motor vehicle on an unsealed road;

    (ii) failing to provide clear instructions to Mr Jarmin as to how to deal with fixing and repairing punctured tyres;

    (iii) failing to provide instructions to Mr Jarmin to access the spare tyre under the Toyota LandCruiser P6190.”

70. In written submissions the Prosecutor clarified that the particulars alleged AGP had breached its health and safety duty because it had failed, to ensure, so far as was reasonably practicable:

    (i) to provide and maintain a work environment without risk to health and safety: s 19(3)(a), and/or

    (ii) to provide and maintain safe plant and structures: s 19(3)(b), and/or

    (iii) to provide the information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking: s 19(3)(f)

71. In their closing submissions the parties dealt with these allegations by reference to s 19(3)(b) first and I will do likewise.

Consideration of particulars pursuant to s 19(3)(b): Did AGP owe a duty to provide and maintain safe plant and structures?

72. Section 19(3)(b) required AGP to provide and maintain "safe plant". Plant includes machinery: s 4. AGP conceded the LandCruiser was "plant". AGP accepted that it had a duty to provide "safe plant".[58]

73. Although the LandCruiser was primarily used on or near the Station, I was satisfied on the evidence that AGP through its employees knew that Mr Jarmin was using the LandCruiser to make trips to the Hotel as he had made two such trips for personal purposes prior to the fatal trip. The use of the LandCruiser for those trips was not a secret and it is apparent that there was acquiescence in this use by AGPs employees. Indeed, Ms Russell received an email and phone calls from Ms Baker-Covey about this use. In addition AGP were advised of and permitted the use of the LandCruiser for the fatal journey, as this was discussed with Ms Russell before Mr Jarmin's departure. Ms Russell did not prevent the proposal as she was under the mistaken belief that the LandCruiser was fully registered. Even though AGP might not have contemplated or intended that the LandCruiser be used for such a work journey it knew of the precise planned use before Mr Jarmin departed. In those circumstances

[58] Written Closing Address for the Defence at [60]

I was satisfied beyond a reasonable doubt that AGP owed a duty to ensure that the vehicle was safe for the trip which it permitted as part of Mr Jarmin's work.

74. I will now address each of the particularised alleged failings under s 19(3)(b) in turn.

(i) Did AGP have a duty to provide fully functional and accessible spare tyre(s) that could be used to replace a punctured tyre? If so, did it fail in that duty? If so, did that failure give rise to a risk of death or serious injury or illness?

75. Spare tyres don't prevent flat tyres, they simply allow a driver to deal with a flat tyre expeditiously. Spares allow a driver to continue the journey rather than waiting for assistance. In my view, the possibility of a flat tyre is a well-known and understood risk when driving. Indeed the risk was obvious to Mr McGlynn and so he took the precaution of showing Mr Jarmin how to change a tyre. Further, in my view common sense and ordinary life experience points to the risk of getting a flat tyre increasing on dirt roads. In addition, common sense and ordinary life experience points to the risk of getting a flat increasing when tyres have been well used and are getting close to needing to be replaced. I was satisfied that the risk of getting a flat tyre, when driving on dirt, on older tyres, over some distance, is quite high. In those circumstances, when a vehicle is permitted to be used for work in those conditions I was satisfied beyond reasonable doubt that the employer owes a duty to minimise that risk by ensuring the vehicle is equipped with a spare tyre, the means of accessing the spare tyre and the tools to change a flat tyre.

76. It is not in dispute between the parties that when Mr Jarmin left the Station for the Hotel the evidence pointed to there being two serviceable spare tyres on the LandCruiser. One accessible on the rear door and one inaccessible (due to lack of tools) under the chassis. Further it is not in dispute between the parties that it is a reasonable inference that Mr Jarmin had a flat on the way to the Hotel and successfully changed the flat tyre using tools in the vehicle and the spare tyre on the rear door.

77. Accordingly, I am satisfied on the evidence that AGP did provide a vehicle with one fully functional and accessible tyre that could be used to replace a punctured tyre. However, did AGP fail in their duty because they did not provide two (or even more) accessible tyres?

78. There was no evidence led as to the number of spare tyres that a vehicle should be equipped with for safe or cautious remote dirt road driving. However, as the LandCruiser was equipped and carrying two spares, it would have been easy, inexpensive and reasonably practicable to ensure that it also carried the necessary tools to access the second spare tyre. The provision of the appropriate tools would have minimised the risk of Mr Jarmin getting stuck with or driving on that second flat tyre. The fact that the tools were not available, in a vehicle that was equipped to carry two spare tyres, was in my view, a breach of AGPs duty to minimise the risk associated with flat tyres so far as reasonably practicable.

79. Did the failure to provide the tools to access a second spare tyre give rise to a risk of serious death or serious injury or illness?

80. In my view the primary risk in relation to flat tyres is getting stuck. The trip was to the Hotel and back and there was only one road that could be taken. The estimated time for such a journey was likely to be about 5-6 hours based on distance, safe speed and time to collect the produce. Had he not returned to the Station within the expected time frame, it is reasonable to assume that Ms Baker-Covey would send out a search party. Even if Mr Jarmin suffered a flat shortly after his departure from the Station the longest he might possibly have been stranded would be up to a day (but likely a much shorter time). The road was remote but not isolated or without any traffic. Concerning the likelihood of passing motorists, I note that on the day of the crash Mr Jarmin was found not long after by a passing motorist. In addition Mr Jamieson estimated that at a minimum 10 vehicles travelled the road per day.[59] There was no evidence that the weather or conditions were such that Mr Jarmin might have suffered a risk of death or serious injury from exposure. In my view, had

[59] Ex 18 p 10

Mr Jarmin been stranded he would easily be found within a time frame that would not have given rise to a risk of death or serious injury.

81. A second but more remote risk was the risk of Mr Jarmin driving on a deflating tyre. Had the second spare tyre been available it is likely that Mr Jarmin would have used it to replace the deflating front tyre. He would not have been driving on that particular deflating tyre at the time of the crash. However, the risk of any of the tyres becoming flat or deflating remained. In my view it was not possible to eliminate the risk of a car experiencing a deflating or flat tyre by the provision of spare tyres. Further I accepted Mr Jamieson's evidence that deflating and /or flat tyres rarely result in a crash. Both crash investigators agreed that the LandCruiser could have negotiated the curve at about 80 kph, both agreed that it was likely the LandCruiser was travelling at 100 kph or more at the time of the crash. While it is possible the deflating tyre might have contributed to the crash, I am satisfied that the primary contribution was speed. In my view, the deflating tyre in and of itself was unlikely to give rise to a crash that would result in death or serious injury or illness and I heard no evidence to the contrary.

82. Accordingly, I was not satisfied that the failure to provide tools to access the second spare tyre was a failure that gave rise to death or serious injury or illness.

(ii) Did AGP have a duty to provide a vehicle in a mechanically suitable condition whereby it was fully equipped to deal safely with traversing the Epenarra Road? If so, did it fail in that duty? If so, did that failure give rise to a risk of serious harm or death?

83. Both post-crash inspections found that there were no mechanical defects in the LandCruiser that contributed to the crash. I note in particular that the tyre tread was satisfactory, the brakes were sound, the steering was intact and the driver's seatbelt was operational. Although Mr Luke found wear and tear on the upper and lower arm bushes and some leaking in the shock absorbers and wheel hubs, he did not consider that these issues contributed to the crash. While Mr Luke considered that the LandCruiser would not have passed a registration check, he did not opine that those mechanical issues gave rise to a risk of death or serious injury or illness. To the contrary, the evidence of the recent use of the LandCruiser for the Power and

Water checks, and by Mr Jarmin to previously travel to the Hotel, in conjunction with there being no evidence suggesting a history of breakdown or malfunction, demonstrated that the LandCruiser was able to safely traverse the Epenarra Road.

84. Concerning the state of the LandCruiser, where the evidence of the post-crash inspectors differed from the observations and impressions of the lay witnesses about the LandCruiser, I accepted the expertise and evidence of the post-crash inspectors.

85. While I accepted that the LandCruiser was old and in generally poor condition such that, according to Mr McGlynn, it was a risk of breakdown, I was not persuaded to accept that a risk of breakdown was equivalent to a risk of having a crash. There was no evidence as to what kind of breakdown Mr McGlynn thought was likely and no evidence to indicate how any breakdown might result in a crash. Other than the possibility of being stuck, there was no evidence to suggest how a breakdown might possibly give rise to a danger of death or serious injury and I was not satisfied that a breakdown would give rise to such a risk.

86. While I note that the LandCruiser was not registered, I draw no inference as to its mechanical soundness or otherwise from that fact. Brand new vehicles might be unregistered. Well maintained vehicles might be unregistered. Registered vehicles might become mechanically unsound during their registration period. In my view, no inference as to mechanical condition could safely be drawn from registration alone (except perhaps on the day of registration inspection).

87. In my view the prosecution failed to prove that the LandCruiser was not mechanically suitable to traverse the Epenarra Road. I was not satisfied beyond a reasonable doubt that AGP had breached its duty to provide a mechanically suitable vehicle.

(iii) Did AGP have a duty to properly maintain the motor vehicle in a condition to deal safely with the conditions on outback roads such as the Epenarra Road? If so, did it fail in that duty? If so, did the failure give rise to a danger of death or serious injury or illness?

88. In my view there was overlap between this and the previous particular. As indicated above, I was not persuaded that the prosecution had proved any defect in the vehicle that was likely to give rise to a danger of death or serious injury or illness. However, I understood this particular to be directed at the maintenance systems in place for the LandCruiser.

89. There was limited evidence on this issue possibly because there were limited maintenance systems in place. As I understood the evidence, Mr McGlynn, as the manager of the Station, considered himself responsible for the vehicles on the Station including the LandCruiser. When Mr McGlynn was at the Station, Shaun Ewington, a "mechanically minded person", drove the LandCruiser for the Power and Water checks and, Mr Ewington and Mr McGlynn checked it mechanically in February or March of 2016. Mr McGlynn said they found some faults and did some general maintenance including replacing some running parts. Mr McGlynn said that when he left the Station in July the LandCruiser was in the same state.[60] As already noted, Mr McGlynn did not allow the LandCruiser to be driven to the Hotel and explained:

> "The main factor was distance. Mechanically in terms of oil and water the vehicle probably could have done the trip no worries, but there's just too much risk involved to break down…So it's just taking the risk out of the business by not incorporating that vehicle to perform that job."[61]

90. Mr Cunningham said he didn't drive the LandCruiser and never really touched it except to "let the air cleaner out and check the oil"[62], though he thought "it looked all right".[63] So far as Mr Cunningham was concerned if there was a problem with any of the equipment on the Station somebody would raise it with him and it would be fixed. If there was anything majorly wrong it would be sent to a mechanic. Mr Cunningham said he didn't let people do things that were dangerous.[64]

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[60] T 105- 108 (B McGlynn)
[61] T 114 (B McGlynn)
[62] T 173 (A Cunningham)
[63] T 174 (A Cunningham)
[64] T 175 (A Cunningham)

91. The LandCruiser was used Monday to Friday by Ms Carr for the Power and Water checks and Ms Carr used it on the day of the crash. It was her view there was nothing wrong with the LandCruiser on that day. There was no evidence as to what Ms Carr knew about Mr Cunningham's approach to car maintenance. However, Ms Carr was Mr Cunningham's partner and I think it likely that she would have told him if she had concerns about the safety of the LandCruiser. Applying Mr Cunningham's approach, if a problem had been raised he would have "fixed it".

92. There was no evidence led in the prosecution case as to what the appropriate maintenance regime ought to have been for the LandCruiser nor how AGP failed in that duty. Apparently I was simply being asked to infer that there should have been regular or better maintenance systems in place. However, in my view there was insufficient evidence for me to draw such an inference and certainly insufficient for me to be satisfied of such an inference beyond a reasonable doubt.

93. While the maintenance of the LandCruiser seemed loose and ad hoc, I have already found that the vehicle was mechanically sound to make the journey to the Hotel and back on the day of the crash. In my view the evidence did not establish that AGP breached any duty with respect to maintenance, nor did it establish a risk of death or serious injury if there had been such a breach.

Consideration of particulars pursuant to s 19(3)(a): Did AGP owe a duty to provide and maintain a work environment without risk to health and safety? If so, did it fail in that duty?

94. AGP did not dispute that it owed Mr Jarmin health and safety duties concerning his work in and associated with the Store.

95. There were two aspects identified in the particulars as to how it was alleged AGP failed in this duty:

(i) By failing to ensure the return work trip to the Hotel was conducted safely by failing to supply a motor vehicle that was legally permitted to be on the Epenarra Road; and

(ii) By failing to supply a motor vehicle that was mechanically equipped to engage safely in such a journey.

96. The second aspect repeats matters already addressed under s 19(3)(b) above.

97. Turning to the first aspect of this alleged breach, although I understood and accepted that the LandCruiser operated under a pastoral permit, there was no clear evidence led as to the limitations or constraints of such a permit. Mr McGlynn provided some evidence that he understood a pastoral permit vehicle could operate up to 150 - 200 km from its garaging address.[65] Whether or not this distance was on or off a property was not very clear. However it is clear that the LandCruiser was regularly driven beyond the boundaries of the property to the Aboriginal community, it was driven on public roads, including the Epenarra Road when it was driven to the Aboriginal community.[66] I also note that Mr Jarmin was at all times less than 150 km from the garaging address during the fatal return trip to the Hotel.

98. Given the lack of clarity in the evidence about pastoral permits, I was persuaded by Defence Counsel's submission that the evidence in the hearing did not prove that the LandCruiser was illegally on the road at the time of the crash, being the particularised breach.

99. In addition, this allegation seemingly equated any illegality arising from a lack of registration with a lack of safety, and concomitantly registration with the safety of a vehicle. However as previously discussed, in my view neither of these inferences can be safely drawn because registered vehicles may become unsafe during their period of registration and unregistered vehicles might be quite safe.

100. On further reflection, perhaps this allegation is directed at minimisation of risk. Registration at least ensures vehicle inspections are conducted as required under the legislation, and those inspections ought to at least ensure a vehicle is mechanically safe and sound in body, as at the date of inspection. However, there was no evidence led as to whether there was any difference between minimum safety standards that applied to registered cars as compared to permit vehicles, nor was there any evidence led as to whether or not pastoral permit vehicles were subject to

[65] T 106 (B McGlynn)
[66] T 163 (C Carr)

less rigorous or frequent inspections. It was therefore not open for me to infer that higher or safer standards applied to registered vehicles as compared to pastoral permit vehicles.

101. I was not persuaded that the evidence established beyond a reasonable doubt any breach by AGP of these alleged particulars.

Consideration of particulars pursuant to s 19(3)(f): Did AGP have a duty to provide the information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking? If so, did it fail in that duty?

102. I did not understand AGP to dispute that it owed a duty to its employees concerning adequate training, information, supervision etc. so that employees could carry out their duties safely.

103. The Prosecutor provided three particulars concerning this alleged breach and I will deal with each in turn.

(i) Did AGP fail to provide clear instructions to Mr Jarmin as to how to safely drive in a four wheel drive motor vehicle on an unsealed road? If so did that failure give rise to a risk of death or serious injury?

104. The Defence were entitled to rely on the lengthy particulars to understand and meet the case alleged against it. The Prosecutor did not seek to amend the particulars. I agree with the submissions of Defence Counsel that this particular was directed at giving appropriate and adequate instructions about how to drive on an unsealed road. A failure to give instructions about carrying spare tyres was not particularised and could not be subsumed into this particular.[67] I disallow the submissions of the Prosecutor where they went beyond the particulars provided.[68]

105. The Prosecutor submitted that this particular alleged that AGP failed to adequately instruct Mr Jarmin not to drive on a deflating or flat tyre. In response to this Defence Counsel submitted that the duty does not require an employer to take every

[67] See Written Closing Address for the Defence at [90] – [91]; see also the specific particulars provided concerning tyres at Particulars: c. (ii) and (iii)
[68] Outline of Written Submissions on Behalf of NT Work Health Authority at [151] first dot point

possible step that could be taken even if it might have some effect on safety. The employer is only required to take steps that are reasonably practicable. Defence Counsel submitted that it is not reasonably practicable to identify and instruct against every obvious hazard that one might encounter when going about work. Defence Counsel submitted:

> "There are probably hundreds of thousands of employees in Australia who need to drive while "at work". It cannot be considered reasonably practicable to require their employers to instruct them all to do that which should be obvious to them, such as keeping a lookout for driving hazards, stopping at red lights, and not attempting to drive 150 km on a flat tyre.[69]"
>
> …
>
> "Generally speaking, employers can properly expect that workers will take reasonable care for their own safety by not doing obviously dangerous things. An employer's duty does not extend to giving instruction about such day-to-day things because it would be impracticable to do so; the list of obvious everyday hazards that any employee may encounter "at work" (but otherwise unrelated to the work) is potentially unending. Employers would find little time to do more than issue safety warnings (e.g. to someone about to make a cup of tea; "don't burn yourself with boiling water": to someone going to buy postage stamps; "don't cross the road without checking for traffic": etc.)" [70]

106. On the evidence, Mr McGlynn did show Mr Jarmin how to change a tyre. In those circumstances it must have been obvious to both Mr McGlynn and Mr Jarmin, without it being specifically stated, that tyres should be changed when they are flat. Indeed, Mr Jarmin demonstrated his understanding of this basic, common sense, driving principle when he changed a flat tyre on a previous trip to the Hotel, again when he changed a tyre on the day of his death, and again when he attempted to address the deflating tyre before his departure from the Hotel. Mr Jarmin's actions indicated that he clearly appreciated that he should change flat tyres. In my view, applying the reasoning in *WorkCover Authority of NSW (Inspector Byer) v Cleary Bros (Bombo)*[71], that Mr Jarmin might choose to drive without properly dealing with the deflating tyre was not something that AGP ought to have reasonably

[69] Written Closing Address for the Defence at [96]
[70] Written Closing Address for the Defence at [98]
[71] [2001] NSW IR Comm 278 at [88]

foreseen and so was it was not reasonably practicable for them to make specific provisions against that event.

107. There was no admissible evidence in the hearing as to what, if any, additional instructions should have been given about driving on unsealed roads, nor how AGP failed in this regard. It was not for me to speculate. I do note that Mr McGlynn told Mr Jarmin not to go over 80 kph on the Epenarra Road and both crash investigators agreed that the LandCruiser could have negotiated the curve if it was travelling at about 80 kph.

108. Consequently, I was not satisfied beyond a reasonable doubt that AGP had breached any duty concerning the provision of instructions for driving on unsealed roads.

109. Further, if I am wrong, and AGP ought to have instructed Mr Jarmin not to drive on a deflating tyre, I am not persuaded that any such failure gave rise to a risk of death or serious injury because, as noted already in this decision, deflating flat tyres rarely cause a crash.

(ii) Did AGP fail to provide clear instructions to Mr Jarmin as to how to deal with fixing and repairing tyres? If so did that failure give rise to a risk of death or serious injury?

110. I was satisfied that Mr Jarmin was instructed on how to change a tyre. Indeed he demonstrated his capacity to do so on at least two occasions.

111. While I accept that there was no evidence that AGP gave instructions on how to repair a flat tyre, I note that nor was there any evidence as to what those instruction ought to have been.

112. In my view it is not reasonably practicable to expect an employer to know all of the possible tyre repair products on the market or to give specific instructions concerning the appropriateness of their use. In any event, the instructions for use and tyre suitability were written on the TyreWeld product. In this case, Mr Jarmin attempted a quick fix using TyreWeld. However, I do not infer from his conduct that he must have misunderstood the products suitability to his tyres. In my view it

is equally plausible that though he understood the product was not recommended for his tyres, he hoped it might work and so was prepared to give it a try. After trying the product, Mr Jarmin drove a short distance (on his deflating or flat tyre), apparently without incident (consistent with the evidence that driving on a flat tyre is unlikely to give rise to a danger of death or serious injury) and returned to the Hotel having realised that the TyreWeld did not work.

113. Similarly, in my view it was likely obvious to Mr Jarmin that any attempted inflation of the deflating tyre might not have kept it adequately inflated to complete the journey home. It seems however that he was prepared to give it a go. I agree with Defence Counsel's submissions that "this allegation is really no different from the allegations (already dealt with), to the effect that Mr Jarmin should have been instructed not to attempt such a journey with a deflated tyre". For the same reasons previously stated, I was not satisfied that such an instruction was required to be given, and if it was, I was not satisfied that any failure to give it gave rise to a risk of death or serious injury.

(iii) Did AGP have a duty to and failed to provide instructions to Mr Jarmin to access the spare tyre under the LandCruiser. If so did that failure give rise to a risk of death or serious injury?

114. Before departing Mr Jarmin put tools in the LandCruiser so that he could change a tyre but he did not have the right tools to access the tyre under the chassis. It is unclear whether the tools were simply not available or whether he did not know that special tools were required and so did not look for them. There was no evidence that anything had been said about these tools. I am prepared to accept that Mr Jarmin was not told and did not know about them.

115. I have already expressed my view that given a second spare was attached to the LandCruiser it was a breach of AGPs duty not to provide the tools to access that spare. Likewise I am satisfied that it would equally be a breach of their duty not to inform Mr Jarmin about the tools that were needed to access that spare.

116. However, again as previously stated, I was not satisfied that a failure to provide instructions or tools to access the second spare tyre was a breach that gave rise to a risk of death or serious injury.

Order

117. Although I was satisfied that AGP failed in a work health and safety duty to provide instructions and tools to access the second spare tyre under the chassis, I was not satisfied that either of those breaches gave rise to a risk of death or serious injury and the charge is dismissed.

Dated this 14th day of October 2019

Judge Elisabeth Armitage
Local Court